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

E. C. SENKLER, K. C.

VOLUME XX.

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1915.

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
HIS HON. HERBERT EWEN ARDEN ROBERTSON, - - - - Cariboo

ATTORNEY-GENERAL:

THE HON. WILLIAM JOHN BOWSER, K.C.

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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

ALBERTA PACIFIC GRAIN COMPANY, LIMITED v. MERCHANTS CARTAGE COMPANY.

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Carriers—Delivery to person other than consignee—Induced by fraud of stranger—Liability to owner—Warranty.

A. delivered five tons of oats to the servant of M. to be carried and delivered to C. The servant, by the fraudulent direction of D., delivered the oats to E. and they were lost. A. sued M. for the value of the oats.

Held, that the property in the oats had never passed from A., and the loss of the goods through delivery by M.'s servant to a wrong person made him responsible.

APPEAL by defendant from a decision of GRANT, Co. J. of the 30th of January, 1914, in an action for the sum of $175, being the value of 125 sacks of crushed oats received from the plaintiff by the defendant for delivery to Currie Brothers, Vancouver. The facts were that D., representing himself to be C., a customer of the plaintiff Company, telephoned to the plaintiff asking for delivery of five tons of oats, to which the plaintiff replied that the oats could be obtained but would have to be called for. D., again representing himself to be C., telephoned

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to the defendant requesting that they call at the plaintiff's warehouse and obtain five tons of oats, and that one of C.'s employees would meet defendant's driver there and shew where the oats were to be delivered. The defendant sent its teamster to the plaintiff's warehouse, who informed plaintiff's warehouseman that he was there to receive five tons of oats for C., and that one of C.'s employees was to meet him. After the oats were loaded the defendant's teamster telephoned defendant's office that C.'s employee had not arrived, and defendant thereupon informed its teamster to deliver the oats to C.'s stable on Cambridge street (easterly approximately two miles from plaintiff's warehouse). The defendant's teamster left the plaintiff's warehouse with the oats, and was met about half a block distant by D., who represented to defendant's driver that he was C.'s employee, and informed him that C. had moved his stables, and the oats were to be delivered on Richard street (southwesterly and approximately one mile from plaintiff's warehouse). The defendant's teamster delivered the oats to the place indicated by D., who accompanied the teamster. Afterwards it was ascertained that C. had never ordered the oats in question, and that the oats had been removed from the place where they were delivered by defendant's teamster, and could not be found. The plaintiff thereupon sued the defendant for the value of the oats, or in the alternative, damages for breach of warranty of authority.

The trial judge gave judgment for the plaintiff for $137.50. The defendant appealed.

The appeal was argued at Vancouver on the 23rd of April, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

W. C. Brown, for appellant (defendant): The man sent with the dray received the oats for Currie Brothers and he signed the receipt for Currie Brothers, for which no liability can be attached to the defendant.

Arnold, for respondent (plaintiff): We say there is an implied warranty, that he had authority to take the goods, on which point see *Yonge* v. *Toynbee* (1910), 1 K.B. 215; *Starkey* v. *Bank of England* (1903), A.C. 114; *Bank of England* v.

Cutler (1907), 1 K.B. 889; (1908), 2 K.B. 208; *Halbot* v. *Lens* (1901), 1 Ch. 344; *Collen* v. *Wright* (1857), 8 El. & Bl. 647.

Brown, in reply: The defendants received instructions to deliver the oats and did so without contracting with the plaintiffs: see *M'Kean* v. *M'Iver* (1870), 40 L.J., Ex. 30; *Cork Distilleries Company* v. *Great Southern and Western Railway Co. (Ireland)* (1874), L.R. 7 H.L. 269.

Cur. adv. vult.

2nd June, 1914.

MACDONALD, C.J.A.: I think the judgment appealed from should not be disturbed. It is a hard case, but it appears to me to be clear that the defendants must suffer the loss. They sent their servant to take delivery of oats, and that servant stated to the plaintiff's shipper that the oats were for Currie Brothers. As a consequence of that representation, delivery of the oats, for carriage, was made to him, and hence, as between these parties, the oats ought to have been carried to Currie Brothers before the defendants could be held to have discharged their duty to the plaintiff. I do not think this case is distinguishable in principle from *Bank of England* v. *Cutler* (1908), 2 K.B. 208.

MACDONALD, C.J.A.

It follows that the appeal should be dismissed.

IRVING, J.A.: In my opinion, as there was no sale by the plaintiff's until the defendant's driver took the goods, the plaintiff is entitled to recover. The case of *Austin & Co.* v. *Real Estate Listing Exchange* (1912), 17 B.C. 177, is in point.

As a rule no damages can be obtained for innocent misrepresentation: see Lord Moulton's speech in *Heilbut, Symons & Co.* v. *Buckleton* (1913), A.C. 30. But there are exceptions to that rule, and one is where an agent in good faith assumes an authority which he does not possess, and induces another to deal with him in the belief that he has the authority which he assumes. On this principle *Collen* v. *Wright* (1857), 8 El. & Bl. 647, a decision of the Exchequer Chamber, proceeded. In that case Wright, professing to act as land agent for G., made an agreement with Collen for a lease of one of G.'s farms. He

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had in fact no authority from G. Wright was held liable because he impliedly, if not expressly, represented that the authority which he professed to have did not in fact exist; there was an assumed authority to enter into a contract.

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In *Starkey* v. *Bank of England* (1903), A.C. 114, a broker, acting *bona fide,* induced the bank to transfer certain shares upon the faith of a forged power of attorney, and was held liable to indemnify the bank. In *Yonge* v. *Toynbee* (1910), 1 K.B. 215, a solicitor, in ignorance of the fact that his client had been found of unsound mind, carried on a law suit, right down to trial. He was ordered personally to pay the costs of the action. And in *Simmons* v. *Liberal Opinion, Limited* (1911), 1 K.B. 966, Dunn, a solicitor who entered an appearance for a non-existing company, was ordered to pay all the costs of the proceedings.

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The effect of the conversation in the plaintiff's office was this: "Yes, I am here from Messrs. Currie Brothers to take delivery of the stuff." That, in my opinion, was a warranty. It was a statement by a person who was bound to give information in answer to a question put by the vendor to determine the solvency of the purchaser.

MARTIN, J.A.: If a firm of grocers were to get the following written order, apparently genuine:

"To Brown & Co.,

"Grocers.

"Please supply me with 10 dozen boxes of soda biscuits, which the City Express Co. will call for this morning.

"Yours faithfully,

"John Smith."

and if, in pursuance of it, the express company called and took away the goods, who would be liable for them if it turned out that the order was a forgery? The express company clearly, because it had, in calling for them on behalf of the customer, represented and held itself out to be his agent, and having obtained possession of the goods in that capacity and on that representation, it was its duty to immediately return them to their owner, from whom it had taken them by innocent deception, upon the discovery of the fraud; and if it were not able to return them because of a further fraud which was perpe-

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trated upon itself, then it must recoup the owner in cash for their value.

I have put this illustration in writing so as to make it as clear and strong as possible in favour of the defendant Company, since some confusion of principle has been strangely introduced herein because the order was given verbally over the telephone, and because, after the delivery of the goods by the owner to the defendant Cartage Company, further fraudulent directions were given to their driver by the thief (for that is what he was) or his agent as to their delivery. Both plaintiff and defendant were deceived by the thief, but that deception does not justify the defendant in carrying off the plaintiff's property as the innocent and deluded agent of the thief, and there are no facts found here by the learned trial judge, either as regards any negligence on the part of the plaintiff or otherwise, which would take the case out of the above principle, and therefore the judgment should be affirmed and the appeal dismissed.

MARTIN, J.A.

GALLIHER, J.A.: I think this appeal must be dismissed: see *Yonge* v. *Toynbee* (1909), 79 L.J., K.B. 209; *Starkey* v. *Bank of England* (1903), 72 L.J., Ch. 402. *M'Kean* v. *M'Iver* (1870), 40 L.J., Ex. 30 does not apply. There specific addresses were written on the packages to be delivered, and they were delivered by the carrier at those addresses.

GALLIHER, J.A.

MCPHILLIPS, J.A.: This is an appeal from a decision of GRANT, Co. J. in favour of the plaintiff Company for $137.50, the value of crushed oats wrongly delivered, the contention of the plaintiff being that the oats were to be delivered to Currie Brothers, of Cambridge street, Vancouver. Undoubtedly, on the facts as disclosed in the case, a fraud was perpetrated. The oats were delivered, not at Currie Brothers on Cambridge street, but, owing to the servants of the defendant taking the directions of a man not acting for Currie Brothers and following his directions—the oats were delivered at a barn on the lane corner on Nelson street, between Richards and Seymour streets —supposedly where Currie Brothers wished delivery to be made.

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The trial judge has found as a fact that the plaintiff delivered

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the oats to the defendant for the purpose of being delivered to Currie Brothers. In effect, what the learned judge has held is that there was misdelivery, and that there was negligence upon the part of the defendant.

The representation as to who the purchaser of the five tons of oats was, was a representation made by the defendant to the plaintiff, and the receipt given by the defendant was for oats to be delivered to Currie Brothers.

Counsel for the appellant most ingeniously and quite ably endeavoured to establish that the defendant was only in the position of carriers, and that they had proceeded quite in accordance with the instructions of the plaintiff, and in the ordinary course of business. This position is not borne out by the evidence, and in fact it may be said to be absolutely displaced by the evidence. Whatever may have been the inception of things to be carried out it was undoubtedly upon the representation that Currie Brothers had ordered five tons of oats, and the defendant communicates that advice to the plaintiff and accepts delivery of the oats for carriage to Currie Brothers—but fails in making the delivery—being imposed upon by a man who appears on the scene when the oats are in course of transit, and represents he is acting for Currie Brothers, and, following his directions, makes delivery, not to Currie Brothers, but at another place, with consequent loss.

MCPHILLIPS, J.A.

M'Kean v. *M'Iver* (1870), 40 L.J., Ex. 30, was referred to by counsel for the appellant, and whilst it does not support the case of the appellant, considering the view I take of the evidence, it very clearly states the law, and is conclusive against the appellant in my opinion. Martin, B. at p. 31-2 said:

> "It seems to me the question is whether or not the defendants acted with regard to these goods in the manner in which they were directed to do. . . . .
>
> "I think they obeyed the directions given to them, and therefore for that reason, I am of the opinion they have been guilty of no wrong, because they dealt with these goods in the manner in which they were directed to do. For the purpose of making carriers guilty of a conversion of goods there must be something beyond this, some fault or some wrong; and in my judgment it is a question of fact whether or not their conduct with respect to the delivery of the goods was negligent. If they, by reason of the directions given by the consignor, were naturally led to act as they did, I do not think that would be a conversion; . . . ."

Upon a careful reading of the evidence I can find nothing which entitled the defendant to act as it did, or to do anything other than to make delivery of the oats to Currie Brothers, and the more so is this the case when the defendant makes the representation that Currie Brothers are the purchasers, and in the ordinary course of business the receipt is given for the oats, delivery to be made to Currie Brothers.

Stephenson v. *Hart* (1828), 4 Bing. 476, 488; 6 L.J., C.P. 97, is very close to this case upon the facts, and further establishes the liability of the defendant, and the correctness of the decision of the County Court judge. See the judgment of Parke, J. at pp. 484-86.

MCPHILLIPS, J.A.

In the present case the property in the oats was never out of the plaintiff. There can be no doubt that this was a swindling transaction, and it was delivery to a wrong person, for which a carrier is without a doubt responsible in law.

It therefore follows that, in my opinion, the judgment of the trial judge was right, and should be affirmed, and the appeal dismissed.

Appeal dismissed.

Solicitors for appellant: *Ellis & Brown.*
Solicitor for respondent: *C. S. Arnold.*

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NICOLAIS v. DOMINION EXPRESS COMPANY.

Damages—Loss of architect's drawings—Measure of damages—Value of plans.

Architectural plans of a building submitted in competition and not accepted, were in the course of transit destroyed by fire.

Held, that the proper measure of damages is the value of the plans to the architect for exhibition purposes, and not the cost of their reproduction.

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APPEAL by defendant from a decision of SCHULTZ, Co. J. in an action tried by him at Vancouver on the 7th of February, 1914. An architect sued for the recovery of $800 damages for injury in the course of carriage to the original plans of a building. The plans had been prepared and submitted in competition, but were not accepted. They were expressed from Winnipeg to the architect in Vancouver, and in the course of transit were irreparably scorched by fire.

Statement

Fillmore, for plaintiff.
Armour, for defendant.

7th March, 1914.

SCHULTZ, CO. J.

SCHULTZ, Co.J.: In this action the plaintiff, an architect, claims $800 as damages from the defendant, who is a common carrier, for the practical destruction by fire of certain drawings. The drawings had been sent by the plaintiff to Winnipeg. The competition was for the purpose of choosing a plan for a contemplated city hall, and the plaintiff not being a successful contestant, the drawings were received by the defendant Company to be delivered to the plaintiff in Vancouver; the value of the plans were put down in the shipping bill at $1,000. The plans were so defaced and charred *en route* in a fire at Medicine Hat that the damage is almost equivalent to a total loss.

The defendant paid $250 into Court in satisfaction of the claim, and at the trial Mr. *Armour,* counsel for the defendant Company, admitted liability, the sole question for determina-

tion being the assessment of the damage. Evidence was introduced by the plaintiff to shew that the plans, though rejected in the Winnipeg competition, were of such merit that they would be a most effective advertisement of his skill as an architect, and thus lead to profitable professional engagements. Architects of the highest local standing swore that it would cost $800 to reproduce the plans, it being necessary to redraw all the sheets with the exception of one. These architects considered that the plans were not only of a lofty order of excellence from a mechanical standpoint, but that they possessed exceptional merit with respect to artistic conception. The plaintiff said that with two assistants it took him three months to execute the plans. Mr. Gorham was the only witness for the defence on the question of the cost of reproducing the plans. He is not a member of the local society of architects. He works as a draftsman for $30 a week, and his experience and ability are obviously quite limited compared to the recognized status of the architects who testified for the plaintiff. Mr. Gorham estimated that he could reproduce the plans in six weeks at $30 a week, which amount would not include material, approximately $15, or overhead expenses computed at about $100.

Lord Halsbury in *The Mediana* (1900), A.C. 113, observes that the whole region of inquiry into damages is one of extreme difficulty. With the paucity of authority applicable to this case such difficulty has not been minimized.

Mr. *Armour* referred to *Watson* v. *The Ambergate, Nottingham, and Boston Railway Co.* (1851), 15 Jur. 448. That case is not altogether applicable to the circumstances here, as damages were claimed for not delivering a plan and model in time for a competition, and the principle to be extracted, only inferentially, is that the measure of damages is the value of labour or material expended in making the plans, etc., and not the loss of the chance of the prize. Little aid is afforded by *Chaplin* v. *Hicks* (1911), 2 K.B. 786, which deals with the deprivation of a chance to compete. It is suggested that the plans would be of no use to the plaintiff as, after submission and competition, they were rejected, and it is further contended

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by the defendant that the plans having been prepared for a particular site, they could not be used in future competition unless the conditions as to site were similar. Lord Halsbury in *The Mediana, supra,* at p. 117, says:

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"Supposing a person took away a chair out of my room and kept it for twelve months, could anybody say you had a right to diminish the damages by shewing that I did not usually sit in that chair, or that there were plenty of other chairs in the room?"

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I think the defendant has no right to consider what use the plaintiff intended to make of the plans. To apply Lord Halsbury's judgment in the above case, as plaintiff is not claiming any special damage, the question is independent of the use the plaintiff could make of the plans.

SCHULTZ, CO. J.

I think the plaintiff should have *restitutio in integrum* so far as that can be brought about, and I find that the plaintiff is entitled to the plans without regard to the use he might have put them to. I accept the cost of reproduction as calculated by the architects for the plaintiff, and accordingly give judgment for the plaintiff for $800 and costs, and direct payment out of the money in Court to be applied on the judgment.

The appeal was argued at Vancouver on the 28th and 29th of April, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

C. B. Macneill, K.C., for appellant (defendant): The train caught fire and the plans were badly scorched. The question is, what damage did the plaintiff suffer? He is not entitled to restitution, as the plans had served their purpose. Even assuming that the plans were of value as a sample of his work for display in his office, he is not entitled to the amount allowed by the trial judge; he is only entitled to their market value: see *Sapwell* v. *Bass* (1910), 2 K.B. 486 at p. 494.

Fillmore, for respondent (plaintiff), referred to Halsbury's Laws of England, Vol. 21, p. 485 (par. 809); *The Greta Holme* (1897), A.C. 596. The principle is not compensation, but restitution: see *The Mediana* (1900), A.C. 113 at p. 118; *The Astrakhan* (1910), P. 172.

Macneill, in reply: There is no evidence of the real value of the plans.

Cur. adv. vult.

2nd June, 1914.

MACDONALD, C.J.A. and IRVING, J.A. concurred in the judgment of GALLIHER, J.A. reducing the damages to $300.

MARTIN, J.A.: It is clear from the evidence that, though the plans in question (which were for a building in a somewhat peculiar situation) had been rejected in the competition for which they had been drawn, yet they nevertheless were of considerable practical value to the plaintiff to display as an illustration of his professional skill and ability, and the question is, what in such circumstances is the measure of damages that he has suffered by their almost total destruction. No case has been cited that is really in point, and that of *Watson* v. *The Ambergate, Nottingham, and Boston Railway Co.* (1851), 15 Jur. 448, is of no more assistance to us than it was to the Court of Appeal in *Chaplin* v. *Hicks* (1911), 2 K.B. 786 at p. 800, and it is also considered in *Sapwell* v. *Bass* (1910), 2 K.B. 486 at p. 494. I confess I am unable to extract any principle from it after very careful examination. The judge below awarded £20 for the loss of the chance of the prize in the competition, and one of the two judges, Patteson, J. says that "no objection was taken that it [the measure of damages] was not" correct, while the other, Erle, J. greatly doubted its correctness, but did not deal with the question, as "the case laid before us does not advert to that point." I find nothing in the case to support the head-note that *"Semble,* the proper measure of damages in such case is the value of the labour and material expended in making the plan and model." As Mr. *Lush* truly said in his argument, "As to the damages, the only question is, whether the evidence was receivable or not. This Court [of Error] has nothing to do with the amount of damages, and has no power to reduce them," which view both judges adopted in their judgments. Moreover, the "goods" here have not "become useless," as Erle, J. said they had in that case. What then is the damage that the plaintiff has suffered, and how is it to

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be assessed? The fact that "sometimes it is a matter of great difficulty" to do so is no answer to the loss, as was pointed out by Fletcher Moulton, L.J. in *Chaplin* v. *Hicks* (1911), 2 K.B. 786 at p. 794, wherein also at p. 792, Vaughan Williams, L.J. said:

> "Sometimes, however, there is no market for the particular class of goods; but no one has ever suggested that, because there is no market, there are no damages. In such a case the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guesswork. But the fact that damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages for his breach of contract."

And see the remarks of Halsbury, L.C. in *The Mediana* (1900), A.C. 113, at pp. 116-8, on the subject, wherein he also points out that "the term 'nominal damages' does not mean small damages." I agree with much that the learned judge below has said in his judgment, but, as I understand it, he has assessed the damages as being the cost of reproduction of the plans in their original state, and on that principle has awarded $800, and that is the position that was urged upon us by the respondent's counsel, who submitted that there was no middle course between allowing nominal damages or the whole cost of reproduction. I cannot, however, agree to this submission—it goes too far, and is not, I think, the true measure, which is, as I can best express it, that the plaintiff should be allowed whatever the value of the plans to him would have been for said display purposes had they been returned to him. That value might have been shewn by evidence to be $1 or $100 or $500, or possibly even $800 (the full cost claimed for his labour and materials), but assuming it would have been, say, only $100, it would obviously be unreasonable and unconscionable to encourage or permit him to expend $800 worth of labour to attain it; if not so, he might, indeed, expend on a set of plans $2,000 worth of labour and materials, and the actual professional value of the result to him might only admittedly have been $500, yet to recoup him for the loss of that value he, if awarded $2,000, would be unjustly charging the defendant with the additional and useless sum of $1,500. In other words, it is not the amount of professional work expended on the restoration or reproduction of the plans that is the measure of

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damages, but the professional benefit that he might fairly derive from them if he still had them in their original state. The more the matter is considered the more does it become apparent that the cost of reproduction cannot be the test, because if the plans originally had no merit they could have had no value, as they would not have enhanced the plaintiff's professional reputation by displaying them—on the contrary, if they did not exhibit evidence of his skill the more they were displayed, the more they would only serve to advertise his professional incapacity and their own worthlessness for any purpose. An architect might on the one hand, after months of labour, produce a set of plans which would be valueless, and therefore detrimental to his reputation, and on the other hand he might, in a comparatively short time, produce a set which would exhibit a high degree of originality, utility and artistic treatment and would be of corresponding value; it would be worse than a waste of time and labour to produce or reproduce the former, though it would be justifiable and profitable in the latter case. In determining this point very divergent views might be taken, and a jury (or judge discharging its functions) would necessarily be allowed great latitude, as is shewn by the *Chaplin* case, *supra,* wherein a common jury allowed £100 as the value of a chance for a prize in a competition and in respect to which Farwell, L.J. remarked, at p. 801:

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"If the jury had given only a shilling, we could not have interfered."

The result is that I think the verdict cannot stand because of the damages having been assessed on a wrong principle, and the case should go back to the learned judge not to be retried, but to assess the damages as best he may on the evidence already before him, on the principles above indicated; and I shall only add that if there is not much of the proper class of evidence to assist the learned judge, that is the fault of the party who should have adduced it and failed to do so.

The appellant should have the costs of this appeal and the additional costs occasioned by such assessment.

GALLIHER, J.A.: The learned trial judge has, in my opinion, proceeded upon the wrong principle in assessing as damages

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the cost of reproducing the plans. Summed up, the evidence is that while the plans had served the purpose for which they were originally drawn, and had not been accepted, and although they were not such as could be used for another building, owing to the peculiar shape of the land upon which the building for which the plans were drawn was to be erected, yet as a work of excellence and in demonstrating plaintiff's skill as an architect they would be a valuable asset to him on exhibition in his office.

I think we can reasonably infer from plaintiff's evidence that he has no intention of reproducing these plans, so that it comes down to a consideration of what value they would be to him for the purposes of exhibition to prospective clients as evidence of his skill. This is entering upon a more or less uncertain realm, and the cases cited by Mr. *Fillmore* do not assist us very much except in so far, I think, that they establish that plaintiff is entitled to substantial as distinguished from nominal damages. Now, what are substantial damages here is not easy of ascertainment, and we have no definite basis upon

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which to proceed, but nevertheless the authorities shew that in such cases damages which a jury may consider reasonable may be given.

This Court having all the evidence before it, should, I think, deal with the matter rather than incur further expense by sending it back for a new trial.

In my view, the damage to the plaintiff is more or less problematical, but I would fix them at $300.

The appeal should be allowed with costs. The defendant should have the costs below.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. concurred in the judgment of MARTIN, J.A.

Appeal allowed.

Solicitors for appellant: *Davis, Marshall, Macneill & Pugh.*
Solicitors for respondent: *Fillmore & Todrick.*

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CLEMENT, J.

1913

April 16.

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BAKER v. MACGREGOR

Principal and agent—Contract with agent for undisclosed principal—Conduct of principal—Alteration in document.

Where an agent sells in his own name for an undisclosed principal, the principal is entitled to recover the price from the buyer, unless, in making the contract, the buyer was induced by the conduct of the principal to believe, and did in fact believe that the agent was selling on his own account.

R., a broker, sold mining shares in his own name to G., payable in sixty days, on behalf of an undisclosed principal. G., who knew that R. was carrying on a brokerage business, understood that the transaction was with R. on his own account.

Held, that G. was liable in an action brought by the principal for the price of the shares.

Cooke v. *Eshelby* (1887), 12 App. Cas. 271, followed.

Per MACDONALD, C.J.A.: The transaction being a brokerage one, the insertion of the words "for Thos. Baker, Esq.," in the bought note or contract after its delivery, did not in any way affect its terms.

APPEAL from a decision of CLEMENT, J. in an action tried by him at Vancouver on the 27th of March, 1913. Prior to the 28th of April, 1911, the defendant Robertson, who was a broker, had done some brokerage business for the plaintiff Baker, as principal, with the defendant MacGregor. On this date MacGregor, who had in his hands $600 of Baker's money, entered into an arrangement with Robertson, by which Robertson was to purchase for Baker 4,000 shares of Steamboat Mountain Mining Corporation shares at 20 cents a share and MacGregor was to buy back the same stock at 25 cents a share, for which payment was to be made in 60 days. The arrangement was carried out by Robertson paying MacGregor $200 more (making $800 in all for the shares), and by MacGregor giving Robertson a written contract to take the shares back at 25 cents a share in 60 days. MacGregor (to whom Robertson owed money personally) swore he understood the transaction was with Robertson on his own account, but admitted he knew Robertson was a broker. He also swore that the words "for Thos. Baker,

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Esq.," were inserted in the agreement or bought note he had signed after its delivery to Robertson.

Woodworth, for plaintiff.

A. M. Whiteside, for defendant MacGregor.

16th April, 1913.

CLEMENT, J.: I am unable to find that the defendant MacGregor knew on the 28th of April, 1911, that Robertson was agent for the plaintiff in taking the defendant's bought note, but he dealt with him as a broker, and I can see nothing in the plaintiff's conduct to induce a belief on the defendant's part that Robertson was selling as principal. *Cooke* v. *Eshelby* (1887), 12 App. Cas. 271, therefore applies, and the plaintiff is entitled to judgment for $1,000, with interest at 5 per cent. from the 27th of June, 1911, with costs. None of the costs occasioned by making Robertson a defendant should be taxed against the defendant MacGregor. The shares, the subject-matter of the deal, are said to be worthless, but the defendant MacGregor is entitled to them.

The appeal was argued at Vancouver on the 5th and 6th of November, 1913, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Whiteside, K.C., for appellant (defendant): The dispute arises on the bought note, and the evidence shews that this was a loan transaction between Robertson and MacGregor: see *Cooke* v. *Eshelby* (1887), 12 App. Cas. 271; *Keighley, Maxsted & Co.* v. *Durant* (1901), A.C. 240; *Duggan* v. *London and Canadian Loan Co.* (1891), 18 A.R. 305 at p. 320; (1893), A.C. 506; *Colonial Bank* v. *Cady and Williams* (1890), 15 App. Cas. 267 at p. 278. On the question of the alteration in the contract, see *Powell* v. *Divett* (1812), 15 East 29.

Argument

Woodworth, for respondent (plaintiff): The learned trial judge had abundant evidence for not believing that Robertson purchased the stock from MacGregor on the 8th of April. In this he preferred the statement of Robertson to that of Mac-

Gregor, who admits that he dealt with Robertson as a broker, and with this admission, the case is governed by *Cooke* v. *Eshelby* (1887), 56 L.J., Q.B. 505, and *Baring* v. *Corrie* (1818), 2 B. & Ald. 137.

Whiteside, in reply.

Cur. adv. vult.

23rd February, 1914.

MACDONALD, C.J.A.: The evidence of the defendant Robertson appears to me to more clearly shew the nature of the transaction in question than that of defendant MacGregor. It shews that Robertson had had several transactions with MacGregor on Baker's behalf, and that on the day in question, the 29th of April, MacGregor had in his hands $600 of Baker's money, and wanted Robertson to get Baker to re-invest it in stock futures, and suggested that he, MacGregor, would sell to Robertson, for Baker, 4,000 shares of Steamboat Mountain stock at 20 cents per share, and would give a bought note to Robertson, as Baker's broker, agreeing to repurchase the shares at the end of 60 days at 25 cents per share. Robertson says that he paid MacGregor $200, which, with the $600 already mentioned, made up the $800 for which the shares were purchased. It was really for the use of this sum of $800 that MacGregor was agreeing to pay in 60 days $200, that is to say, he was selling the shares to Robertson as Baker's broker for $800, and agreeing to buy them back at the end of 60 days for $1,000. MacGregor, in his examination for discovery, says that he dealt with Robertson as with other brokers. If the transaction was a brokerage one, pure and simple, and not a personal contract with Robertson, then it does not matter whether Baker's name was mentioned or not. It appears that Robertson, after receiving the bought note from MacGregor, altered it by inserting the words "for Thomas Baker, Esq.," and it was contended that this alteration voided the transaction. If I am right in the conclusion that the transaction was a brokerage one, the insertion of these words in the bought note did not in any way affect its terms. The fact is, if the plaintiff's and Robertson's stories to the effect that MacGregor bought the shares for Baker, through Robertson, are believed, that his

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(MacGregor's) liability in the matter has not been affected in the slightest degree by the insertion of the words. They were simply superfluous words.

I would dismiss the appeal.

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MARTIN, J.A.: In my opinion the learned trial judge has reached the right conclusion in this matter and, therefore, the appeal should be dismissed.

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GALLIHER, J.A.: I agree with the judgment of the learned trial judge.

In *Cooke* v. *Eshelby* (1887), 12 App. Cas. 271, Lord Watson says:

> "It must be shewn that he [the agent] sold the goods as his own, or, in other words, that the circumstances attending the sale were calculated to induce, and did induce, in the mind of the purchaser, a reasonable belief that the agent was selling on his own account and not for an undisclosed principal; and it must also be shewn that the agent was enabled to appear as the real contracting party by the conduct, or by the authority, express or implied, of the principal."

Here the defendant says he was dealing with the agent as a broker. He had had several deals with him before, some as principal and some as agent. There is a conflict of evidence, the defendant swearing he thought he was dealing with Robertson as a principal, and Robertson swearing that MacGregor knew that Baker was principal. Be that as it may, MacGregor made no enquiries to assure himself that he was dealing with Robertson as principal. Moreover, Baker did nothing by which Robertson was enabled to hold himself out as the principal; in fact, he demurred, because the contract was not made out in his name, until assured it was all right. I cannot distinguish this case from *Cooke* v. *Eshelby, supra.*

GALLIHER, J.A.

The appeal should be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The action is one brought to recover the sum of $1,000 upon a bought note entered into by the appellant MacGregor, with his co-defendant Robertson, the plaintiff (the respondent) being a broker acting for the plaintiff. Both MacGregor and Robertson were brokers and had large transactions together.

The respondent MacGregor bought of Robertson, as set forth

in the bought note, 4,000 Steamboat Mountain Mining Corporation shares at 25 cents—$1,000—the terms being 60 days, the date of the transaction being the 28th of April, 19...., the year being left in blank, but upon the evidence it can be said to have been 1911.

It is contended that the words "for Thos. Baker, Esq.," were inserted in the bought note by Robertson unauthorizedly. However, Robertson swears that MacGregor was to have inserted these words at the time, and it was the agreement at the time, and that he did so carrying out the well-understood agreement, when he noticed the omission. Robertson also states that he advised MacGregor that he had done this, and presumptively it was assented to, and apparently the learned trial judge was satisfied upon the evidence on this point, and as it was a matter eminently for decision by the learned trial judge, I think this question may be dismissed from further consideration, remarking only that the material alteration of written documents after their delivery is most unwarrantable, and can only be supported when the surrounding circumstances admit of the Court finding that the alteration in the circumstances was right and proper, and made by one of the parties to the contract with authority, express or implied. Here it may be remarked that the bought note without the added words would be equally enforceable, as I view the facts, and looking at the evidence of Robertson, which apparently was accepted by the learned trial judge, Robertson asked MacGregor to insert "for Thomas Baker, Esq.," and it being omitted, he did so, coupled with his (Robertson's) statement:

"He [MacGregor] asked me to get Mr. Baker to employ money in the four thousand Steamboat Mountain Mining Corporation shares, and he [MacGregor] said he would give me a contract to get them back at 25 cents a share.

"And did MacGregor know whose money was to be thus employed? Yes."

So that it can be well said, in my opinion, that the alteration by Robertson was an alteration for which MacGregor was responsible, and at the worst Baker, being the undisclosed principal, the bought note is not avoided, but enforceable according to the original terms—which will make no difference in the way I view the facts of the case. It might be further said that

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the alteration is not one that could be said to be a material alteration—one altering, or attempting to alter the character of the writing itself.

The question of the materiality of an alteration was considered in *Suffell* v. *Bank of England* (1882), 51 L.J., Q.B. 401, where the alteration was that of a number upon a Bank of England note, and it was there held that it was a material alteration, and a *bona-fide* holder for value was held not entitled to recover. See *per* Jessel, M.R. at pp. 403, 404 and 407. See also Smith's Mercantile Law, 11th Ed., Vol. 1, pp. 313 and 677.

I have not overlooked *Powell* v. *Divett* (1812), 15 East 29; 13 R.R. 358, where it is held that:

"A material alteration in a sale-note by the broker, after the bargain made, at the instance of the seller, without the consent of the purchaser, annuls the instrument, so as to preclude the seller from recovering upon the contract evidenced by the instrument so altered by him; there being no other evidence in writing of the contract to satisfy the Statute of Frauds."

Upon the facts of the case before us, it seems to me there was ample evidence upon which the learned trial judge could hold, and this Court likewise can hold, that MacGregor assented to the alteration, in fact, it was the contract, and in effect is no material alteration.

MCPHILLIPS, J.A.

In *Pattinson* v. *Luckley* (1875), L.R. 10 Ex. 330, we have the case of an altered contract, and where the Court took the view that it was a material alteration, having relation to orders for extras, a new trial was directed, but see the remarks of Bramwell, B., at p. 334, to the effect that the bargain can be ascertained from the instrument even if not of intrinsic operation.

It would seem that at the trial the question was raised as to whether the action was brought upon the bought note which contains the alteration, and what took place was as follows:

"Mr. *Whiteside*: I submit, my learned friend has not made out his case. In the first place, he is relying upon a contract which has been materially altered.

"Court: No, you see he is not suing on that document, but for money he says he loaned these two gentlemen instead of one.

"Mr. *Whiteside*: His pleadings shew that is what he is relying on and that is what the evidence certainly shews.

"Court: It is only the evidence of the transaction.

"Mr. *Whiteside*: That is the agreement on which he is suing. He goes down and demands payment of this $1,000.

"Court: On the wording of that document, it is in the nature of an admission."

The statement of claim being turned to, it is seen that the action is formulated on an advance made by the respondent Baker to the appellant MacGregor, and that the bought note was only one element of the transaction, and a portion of the terms of the contract. Therefore the learned trial judge, upon the authority of *Pattinson* v. *Luckley, supra,* was well entitled to rule as he did.

Were it that the alteration is a material one, and was not assented to by the party to be charged—MacGregor—it is seen that the bought note can be looked at to see what the contract was, and its terms.

Now, with regard to the facts adduced at the trial, there is evidence establishing the fact that MacGregor well knew that the money he received was the money of Baker, and also that Baker was making the advance to him. It was attempted at the trial, and is argued here, that MacGregor dealt with Robertson, his co-defendant, in this action, as principal in the transaction, and that the equities existing between them must be recognized, that is, set-off of accounts, and that no sum is due or owing by MacGregor; therefore, the action should stand dismissed.

In my opinion, any such contention is, upon the evidence, absolutely untenable, as MacGregor stated that he dealt with Robertson as a broker, and that they mutually dealt with each other in a large way. It is true that in other portions of his evidence he attempts to say that Robertson, in the transaction we have before us, dealt as principal, but we have, as against this, the express finding of the learned trial judge that he dealt with him as a broker.

To enable the appellant MacGregor to succeed upon this appeal it is necessary to establish to the satisfaction of this Court, and against the finding of the learned trial judge, that, upon the evidence, the respondent Baker allowed Robertson to appear as principal in the transaction. Were that established, it would admit of MacGregor being entitled to meet the action

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by the set-off of the debt due to him by Robertson, that is, if the debt was incurred before MacGregor knew of the true relationship, that is, that Robertson was acting for Baker.

When it is apparent that it was an advance of money—a loan—to contend that the money was advanced by Robertson to MacGregor is an idle contention upon the facts, as, admittedly, Robertson was not in funds; and even upon the other phase of things, it is apparent that MacGregor and Robertson were dealing with each other as brokers—which in its very statement imports principals into the transaction.

The most destructive point of evidence against MacGregor's contention is this—that he received the $800, which, with the agreed-upon bonus of $200, makes up the $1,000 sued for, by taking to himself $600, the money of Baker then in his hands, and $200 which Robertson handed to him, and with the knowledge of Robertson's financial position, can it for a moment be contended that MacGregor dealt with Robertson as being the principal in the transaction? What warrant would there be to so appropriate $600 of Baker's money? The conclusion is an irresistible one that MacGregor well knew that Baker was the principal, not Robertson.

MCPHILLIPS, J.A.

It follows that the appeal, in my opinion, should be dismissed, and the decision of the learned trial judge affirmed.

Appeal dismissed.

Solicitors for appellant: *Whiteside & Buddle.*

Solicitors for respondent: *Woodworth, Creagh, Banton & Fisher.*

FIRE VALLEY ORCHARDS, LTD. v. SLY.

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FIRE VALLEY ORCHARDS v. SLY

Company law—Shares—Consideration—Transfer—Ultra vires transaction —Return of illicit profits.

The objects which a company may legitimately pursue must be ascertained from the memorandum of association, and the powers which the company may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from the provisions of such memorandum.

Where, therefore, there is the power to buy from two promoters at a price to be agreed upon with them, it does not carry with it, by any reasonable implication, a power to buy from another, at a price to be agreed upon with him.

Illicit profits made by a promoter-vendor out of a transaction not disclosed to the vendee company cannot be retained by him.

Where a certificate of shares in proper form has been issued, but the affixing of the company's seal has been unauthorized, such certificate must be held as a void document, and the issue does not operate as a warranty of genuineness or estop the company from denying the validity of the certificate.

ACTION tried by CLEMENT, J. in Vancouver on the 20th of April, 1914. The plaintiff Company was incorporated to acquire certain lands held by two of the promoters of the Company at a price to be arranged and settled by agreement between the Company and these promoters. Pending the incorporation these promoters purported to sell the lands to the defendant, who was also one of the promoters. After its incorporation the Company agreed to buy the land from the defendant at an increased price, and the Company assumed the agreement of purchase, and ostensibly paid to the defendant $16,000 as a profit, being placed in funds to do so by cheques from the two promoters and the defendant in the Company's favour in pretended payment of shares in the Company to the same amount. These shares were issued to the defendant and the two other promoters, and the defendant subsequently assigned his shares to his wife, who was a co-defendant. The four persons interested and their solicitor were the directors and shareholders of

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the Company at the time of these transactions. Subsequently shares were offered for public subscription, and at the instance of new shareholders this action was brought to rescind the transaction and cancel the shares.

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

CLEMENT, J.: This is an action by the Company seeking a declaration that the allotment to the defendant Elmer R. Sly of some 35 shares in the capital stock of the Company was illegal and fraudulent as against the Company, and for an order for the delivery up and cancellation of the certificates issued for such shares; also for a declaration as against the defendant Edna H. Sly that an alleged transfer of the shares in question from the defendant Elmer R. Sly to her was and is inoperative as against the Company, and that an alleged certificate issued to her for said shares was void as issued without the Company's authority by the defendant Elmer R. Sly.

In my opinion the plaintiff Company is entitled to the full relief asked.

Shortly prior to the 4th of February, 1911, Illingworth and Murphy had entered into an agreement for the purchase from one J. E. Annable of certain lands in Fire Valley in the Kootenay District of British Columbia; and on the 4th of February, 1911, a memorandum and articles of association were subscribed by five persons, including Illingworth and Murphy and the defendant Elmer R. Sly, looking to the incorporation of a company "to acquire and take over certain of the lands at the present time held and controlled by Illingworth and Murphy . . . . at a price to be arranged and settled by agreement between the Company and the said Illingworth and Murphy."

Judgment

The Company was duly incorporated on the 22nd of February, 1911, and is the plaintiff Company. That the defendant Elmer R. Sly and Illingworth and Murphy were the active organizers and promoters of the Company is clear. It is also, I think (though the matter is not really material in the view I take of the case), undoubtedly the fact that the defendant Elmer R. Sly was from the outset one of a syndicate interested

in the venture who operated through Illingworth and Murphy.

Pending the Company's incorporation the greed of these gentlemen seems to have run away with their intelligence. On the 8th of February, 1911, the defendant Elmer R. Sly entered into an agreement with Illingworth and Murphy for the purchase by him from them of the property; upon what terms does not appear. In this transaction, as subsequent events shew, Sly was acting for his associates, including Illingworth and Murphy, and not entirely for himself. The effect of the transaction—if it had been a real one—was to put it out of the Company's power to carry out the chief object of its incorporation, which was, to acquire the property "at a price to be arranged and settled by agreement between the Company and the said Illingworth and Murphy."

After incorporation, and at a time when the only shareholders in the Company, including its directors, were—if we except one of the Company's solicitors—its promoters and in real substance, its proposed vendors, the Company purported to buy out the interest of the defendant Elmer R. Sly under his purchase from Illingworth and Murphy for a cash consideration of $16,000. The Company was ostensibly put in funds to make this payment by the receipt of worthless cheques given by the defendant Sly, and Illingworth and Murphy, in pretended payment for $16,000 worth of shares in the Company's capital stock; and the Company did not apparently even go through the farce of issuing its own cheque to pay for the land, but simply returned to the defendant Elmer R. Sly the dishonoured cheques. The real transaction was that $16,000 worth of shares was divided up among these brilliant financiers as the consideration for the purchase by the Company from the defendant Elmer R. Sly.

The 35 shares (nominal value $3,500) in question in this action was Sly's share of the spoils. I say spoils, because the transaction was not disclosed to the Company, even if disclosure would have availed to validate a transaction so clearly *ultra vires* of the Company.

The objects which the Company might legitimately pursue must be ascertained from the memorandum of association, and

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the powers which the Company might lawfully use in furtherance of those objects must either be expressly conferred or derived by reasonable implication from its provisions. This is but a paraphrase of the language of Lord Watson in *Baroness Wenlock* v. *River Dee Company* (1885), 10 App. Cas. 354, which is quoted and adopted by Lord Macnaghten in *Amalgamated Society of Railway Servants* v. *Osborne* (1910), A.C. 87. What is "incidental" or "ancillary" or "conducive" to the Company's business so as to bring it within the Company's legal capacity is only what may be reasonably implied from the language of the Company's charter, in this case, its memorandum of association. It cannot, I think, be contended that a power to buy from A. at a price to be agreed on with A. carries with it on any reasonable implication a power to buy from B. at a price to be agreed upon with B. This was what the Company purported to do in this case, and in my opinion it was clearly an *ultra vires* transaction, and the allotment of shares which was part of it cannot stand.

But even if *intra vires,* the transaction cannot stand so as to enable the defendant Elmer R. Sly to retain the shares. They represent an illicit profit made by a promoter-vendor out of a transaction not disclosed to the Company. That it was spread upon the minutes of the director's meeting is not material; that simply means that these gentlemen in one character confessed to themselves in another what they were doing. As I have said, there were no other shareholders yet. They were to be sought for among the general public, to whom a prospectus was issued which is not merely silent as to the purchase from Sly, but untruthfully states that there was no promoter's stock to lessen the public's dividends. In these circumstances the defendant Elmer R. Sly must disgorge. I need refer to no other authority than *Gluckstein* v. *Barnes* (1900), A.C. 240, which shews that this action is properly brought, not for rescission, but to compel relinquishment of illicit gain. I should, perhaps, have stated that the whole $16,000 was profit. The auditor of the Company could find no trace of any actual outlay by the defendant Elmer R. Sly throughout the transactions of purchase. Sly described the $16,000 as profit on an

Judgment

examination under oath, and was not present at the trial to give evidence to explain the transaction in further detail.

As to the defendant Edna H. Sly: On the 1st of March, 1912, or at least by assignments bearing that date, the shares in question were assigned "for value received" by the defendant Elmer R. Sly to his wife, the defendant Edna H. Sly. His reign at this time was nearly over. Other shareholders had risen in rebellion, and early in May, 1912, a new board of directors and a new secretary were installed. Informally they refused to recognize the transfer to Mrs. Sly, and so far as her title rests upon the assignments from her husband to herself, they confer no title as against the Company. In fact, she has not put herself in a position to ask recognition, as she never herself executed the assignments. Her real title, if any, is under a share certificate (the stub only of which is in evidence) for 34 shares, issued to her on the 15th of April, 1912. There is no indication in the Company's books, of which to that date Sly was himself the custodian, that the issue of this certificate was ever authorized; and as I have said, the defendants did not appear to give evidence to meet this *prima-facie* proof that the certificate was the act of Sly alone, and the affixing thereto of the Company's seal (if it were affixed) in effect a forgery. The certificate itself is said to be held by one Wright (father of Mrs. Sly) as security for a loan, but it was not produced. I must hold it as a void document: *Ruben* v. *Great Fingall Consolidated* (1906), A.C. 439.

Judgment

There will, therefore, be judgment for the plaintiff Company as indicated, with costs. The certificate for the 35 shares in question will be delivered out of Court to the Company for cancellation.

Judgment for plaintiff.

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PERRIN v. ANTLERS REALTY COMPANY, LIMITED.

Lease—Monthly rental—Term of, to pay first and last months' rent forthwith—Agreement to cancel and substitute new lease to third party—Action to recover last month's rent.

PERRIN v. ANTLERS REALTY CO.

The defendant leased the plaintiff a business premises for 23 months at $500 a month, it being a term of the lease that the first and last months' rent be payable in advance. The plaintiff paid the two months' rent and took possession. During the term the parties agreed in writing to concel the lease and grant a new lease to another person on similar terms. The agreement was carried out, the old lease being cancelled and a new lease given the second lessee, who entered into possession and paid the first and last months' rent in advance. In an action for the recovery of the last month's rent paid by the first lessee:—

Held, on appeal (reversing the decision of GRANT, Co. J.), that the agreement for cancellation of the lease made no provision in respect of the last month's rent, and all the terms of the lease (except as provided for in said agreement) were finally settled by its cancellation.

APPEAL by defendant from a decision of GRANT, Co. J. in an action by the plaintiff as liquidator of the Baltimore Quick Lunch System, Limited, for the recovery of $500 alleged to have been wrongfully retained by the defendant in respect of a lease. The defendant leased to certain parties a business premises. These parties later became incorporated under the above title and assigned their lease and business to the Company. The latter went into liquidation and the business, together with the lease, was disposed of by the liquidator, the defendant accepting the new tenant, from whom it obtained a deposit of $500 in respect of the last month's rent; but it was alleged that the defendant had already received this sum from the previous tenant, and was, therefore, paid twice. The trial judge was of opinion that one of the sums of $500 should be paid back to the liquidator, and gave judgment accordingly.

Statement

The defendant appealed, and the appeal was argued at Vic-

toria on the 5th of June, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

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C. W. Craig, for appellant (defendant).
C. Dubois Mason, for respondent (plaintiff).

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MACDONALD, C.J.A.: I think we must allow this appeal. Putting the case in the most favourable light for the respondent, I think it amounts to no more than this, that a lease was made, we will assume for the purpose of this judgment that it was made between the company, of which the plaintiff was liquidator and defendant, eliminating any question of assignment—a lease was made by which the lessee agreed to pay to the lessor the rent and fees amounting to $500, and also agreed to pay the last month's rent in advance—that is to say, at the beginning of the term. That meant that the lessee was to pay in advance $1,000—$500 for the first month and $500 for the last. In the midst of the term the parties agreed to cancel that lease and agreed that a new lease should be given to another person on similar terms. They made no provision at all in respect of the $500 that has been paid for the last month of the original term. Either by oversight or intentionally they make no disposition of the $500, and their agreement is in writing and it purports to be a cancellation and settlement of all the terms of the first lease.

MACDONALD, C.J.A.

IRVING, J.A.: I think the appeal must be allowed. This money was not obtained by fraud nor by any mistake. The only way in which it could be recovered would be on the ground that there was a total failure of consideration, but as this money was deposited as a guarantee, not for the last month's rent, but as a guarantee of the association's solvency and good standing, I do not think it can be said that there has been a total failure of consideration. The liquidator may think there is a moral obligation on the part of these people not to keep this $500, but a moral obligation is not sufficient to support his claim at law.

IRVING, J.A.

MARTIN, J.A.: I agree that the appeal should be allowed. I

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know of no legal principle on which the judgment can be supported.

GALLIHER, J.A.: I agree.

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MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree. It stands to reason that, having swept away the very document entitling receipt of this $500, it would be contrary to all legal principles to step in now with the document destroyed and say this $500 ought to go to someone else. This is practically the position the liquidator takes, but one can hardly see how this can be contended for when the lease was to be set aside and when, admittedly, that $500 was in payment of the month's rent which had not yet become due, and when the documents point to a requirement to pay another sum of the like amount. It is very unfortunate if this was the agreement. We can only assume that the parties have rightly evidenced the agreement come to when it is reduced to writing—and the solemnity of the writing seems to be in no sufficient manner impugned.

Appeal allowed.

Solicitor for appellant: *G. G. Duncan.*
Solicitors for respondent: *Taylor & Hulme.*

HVYNCZAK v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

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HVYNCZAK v. B.C. ELECTRIC RY. CO.

Master and servant—Negligence—Injury to servant—Defective system of signalling—Neglect to warn—Fellow servant—Dismissal of action.

The plaintiff, while in the employ of the defendant Company, was struck and injured by a "box" or "skip" filled with broken cement as it was hoisted by a derrick for removal, after having been filled by the plaintiff and other workmen. The derrick was in charge of a signalman whose duty it was to warn the men immediately before he signalled the engineer to hoist. In an action for damages the jury found that the defendant's system of warning their workmen to stand clear of the "skip" before hoisting it, was a defective one.

Held, on appeal, that the finding was contrary to the evidence, and that even if the signalman did not, on the occasion on which the plaintiff was injured, give the signal, it was not the fault of the system, but the fault of the signalman, who was the plaintiff's fellow servant.

APPEAL by defendant Company from a decision of MACDONALD, J. and the verdict of a jury in an action tried at Vancouver on the 15th of January, 1914, giving the plaintiff $2,500 damages for injury sustained by him while working for the defendant Company. The plaintiff was engaged in breaking up cement in connection with the repair and improvement of the road-bed of the defendant Company on Granville street in Vancouver. As the cement was broken up it was put into a box or skip, which, when filled, was hoisted by a derrick onto a car for the removal of its contents. While the plaintiff was so engaged the "skip" was hoisted by the derrick, and, swinging, struck him, breaking his leg. When the skip was filled, three chains on a ring at the end of the cable from the derrick, were attached to it, and it was then hoisted by the derrick to the car. The derrick was in charge of a man whose duty it was to warn the men before giving the signal to hoist. There was conflict of evidence as to whether warning was given to the men immediately before the raising of the skip at the time of the accident, the plaintiff, who was a foreigner, swearing that no signal was given, and that the skip was half full when he turned to pick

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up a piece of concrete. On picking it up he turned back, and the chains had in the meantime been attached to the skip, which was starting to move, and it struck him before he could get out of the way. The defendant Company raised the defence that the plaintiff had voluntarily incurred the risk, and that he was guilty of contributory negligence. On judgment being entered for the plaintiff, the defendant appealed.

The appeal was argued at Vancouver on the 30th of April, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

McPhillips, K.C., for appellant (defendant): A verdict was given for the plaintiff at common law, the jury having found there was an inadequate system of signals and an inadequate warning to the men, but we say there was evidence of proper warning having been given, and even if it was found that he did not receive warning, it was the negligence of a fellow servant. Plaintiff was guilty of contributory negligence, as it was entirely due to his own carelessness that he was injured. He would not swear there was no warning given: see *Newberry* v. *Bristol Tramway and Carriage Co.* (1912), 29 T.L.R. 177; *Grand Trunk Railway* v. *McAlpine* (1913), A.C. 838. He had been eight years at this work and knew the danger.

Mowat, for respondent (plaintiff): The hook was not on the box and it was not more than half full. He turned to get another piece of concrete and when he turned back to put the concrete in the box it was swinging towards him. He referred to *Darke* v. *Canadian General Electric Co.* (1911), 28 O.L.R. 240.

McPhillips, in reply: The Employers' Liability Act is not open, as the jury gave no finding: see *Garland* v. *Toronto* (1895), 27 Ont. 154; (1896), 23 A.R. 238.

Cur. adv. vult.

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MACDONALD, C.J.A.

MACDONALD, C.J.A.: The only question apart from that of contributory negligence is that of the adequacy of the defendant's system of warning the men to stand clear of the skip before hoisting it. In my opinion the jury's finding that that system was a defective or negligent one is wholly contrary to the evi-

dence. The instructions given to Clark, the signalman, who was a competent, careful and experienced signalman, were to warn the men to stand clear, and to give a signal to the engineer of the derrick to hoist the skip. He was not given other duties which would interfere with the due performance of these. I can conceive of no better system, having regard to the work that the plaintiff and the other men were engaged in. Whether he gave the signal or not on this particular occasion does not affect the question. There is very positive evidence that he did give the signal, and the jury were unable to say that he did not do so. But if he did not, that was not the fault of the system, but his own fault, and being a fellow servant with the plaintiff, defendant is not liable.

It is not necessary in this result to consider the question of contributory negligence, though I may say that in my opinion the jury were justified in coming to the conclusion that the plaintiff had not been negligent. It was one of those accidents which happen without fault on either side.

MACDONALD, C.J.A.

I would allow the appeal and dismiss the action.

IRVING, J.A.: I would allow this appeal.

Clark, in my opinion, does not come within the definition of superintendent. He was hookman and signalman, and in the latter capacity exercised a certain amount of superintendence over the job of hoisting, but he had not that general superintendence over the men engaged about the machine as is exercised by a foreman, or by a person in like position to a foreman. The second subsection of section 3 deals with the case of a foreman in his superintendence; the third subsection with the case of a person not given superintendence. The British Columbia statute differs from the English Act. Therefore, the English cases do not assist us. *Garland* v. *Toronto* (1896), 23 A.R. 238, has no application to this case, because the so-called superintendent had never been given any authority by the company.

IRVING, J.A.

MARTIN, J.A.: This verdict, which is definitely founded by the jury on a liability at common law, can only be upheld on the ground that there was a defective system of warning the defendant's servants. But I am unable to find any evidence in

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support of this contention. On the contrary, it is clear that the system was that immediately after the hook was attached to the loaded skip a verbal warning was given by the signalman on duty to the workmen to stand clear, and a signal by his hand to the engineer to raise the skip at once. In what respect is this inadequate? The fact that in this particular case the jury could not say that the signalman did give the signal he ought to have given does not entitle the plaintiff to maintain his action, and, therefore, this appeal should be allowed.

GALLIHER, J.A.
MCPHILLIPS, J.A.

GALLIHER and MCPHILLIPS, JJ.A. agreed, for the reasons given by MACDONALD, C.J.A.

Appeal allowed.

Solicitors for appellant: *McPhillips & Wood.*
Solicitors for respondent: *Russell, Mowat, Hancox & Farris.*

CLEMENT, J.

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CUTLER v. CUTLER.

CUTLER v. CUTLER

Husband and wife—Divorce—Test of jurisdiction—Domicil.

On a petition by a husband for a decree of divorce it appeared that the marriage had taken place in England and the wife's misconduct and her desertion of him in Manitoba. After her desertion he went to British Columbia, where he acquired a domicil. The wife had never been in British Columbia, nor had the petitioner invited her to join him there.

Held, that the domicil of the husband is also that of the wife; and the petitioner having acquired a domicile in British Columbia is entitled to a decree of divorce from the Supreme Court of that Province.

Le Mesurier v. *Le Mesurier* (1895), A.C. 517, followed.

Statement

PETITION by a husband domiciled in British Columbia for a divorce from his wife who had never been in British Columbia,

on the ground of her having committed adultery. Heard by CLEMENT, J. at Victoria on the 29th of May, 1914.

Crease, K.C., for the petitioner.
No one for respondent.

4th June, 1914.

CLEMENT, J.: At the hearing I held that the petitioner had at the date of the presentation of his petition acquired a domicil in this Province, so far as he himself is concerned. The wife has never, so far as the husband knows, been in this Province. Her marriage to the petitioner took place in England; her misconduct and her desertion of him took place in Manitoba, where, as I find on the evidence, she is still living in adultery with the co-respondent, the man with whom she ran away in the first instance. After remaining for some years in Manitoba, the deserted husband a few years ago moved to this Province, and has, as I have said, acquired a domicil here. His reason for not applying for a divorce before coming here was a lack of means to take the necessary steps to procure an Act of Parliament, the only method of divorce open to a domiciled Manitoban. He very frankly informed me that he had never asked his wife to join him in this Province; in fact, he has had no communication with her since she ran away from him. In the circumstances the most censorious could scarcely blame him.

Judgment

In *Adams* v. *Adams* (1909), 14 B.C. 301, I had a very similar state of facts before me, and I ventured to point out that "only by the application in its most absolute form of the principle that a wife's domicil invariably and of legal necessity follows that of her husband can it be said that this is the community to which this respondent belongs." In that case the marriage had taken place in this Province, the married pair removing at once to the Territories, where the husband had taken up a pre-emption. In this case, as I have said, the wife has never been in this Province at all, so that this is the most extreme case that can be put. In *Adams* v. *Adams, supra,* I used the phrase "the community to which this respondent belongs" because of the language of Lord Penzance in *Wilson*

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v. *Wilson* (1872), L.R. 2 P. & D. 435. "It is both just and reasonable," he says, "that the difference of married people should be adjusted in accordance with the laws of the community to which they belong"; and this passage is quoted with approval and is in fact accepted as the basis of the decision of the Privy Council in *Le Mesurier* v. *Le Mesurier* (1895), A.C. 517. This last-cited case authoritatively settles that "the domicil for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage."

It was not necessary in *Adams* v. *Adams* to enquire whether the principle as to the wife's domicil following the husband's should be so uncompromisingly stated as is above indicated, because on the facts I held that the petitioning husband had not himself acquired a domicil here; but I referred to *Ogden* v. *Ogden* (1908), P. 46, as suggesting possible exceptions to the rigid rule. The recent case of *Strathatos* v. *Strathatos* (1913), P. 46, and *de Montaigu* v. *de Montaigu, ib.* 154, shew that there may be such exceptions, but those decisions do not assist me here. There is nothing here of merit on the wife's part or of undeserved wrong suffered by her in holding her strictly to her husband's domicil. And I find that in the very case (*Wilson* v. *Wilson*) in which Lord Penzance used the language quoted above, he granted a decree in favour of a husband where the erring wife lived in Scotland and had never, so far as the report shews, been in England. The husband's earlier domicil had been in Scotland, the wife was Scotch, the marriage had been contracted in Scotland, and the wife's misconduct had all happened there. It is quite apparent, therefore, that when Lord Penzance spoke of "the community to which they belong" he had reference to the community as fixed by the husband's domicil; and that I must take to be the law, subject only to such exceptional circumstances as arose in the recent cases above referred to, and which clearly do not exist here. Decree granted.

Judgment

Decree granted.

CARTER DEWAR CROWE COMPANY v. COLUMBIA BITULITHIC COMPANY.

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CARTER DEWAR CROWE CO. v. BITULITHIC COLUMBIA CO.

Company—Powers under charter—Guarantee of debt of another company—"Incidental"—Meaning of—Ultra vires.

A company endorsed a promissory note guaranteeing the payment of goods already delivered to a second company, in which the first company held shares, of which it was a large creditor, and upon whose effects it held a blanket mortgage. The memorandum of association of the first company did not specifically include power to guarantee the payment of the obligations of others, or to undertake primary liability therefor. In an action against the first company for the balance due on the promissory note:—

Held, that, even in the event of the defendant Company's interests being served by endorsing the note, the endorsement was *ultra vires* of the Company.

Ashbury Railway Carriage and Iron Co. v. *Riche* (1875), L.R. 7 H.L. 653, followed.

Decision of SCHULTZ, Co. J. reversed.

APPEAL from a decision of SCHULTZ, Co. J. in an action tried by him at Vancouver on the 24th of February, 1914. The defendant Company had through its officers endorsed a promissory note made by a certain quarry company to the plaintiffs, it being intended either to guarantee payment of the quarry company's indebtedness to the plaintiff or to become primarily liable therefor. The defendant Company was incorporated to carry on a general contracting business, its activities being principally directed to street paving. Under its memorandum of association the objects of the Company did not specifically include power to guarantee the payment of the obligations of others, or to undertake primary liabilities therefor. The defendant Company was the owner of shares in the quarry company, had made it various loans, amounting in all to $46,000, and held as security therefor a blanket mortgage on the Company's effects; it expected in the ordinary course of business to obtain stone from the quarry company for use in its business, and had to that extent an interest in its success.

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After the quarry company had made a payment on account of the note, the plaintiff sued the defendant Company for the balance. The trial judge gave judgment in favour of the plaintiff. The defendant Company appealed on the grounds that the transaction was *ultra vires* of the defendant Company, and that the note was made without consideration.

The appeal was argued at Vancouver on the 8th of April, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Ritchie, K.C., for appellant (defendant): The defendant Company under its memorandum of association was incorporated for taking contracts for street paving. It took shares in a quarry company, loaned the quarry company large sums, and, in order to further assist, guaranteed for a bill of goods, for which it gave a promissory note. The note was given after the goods were delivered. Under the powers in the memorandum of association anything outside of taking shares in the quarry company was *ultra vires*: see *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875), L.R. 7 H.L. 653. As to the meaning of "incidental," see *London County Council* v. *Attorney-General* (1912), A.C. 165. The quarry business is not "incidental" to the defendant Company's business. See also *Attorney-General* v. *Mersey Railway* (1907), A.C. 415; *Amalgamated Society of Railway Servants* v. *Osborne* (1910), A.C. 87; *In re Cunningham & Co., Limited* (1887), 36 Ch. D. 532; *Small* v. *Smith* (1884), 10 App. Cas. 119; *In re West of England Bank. Ex parte Booker* (1880), 14 Ch. D. 317; *Brettel* v. *Williams* (1849), 4 Ex. 623; Brice on Ultra Vires, 3rd Ed., 269.

Housser, for respondent (plaintiff): The defendant Company's powers are very extensive under its memorandum of association. The quarry company, whose business is, we contend, incidental to that of the defendant's business, was practically taken over by the defendant Company. It had purchased stock in this company and had advanced about $46,000 before giving the note that is in question here. Although the note was given after the delivery of the goods, the arrangement

for giving the note was prior to delivery. The question is whether the giving of the note is *intra vires* of the Company, and we contend it comes within the memorandum of association, as the quarry business comes within the words "things necessary or convenient to carry on their works."

Ritchie, in reply.

Cur. adv. vult.

2nd June, 1914.

MACDONALD, C.J.A.: The plaintiff (respondent) supplied goods to the Scott Goldie Quarry, Limited. Thomas Scott was president of that company and president and manager of the defendant Company. He was requested by plaintiff to guarantee the payment of said goods and did so in the form of a promissory note which he and the secretary signed in their official capacity on behalf of the defendant and in favour of the plaintiff. The Scott Goldie Quarry, Limited, made a payment on account of the note, and it is for the balance that judgment was entered in the Court below in favour of the plaintiff. The grounds of appeal are (1) that the transaction was *ultra vires* of the defendant; and (2) that the note was made without consideration. The latter rests on the fact that the goods were sold and delivered before the note was given, but there is some evidence that the promise to guarantee the account was made before the goods were delivered. This branch of the case need not be considered if the first ground of appeal be well taken.

Carter, a witness for the plaintiff, and its manager, appears to have had a very nice appreciation of the difference in law between a promise to answer for the debt of another and one to pay it. It appears to me, however, to be immaterial in the result of this case whether the transaction was a guarantee or an undertaking to become primarily liable for the account, because if the one transaction was *ultra vires* of the defendant, the other was, also.

The defendants were incorporated to carry on a general contracting business, its activities being principally directed to street paving; its objects, as defined in its memorandum of

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association, did not specifically include power to guarantee the payment of the obligations of others or to undertake primary liability therefor. The law governing this case is well settled by *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875), L.R. 7 H.L. 653, followed and approved of in a number of subsequent cases, in one of which, *Attorney-General* v. *Great Eastern Railway Co.* (1880), 5 App. Cas. 473, Lord Selborne, at p. 478, speaking of the doctrine of *Ashbury Railway Carriage and Iron Co.* v. *Riche,* said:

> "I agree with Lord Justice James that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires.*"

That reasonable application of the doctrine was made by Malins, V.C. in *In re West of England Bank. Ex parte Booker* (1880), 14 Ch. D. 317, the case relied upon by Mr. *Housser* in support of his contention that the assumption of the liability aforesaid by the defendant was in its own interests, and might not unreasonably be held to be incidental to those objects specifically defined in its charter. *In re West of England Bank. Ex parte Booker, supra,* is, in my opinion, distinguishable from this case. There the guarantee of the bank was supported on the ground that the securities guaranteed being the property of the bank were accepted by the person to whom the guarantee was given only because of such guarantee, the result being to enable the bank to dispose of the securities. It was held to be a banking transaction, and hence incidental to the objects of the banking company. The most that can be said in support of the case at bar is that the defendant was the owner of shares in the quarry company, which it had power to acquire; that it was a creditor and the mortgagee of its effects; that it expected in the ordinary course of business to obtain stone from the quarry company for use in its business. For these reasons, it was argued, defendant had a substantial interest in the success of the quarry company.

MACDONALD, C.J.A.

Assuming that in these circumstances the defendant's interests would be served by the giving of the note, how can that affect the question? Directors and managers of companies

might frequently find it in the interests of their companies to engage in transactions outside their offices. If such considerations could be allowed to prevail, the enumeration of a company's objects in the memorandum of association would be an idle form.

I would allow the appeal.

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IRVING, J.A.: The decision of a strong Court, Boyd, C. and Anglin and Maybee, JJ. in *The A. R. Williams Machinery Co., Ltd.* v. *The Crawford Tug Co., Ltd., and J. T. Crawford* (1908), 16 O.L.R. 245, seems to me to be a decisive authority in favour of the appellant.

I would allow the appeal.

MARTIN, J.A. concurred with the judgment of MCPHILLIPS, J.A.

MARTIN, J.A.

GALLIHER, J.A.: I think the note sued upon was a guarantee of the debt of the Scott Goldie Quarry, Limited, which the officers of the defendant Company were not empowered to give, and is not such a transaction as falls within the general words "necessary or convenient" in their memorandum of association: see *The A. R. Williams Machinery Co., Ltd.* v. *The Crawford Tug Co., Ltd., and J. T. Crawford* (1908), 16 O.L.R. 245.

GALLIHER, J.A.

MCPHILLIPS, J.A.: This is an action brought in the County Court of Vancouver and is an appeal by the defendant from a decision of SCHULTZ, Co. J., wherein he directed judgment to be entered for the plaintiff (respondent) against the defendant for the sum of $700, being the balance due in respect of a promissory note for $1,100 made by the defendant in favour of the plaintiff, dated the 27th of August, 1913, payable three months after date.

It would appear that when the promissory note fell due, the company which had been supplied with the goods by the plaintiff (the promissory note representing the purchase price thereof) —the Scott Goldie Quarry, Limited—issued its cheque under date the 1st of December to the plaintiff for $420.05, and executed a promissory note to the plaintiff for the balance remain-

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ing due, *viz.*: $700, payable in one month, which promissory note was endorsed by the defendant and fell due on the 4th of January, 1914, and remains unpaid.

It is clear upon the evidence that the defendant was in no way indebted to the plaintiff, and the promissory note sued upon was given without consideration, the plaintiff preferring to have the note of the defendant Company; no doubt intimate business relations existed between the defendant Company and the Scott Goldie Quarry, Limited, but that does not create legal liability; the companies must be looked upon as distinct one from the other: *Salomon* v. *Salomon & Co.* (1896), 66 L.J., Ch. 35, *per* Lord Herschell at pp. 45-57.

When the renewal promissory note for $700 was given the defendant Company endorsed it, but without consideration, the plaintiff Company well knowing the situation of matters, desirous, however, of getting what was considered to be the additional security of the defendant Company's endorsement; in fact, what was attempted was the obtaining of a guarantee from the defendant Company for the due payment by the Scott Goldie Quarry, Limited, of the moneys due by that company to the plaintiff Company.

MCPHILLIPS, J.A.

In my opinion, the promissory note sued upon is not binding upon the defendant Company, and the making of same and the endorsement of the renewal note of $700 was without the corporate powers of the defendant Company—it not being shewn that in the circumstances at the time existing the giving of the promissory note or the endorsement of the renewal thereof was necessary or within the ordinary business or corporate powers of the company; and the plaintiff Company is in no way a holder for value, and the action being one between the original parties, the plaintiff Company was not entitled to judgment.

It therefore follows that, in my opinion, the appeal should be allowed, the judgment of the trial judge set aside and the action dismissed with costs here and in the Court below.

In arriving at the conclusion which I have in the present case, it has only been after the consideration of the following authorities: *In re Cunningham and Co., Ltd.* (1887), 57

L.J., Ch. 169; *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875), 44 L.J., Ex. 185; *Amalgamated Society of Railway Servants* v. *Osborne* (1909), 79 L.J., Ch. 87; *Coleman* v. *Eastern Counties Railway Company* (1846), 10 Beav. 1; 16 L.J., Ch. 73; *Attorney-General* v. *Great Eastern Railway Co.* (1880), 5 App. Cas. 473; 49 L.J., Ch. 545; *Foster* v. *London, Chatham and Dover Railway Co.* (1895), 1 Q.B. 711; 64 L.J., Q.B. 65; *Burland* v. *Earle* (1901), 71 L.J., P.C. 1 at p. 5; *Great North-West Central Railway* v. *Charlebois* (1898), 68 L.J., P.C. 25.

Appeal allowed.

Solicitors for appellant: *Senkler, Spinks & Van Horne.*

Solicitors for respondent: *Williams, Walsh, McKim & Housser.*

ELLIS v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Master and servant—Death of servant—Workman at railway crossing—Defective system of warning—Special finding of jury—Explanation—General verdict—Families Compensation Act, R.S.B.C. 1911, Cap. 82.

In an action for damages under the Families Compensation Act the jury, in answering questions, found that the defendant's negligence consisted of "insufficient precautions," but they did not answer the question, "Was the defendant's system defective?" In answer to questions put to him by the judge, the foreman explained "that the jury looked at it as if proper precautions were not taken, but that they do not feel that they are able to find whether there was a defective system or not." Further conversation between the judge and the foreman made it appear that the jurors were confused as to the meaning of the word "system." The judge then sent the jury back, when they returned a general verdict in favour of the plaintiff.

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Held, on appeal, that when the jury found the precautions taken were insufficient they, in effect, found that the system was defective, and they were justified in bringing in a general verdict.

APPEAL by the defendant Company from a decision of MACDONALD, J. and the verdict of a jury in favour of the plaintiff in an action tried at Vancouver on the 23rd of January, 1914, brought under the Families Compensation Act to recover damages for the death of a workman employed by the defendant Company by reason of the negligence of said Company. The facts were that four men and a foreman were working for the defendant Company laying down planks at a tramway crossing, where there was a double track, with passenger cars passing every fifteen minutes and freight cars at indefinite intervals, operated at a high rate of speed. It was the duty of the foreman to warn the men of the approach of a car, but his care in watching was hampered owing to his personal assistance in the work that the gang was engaged in. The crossing was approached from one direction around a sharp curve. A car coming around this curve killed one of the men. He had received a warning, but not knowing which track the car was on, he stepped in front of it and was killed. At the trial the jury attempted to answer questions and they found the defendant's negligence to be "insufficient precautions." The foreman, in answer to the trial judge, explained this by saying that proper precautions were not taken on acount of the curve, and that the jury were unable to find whether the system was defective or not, it being apparent from the discussion between the judge and the jury that the jurors were confused as to the meaning of the word "system." After further instruction from the judge, and after ascertaining that they might bring in a general verdict, they retired and brought in a general verdict in favour of the plaintiff, upon which judgment was entered. The defendant Company appealed.

Statement

The appeal was argued at Vancouver on the 30th of April, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

McPhillips, K.C., for appellant (defendant): The only

question in this case was whether there was a defective system. The jury returned and submitted that they were unable to say there was a defective system. They were then sent back, and later brought in a general verdict for $1,500. We contend that after their first finding they could not then go back and bring in a general verdict: see *Newberry* v. *Bristol Tramway and Carriage Co.* (1913), 29 T.L.R. 177.

Mowat, for respondent (plaintiff): The evidence shews the instructions to the foreman were very indefinite. He was made to work with the other men and could not properly watch for approaching cars while so engaged, and it was due to insufficient warning that the accident happened. Argument

McPhillips, in reply: There was no evidence that the foreman had to work; his sole duty was to instruct the men and warn them in case of danger.

Cur. adv. vult.

2nd June, 1914.

MACDONALD, C.J.A.: The deceased was one of a gang of four men working under a foreman laying down planks at a tramway crossing. Passenger cars were passing to and fro over the double track every fifteen minutes, and freight cars sometimes passed at indefinite intervals. These cars were being operated at a high rate of speed. The crossing in question was approached from one direction around a sharp curve. The foreman was, to the knowledge of the defendant's road-master, and I think of themselves, allowed to assist in the manual labour. Indeed, the fair inference which the jury might draw is that he was required to do so. What his instructions were with regard to the safety of the men is a matter of some controversy. The jury might well find that they were in effect that the men should look out for their own safety, subject only to this qualification, that it was the foreman's duty to warn them of approaching cars, but as his attention, like that of his men, would be taken up primarily with his manual labours, he was in no better position to warn them than they were to look to their own safety. These men were put to work at a crossing exceptionally dangerous, owing to the existence of the said

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curve, without any safeguard by way of warning of approaching cars other than that I have referred to, their own wits, and those of the pre-occupied foreman.

The jury attempted to answer questions. They found the defendant's negligence to consist of "insufficient precautions"; the foreman, in answer to the learned judge, explained this by saying:

> "The jury look at it as if proper precautions were not taken in that place on account of the curve. . . . . The jury do not feel as if they are able to find whether the system was defective or not."

During further discussion between the Court and the jury it was made to appear, I think, that the jurors were confused as to the meaning of the term "system," and after some further instructions from the judge, and after ascertaining that they might bring in a general verdict, they retired and brought in such a verdict in favour of the plaintiff.

The argument before us was confined to the question of whether or not there was evidence of a defective system of warning the men, and whether the jury, having stated as they at first did, what, in their opinion, defendant's negligence consisted of, the general verdict could properly have been acted upon.

If I understand aright the contention of appellant's counsel on the general question of system, it was that no other system of warning men working on railway tracks is in vogue; that his client was not bound to provide a system to meet the dangers at crossings situated as this one was near a curve, other than to put the men in charge of a competent foreman to watch and warn them of approaching danger; that the men were in charge of such a person, and that in adopting a good general system they had discharged their obligations to their servants. This would appear to have confused the jurors. A system which requires or permits a person charged with the duty of giving a warning to incapacitate himself from doing that effectually is a defective system, and when the jury found that the precautions taken were insufficient, owing to the existence of the curve, they in effect found that the system was defective. I think there was evidence upon which the jury could properly find negligence at common law.

MACDONALD, C.J.A.

Instead of criticizing the course adopted in sending the jury

back to reconsider their verdict, I would commend that course. In negligence cases it is very desirable, in the interests of both parties, that the issues of fact should be found in the form of answers to questions. That practice is to be encouraged, and the jury assisted by the judge and counsel as far as possible to that end, as was done in this case. To declare a jury at fault because they had failed to make their meaning clear in their answers, and when sent back had brought in a general verdict, unless the general verdict was not an honest one, would be to discourage juries from attempting to answer questions. There is nothing repugnant to the general verdict in the answer that defendant had not taken "sufficient precautions." The only thing that is repugnant to it is the statement of the foreman that the jury could not say whether the system was defective or not, but that answer was the result of misapprehension as to the meaning of the term "system," which I think must be assumed to have been removed before they were sent back.

MACDONALD, C.J.A.

I would dismiss the appeal.

IRVING, J.A.: I would dismiss this appeal.

The final answer of the jury is binding. It agrees with their original answer that the Company was negligent in not taking sufficient precautions. The presumption is that the jurors were doing their work honestly, and I see nothing to justify a suggestion that the final verdict is not an honest verdict. The change from a special to a general verdict may be attributed to their inability to express their meaning to their own satisfaction.

IRVING, J.A.

There was, in my opinion, evidence to justify a finding that the system of warning adopted was defective. This is not a case of fellow workmen, but of defective system. This man got a warning, but there being nothing to tell him from what direction the car was coming, he stepped right in front of the approaching car. In my opinion the system was defective in two respects, (1) in permitting the foreman charged with the duty of warning to work as one of the gang; (2) in not giving any indication as to the track on which the approaching car was coming.

MARTIN, J.A.: There was, in my opinion, evidence upon

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which the jury could find that the system of personal warning was defective in the circumstances, in that the duties that the foreman was knowingly permitted, or, in truth, expected, according to custom, to perform in working with his small gang of five men (including himself) occupied him to such an extent that he could not keep a safe look out so as to protect the workmen in his charge, and no other person was detailed to watch and warn them. On this occasion he was actually holding a heavy plank with the others, which they dropped when the car came upon them. The system, in short, was too lax to be effective, and it was liable to become specially defective when the gang was working, as at the time of the accident, at a curve in the track where the range of vision was restricted.

GALLIHER, J.A.: I think the Company's system of warning, although sufficient in its inception, was rendered inefficient and defective by the Company knowingly permitting the foreman, whose duty it was to give the signals, to engage in work with the other men, thereby distracting his attention from the approach of cars, which occurred in the case at bar.

GALLIHER, J.A.

I feel much more doubt on the question as to whether this accident was caused by such defective system, but I am unable to say the jury could not reasonably have come to that conclusion. I think we must accept the general verdict finally brought in by the jury as a finding in the plaintiff's favour on all points necessary to support that verdict.

The appeal will, therefore, be dismissed.

MCPHILLIPS, J.A.

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

Solicitors for appellant: *McPhillips & Wood.*

Solicitors for respondent: *Russell, Mowat, Hancox & Farris.*

HUPP v. CANADIAN PACIFIC RAILWAY COMPANY.

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HUPP v. CANADIAN PACIFIC RY. CO.

Railway—Injury to animal—Escape from control of owner's servant—Fences—When "at large"—Negligence—Railway Act, R.S.C. 1906, Cap. 37, Secs. 254, 294 and 295.

The plaintiff, while at work on a railway-grading contract, turned out his horses each night for pasture on unenclosed lands adjoining the defendant's railway and drove them back to camp in the morning. The railway was not fenced at this point and the land was within the railway belt. There was some evidence that the pasture land belonged to a man who had given the plaintiff permission to use it. One morning, while on the way back to camp, one of the horses escaped from control, ran onto the railway track, and was killed by a passing train. In an action for the recovery of the value of the horse:—

Held (IRVING and MARTIN, JJ.A. dissenting), that the horse was not "at large" within the meaning of section 294 of the Railway Act, and the plaintiff could not recover.

Per IRVING and MARTIN, JJ.A.: An animal which breaks away from its owner on unenclosed lands is "at large" within the meaning of the Act, whether the lands belong to the owner or not.

APPEAL from a decision of GRANT, Co. J. in an action tried at Vancouver on the 6th of June, 1913. The plaintiff, a sub-contractor on the right of way of the Canadian Northern Railway, had a number of horses which he used during the day on his contract work. They were turned out at night to pasture on lands adjoining the defendant's railway, within the Dominion railway belt, and in the morning were herded back to camp for the day's work. There was some evidence that the land upon which the horses were turned out at night belonged to one McAllister, from whom the plaintiff had obtained permission to so use the land. One morning, while the men in charge were driving the horses back to camp, one of the horses escaped from control, and, running onto the defendant's railway track, was struck by a passing freight train and killed. In an action for the recovery of the value of the horse the trial judge found there was no negligence on the part of the plaintiff, and gave judgment in his favour for $300 and

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costs, following *Parks* v. *Canadian Northern R. Co.* (1911), 14 Can. Ry. Cas. 247. The defendant Company appealed on the ground that the trial judge should have found that the horse, when it got on the defendant's track, was at large through the negligence of the plaintiff, or his agent or custodian, or if not at large, got upon the defendant's track directly from the land where it was pasturing with the consent of the adjoining landowner, and at a point where there was no duty upon the defendant to have its railway fenced, and on other grounds.

Statement

The appeal was argued at Vancouver on the 13th of November, 1913, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

McMullen, for appellant: As the animal was on McAllister's land, upon which the plaintiff was allowed to pasture his horses, it was not "at large"; it was at home: see the Railway Act, Sec. 294, Subsec. 4; *Yeates* v. *Grand Trunk R.W. Co.* (1907), 14 O.L.R. 63 at p. 72; *Higgins* v. *The Canadian Pacific R.W. Co.* (1908), 18 O.L.R. 12 at p. 16; *McLeod* v. *Canadian Northern R.W. Co., ib.,* 616 at p. 620; *Cortese* v. *The Canadian Pacific Ry. Co.* (1908), 13 B.C. 322; Mac-Murchy & Denison's Railway Law of Canada, 2nd Ed., 490.

C. W. Craig, for respondent: The horses were not "at large" as long as they were under control. When, however, one of the horses, while being driven to the stable, escaped, he was then "at large": *Krenzenbeck* v. *Canadian Northern R.W. Co.* (1910), 13 W.L.R. 414. The plaintiff was not guilty of contributory negligence, having used reasonable care.

McMullen, in reply, referred to *Parks* v. *Canadian Northern R. Co.* (1911), 14 Can. Ry. Cas. 247.

Cur. adv. vult.

6th January, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiff turned out his horses to pasture on lands abutting the defendant's railway in the neighbourhood of Drynock, in this Province. These lands were in the Dominion railway belt, and there is some evidence that they belonged to one McAllister and that plaintiff had McAllister's

permission to so pasture his horses. The evidence as to McAllister's ownership and plaintiff's permission to use the lands is vague and unsatisfactory, but in the result it does not, in my opinion, make any difference who owned the land, or whether the plaintiff had the owner's permission or not. It appears that the plaintiff was in the habit of turning his horses out at night, and while the men in charge of them were driving them to camp in the morning, one escaped from their control, got on the railway track, and was killed by one of the defendant's trains.

It was conceded by his counsel that if the plaintiff can succeed at all, he must do so by virtue of section 294 of the Railway Act. The case depends on the interpretation to be put upon the term "at large" as used in that section. Animals may be "at large" on a highway in the contemplation of Parliament, though in charge of some competent person: section 294, Subsec. (1). Then they may be "at large" whether they be on the highway or not: Subsec. (4). If, therefore, the fact of animals being in charge of a competent person renders them none the less at large on the highway, they would be also at large elsewhere than on the owner's own lands, notwithstanding that they were being herded or driven in by plaintiff. By said subsection (4) the Railway Company is rendered liable for injury to the animal only if it got at large otherwise than by the negligence or wilful act or omission of the owner, or his agent, or of the custodian of the animal or his agent. If the horse was at large before he escaped from the man in charge, and got upon the railway track, he was no more at large afterwards, and being at large, *i.e.*, at pasture, or being driven in by the wilful act of the owner, this section does not assist the plaintiff, upon the assumption that the lands from which the horse got on to the track were not lands of the plaintiff's, or lands which he had a right to use as his own.

MACDONALD, C.J.A.

Assuming, on the other hand, that the plaintiff had the licence of McAllister to pasture his horses there, and was in this sense to be regarded as the owner or occupier of these lands, the horses were turned out then upon the owner's own lands, and could not, according to the authority of *McLeod* v.

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Canadian Northern R.W. Co. (1908), 18 O.L.R. 616, and other authorities, be considered to be at large at all. In this case, again, the section does not assist the plaintiff.

The only difference between this case and *Parks* v. *Canadian Northern Ry. Co.* (1911), 21 Man. L.R. 103; 14 Can. Ry. Cas. 247, is that there the horse escaped from the plaintiff's own premises, without negligence or wilful act or omission of the plaintiff, and reached the railway track over the lands of strangers. To find in favour of the plaintiff I should have to go a step further than that case has gone, and further than any other cases to which we have been referred have gone, and say that horses must be deemed to be "at large" on their owner's lands when they break away from the person or persons in charge of them. There is no warrant for that, and hence I cannot see how the judgment in favour of the plaintiff can be sustained.

The appeal should be allowed.

IRVING, J.A.: I would dismiss this appeal. The learned County Court judge has come to the conclusion that the Company has not shewn that the animal, when he escaped, got at large through the negligence or wilful act, or omission of the plaintiff or his men. On this finding, with which I do not think we can interfere, I think the plaintiff is entitled to hold his judgment.

IRVING, J.A.

The animal, after it had been rounded up with the other animals, while being driven to the stable, escaped from the men who were driving it. In my opinion he was then "at large" (that is, free from control, unconfined), whether the land upon which the stable was be regarded as the plaintiff's land (under licence from McAllister) or not. From that unfenced piece of land he wandered by way of an old trail up on to the defendant Company's track, where he was killed.

I think an animal can be said to be "at large" even on his owner's own property, certainly where that property is unfenced. The expression would be inapplicable, I think, to a horse in a corral, or a paddock, but would be quite proper in describing animals turned out on a range.

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MARTIN, J.A.: Unless the horse in question was "at large," it is conceded that the judgment cannot stand. There is no evidence to "establish," as required by subsection (4), the Company's contention that the horse, if he "got at large," did so "through the negligence or wilful act or omission of the owner or his agent." The plaintiff had made arrangements with the owner, or lawful occupant, of the adjoining land to erect a temporary camp thereon, but had made no arrangement to pasture his horses thereon, letting them wander at night in charge of a herd, but in daytime they were used in working on the plaintiff's contract. At the time the accident happened, about 7 a.m., the horses were being driven into the stable to be hitched up, by three men, Brown (the man in charge of the camp), and two others, when the one in question got frightened, for some unknown reason, broke away, and got on the railway track, despite the efforts of the men to head it off (there being no fence between the track and McAllister's unfenced land), and was killed. The railway track was about 75 feet above the level of the camp and the stable was about 2,000 feet from the track.

The sole point to determine is whether the horse "got at large" within the meaning of subsection (4) when it broke away from the control of the men who were driving it. If land is unfenced, I cannot see that ownership has anything to do with the question before us. The expression is not "run at large," as in the Animals Act, R.S.B.C. 1911, Cap. 10, Sec. 3, or "running wild upon the public lands," under section 18, but even under that Act anyone who let his stallion or bull "run at large" upon his unfenced range might find himself liable, under sections 3 and 11, for damage committed by them upon said range. It cannot, I think, reasonably be said that a horse turned out loose upon an open range to roam uncontrolled is not "at large," even though the land and horse have the same owner. I understand that is what Chancellor Boyd means, when he said in *McLeod* v. *Canadian Northern R.W. Co.* (1908), 18 O.L.R. 616 at p. 624, "cattle on the lands of the owner are not 'at large' but 'at home' " if the lands are enclosed. The case of *Yeates* v. *Grand Trunk R.W. Co.* (1907), 14 O.L.R.

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63, is also one of cattle escaping from an enclosure. I agree with the opinion expressed by McLorg, Dist. Ct. J. in *Krenzenbeck* v. *Canadian Northern R.W. Co.* (1910), 13 W.L.R. 414 at p. 420:

> "It seems to me from these authorities that whether cattle are at large or no, depends on whether they are under restraint or control, quite irrespective of whether they are on the plaintiff's land or not."

The case at bar seems to be largely governed by, though on the facts it is stronger than, the very similar one of *Parks* v. *Canadian Northern Ry. Co.* (1911), 14 Can. Ry. Cas. 247, the only difference being that the horse there had escaped from control for about a day and a night, whereas here for only a few minutes, and that point was pressed upon us. But the principle does not depend upon lapse of time but escape from control, and the horse in the *Parks* case was just as much "at large" the moment he took to his heels as he was one or 100 days later.

MARTIN, J.A.

GALLIHER, J.A.: Were it not for the wording of subsection (1) of section 294 of the Railway Act, R.S.C. 1906, Cap. 37, which would seem to indicate that the statute treats all animals as "at large," whether in custody of owner or servants, which are away from home, I should have thought that no animal was at large in any place where it was in the custody or control of the owner or his servants.

If the statute has that meaning, and there seems no escape from that conclusion when we read the words there used:

GALLIHER, J.A.

> "No horses, sheep, swine or other cattle shall be permitted to be at large upon any highway . . . . unless they are in charge of some competent person or persons . . . ."

If on a highway, then why not any other place outside the plaintiff's premises? The plaintiff cannot here succeed.

Assuming that the premises in question were McAllister's, and that the plaintiff had acquired them for the purpose of grazing his horses thereon, facts of which I am far from certain upon the evidence, then, according to the Ontario decisions, the animals were not at large, and there being no duty to fence under section 254, the plaintiff cannot recover.

And on the other hand, if the plaintiff had no rights on the

land, and McAllister could give him no rights, the animals were there at large, and being there by the wilful act of the plaintiff, he cannot recover under subsection (4) of section 294.

The appeal must be allowed, with costs.

McPHILLIPS, J.A. agreed with MACDONALD, C.J.A.

Appeal allowed, Irving and Martin, JJ.A. dissenting.

Solicitor for appellant: *J. E. McMullen.*
Solicitor for respondent: *W. G. Anderson.*

McKINNON *ET AL.* v. LEWTHWAITE.

Judgment—Interest—Can. Stats. 1900, Cap. 29, Sec. 1—Default judgment—Judgment entered for excessive amount—Amendment—Rule 319.

Where judgment in default of defence is signed for an excessive amount owing to a clerical error:—

Held (MARTIN, J.A. dissenting), that the Court may under rule 319 order the judgment to be amended by the insertion of the proper amount.

Where by virtue of the Bills of Exchange Act and the Interest Act, interest is claimed by way of liquidated damages on a promissory note, dated prior to the passing of the amendment to the Interest Act in 1900, when the rate was reduced from 6 per cent. to 5 per cent.:—

Held (MARTIN and MCPHILLIPS, JJ.A. dissenting), that the word "liabilities" in the proviso to the amending Act referred to the original debt, and the interest should, therefore, be computed at the rate in force prior to the passing of the amending Act.

APPEAL by plaintiffs from an order of MURPHY, J. made at chambers in Vancouver, on the 19th of January, 1914. The action arose over a promissory note made by the defendant on the 11th of April, 1899, payable on demand, for $1,500. In an action upon this note brought in 1907, judgment was

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entered for the plaintiffs, in default of defence, on the 5th of March, 1907, for the amount of the note and interest at 6 per cent. from the 12th of April, 1899, when a demand was made, up to the day of the judgment. The note did not provide for interest and it was admitted that there was an error in the calculation of interest, $6.07 being charged more than the proper amount when calculated at 6 per cent. The defendant did not move to set aside the judgment until six years and ten months after judgment was signed. An order was made setting aside the judgment entered in default of defence and allowing the defendant in to defend. The plaintiffs appealed.

The appeal was argued at Vancouver on the 15th and 16th of April, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Gibson, for appellants (plaintiffs): The indebtedness arose before the passing of the amendment to the Interest Act, when the rate was reduced from 6 per cent. to 5 per cent.: Can. Stats. 1900, Cap. 29, Sec. 1. This Act has a proviso that the change in the rate of interest shall not apply to liabilities existing at the time of the passing of the Act. We have, then, the right to charge 6 per cent. up to judgment. The cases of *British Canadian Loan & Agency Co.* v. *Farmer* (1904), 15 Man. L.R. 593; and *Plenderleith* v. *Parsons* (1907), 14 O.L.R. 619, reversing the Master in Ordinary ((1906), 9 O.W.R. 265), are against me, but in *Kerr* v. *Colquhoun* (1911), 18 O.W.R. 174, Middleton, J., although following Boyd, C. in *Plenderleith* v. *Parsons,* expressed some doubt as to the correctness of the decision. In any event these cases can be distinguished, as they were in relation to a mortgage, whereas this action is on a bill of exchange.

The error of charging an amount too much, owing to a slip in computation when judgment was signed, can be amended now, and does not give the defendant the right to be allowed in to defend: see *Anlaby* v. *Prætorius* (1888), 20 Q.B.D. 764; *Hughes* v. *Justin* (1894), 1 Q.B. 667; *Hodges* v. *Callaghan* (1857), 2 C.B.N.S. 306; *Re Mosenthal, Ex parte Marx* (1910), 54 Sol. Jo. 751; *Armitage* v. *Parsons* (1908), 2 K.B.

410; *Muir* v. *Jenks* (1913), 2 K.B. 412. The defendant must disclose a defence before he is entitled to have the case reopened, and he has not done so: see *Piper* v. *The Kings' Dyspepsia Cure Co.* (1898), 30 N.S. 429; *O'Donohoe* v. *Bourne* (1897), 27 S.C.R. 654. There is no excuse for the delay in not applying to reopen the case until seven years after judgment was signed.

Creagh, for respondent (defendant): The judgment should be set aside owing to the excessive interest charged. They were entitled to 6 per cent. only for the period prior to the amendment of the Interest Act, when it should have been reduced to 5 per cent.: see *British Canadian Loan & Agency Co.* v. *Farmer* (1904), 15 Man. L.R. 593; Halsbury's Laws of England, Vol. 27, p. 142, par. 263. The endorsement is bad also, as they claimed too much: see *Hassard* v. *Riley* (1897), 6 B.C. 167; *Bank of Montreal* v. *Bainbridge* (1894), 3 B.C. 125. Assuming the judgment was regular, there was a discretion in the judge below, and he, having exercised that discretion in our favour, this Court should not interfere: see *Royal Bank* v. *Fullerton* (1912), 17 B.C. 11. On the question of delay in applying to set aside the judgment, see *Atwood* v. *Chichester* (1878), 3 Q.B.D. 722.

Argument

Gibson, in reply.

Cur. adv. vult.

2nd June, 1914.

MACDONALD, C.J.A.: The defendant has not made out his claim that the judgment was entered in contravention of an undertaking between the solicitors. The onus of proof is upon him to shew this, which onus he has failed to satisfy; on the contrary, the evidence on this point is substantially against the defendant. This being so, there being no reasons for judgment in the Court below, I think I can fairly assume that the judgment was not set aside on the ground above alluded to.

MACDONALD, C.J.A.

The next ground relied upon by the defendant is that the judgment was irregularly entered because, assuming the rate of interest to be 6 per cent. for the whole period, the interest included in the judgment is $6.07 in excess of the true amount.

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This is admitted. As, however, it was a clerical error, I think the Court ought to exercise the discretion given to it by rule 319 and reduce the interest to the proper amount.

The other and substantial objection to the judgment as entered, is that the rate of interest is not the legal rate, and hence, judgment could not be entered in virtue of rule 295.

Interest at 6 per cent. was charged from the 12th of April, 1899, to the 5th of February, 1907. The promissory note which evidences the debt did not by agreement provide for interest. The interest is therefore claimed by way of liquidated damages by virtue of the Bills of Exchange Act and the Interest Act. The legal rate in 1899 was 6 per cent., but this rate was changed by an amendment to the Interest Act made in 1900, reducing the rate to 5 per cent.

The contention of the respondent is that the legal rate was 6 per cent. up to the 7th of July, 1900, the date of the reduction of the rate of interest, and 5 per cent. thereafter, while the appellants contend that the reduction in the rate did not apply to a case like the present one, and that 6 per cent. continued to be the legal rate up to the entry of judgment. We were referred to *Plenderleith* v. *Parsons* (1907), 14 O.L.R. 619; *British Canadian Loan & Agency Co.* v. *Farmer* (1904), 15 Man. L.R. 503; and *Kerr* v. *Colquhoun* (1911), 18 O.W.R. 174. There are some American cases mentioned in the judgment of Richards, J. in the Manitoba case, but the wording of the statute upon which they are based is so different from ours as to render them of little assistance here. The decision of this point depends upon the construction to be placed upon the proviso in the amending statute of 1900, which reads as follows:

MACDONALD, C.J.A.

"Provided that the change in the rate of interest in this Act shall not apply to liabilities existing at the time of the passing of this Act."

The only liability to which it can apply is the debt. If the accrued interest up to 1900, using the words "accrued interest" as a convenient designation of the creditor's right to damages for the detention of the principal, be termed a liability, the section could have no reference to it, because it is not interest bearing. To put it in another way: There are two liabilities, first, the debt for the detention of which damages may be

awarded to the amount of the statutory rate of interest; second, the accumulated damages on the debt. Now, it is clear that the creditor had no right to interest on the accumulated damages by way of further damages for their detention. The change in the rate of interest, therefore, has no reference to that liability. It therefore must have reference only to the debt, and the effect of it is to leave the old rate untouched in its application to the debt which is still to bear interest unaffected by the reduction.

I have come to this conclusion with a good deal of hesitancy, because it is at variance with the construction placed upon the section by the learned Chancellor of Ontario and Mr. Justice Richards. Mr. Justice Middleton, however, though feeling himself bound by the learned Chancellor's opinion, appears to have entertained the contrary one.

MACDONALD, C.J.A.

Respondent also claimed a good defence on the merits. He wished to plead the Statute of Limitations and that the note was an accommodation. The material before us disposes effectually against him of both, and the delay of seven years in moving against the judgment is not satisfactorily explained.

The order below should be set aside and the judgment reinstated, with a reduction of the interest charged by $6.07.

Defendant should have costs as of a motion to amend the judgment. The plaintiffs should have all other costs here and below.

IRVING, J.A.

IRVING, J.A.: I prefer the opinion expressed by Mr. Cartwright in *Plenderleith* v. *Parsons* (1906), 9 O.W.R. 271, and of Middleton, J. in *Kerr* v. *Colquhoun* (1911), 18 O.W.R. 174, to the decisions relied upon by the learned judge appealed from. In my opinion the endorsement was right, and the judgment should not have been set aside.

Mr. *Creagh* says that the judge, having exercised discretion, this Court should not interfere. Undoubtedly a judge has discretion, but it is not shewn that he proceeded on that ground. On the contrary, I am satisfied that he must have proceeded on the ground that the defendant was entitled *ex debito justitiæ* to have the judgment set aside on account of the supposed error in the rate of interest. Another argument relied on by Mr.

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Creagh was that there had been a breach of the plaintiffs' solicitors' undertaking to give him time. The giving of any undertaking is denied, so that we have no sure guide to enable us to determine the question of fact, if it were desirable that such should be done. When a solicitor alleges that an extension of time has been granted to him, the onus is on him to prove it. If the agreement is a verbal one, the proper and only safe course for the solicitor relying on such extension, is to write a letter as soon after the interview as possible, stating the terms of the agreement.

Another point relied on was that there was no presentation at the place named in the note alleged in the endorsement: *Croft* v. *Hamlin et al.* (1893), 2 B.C. 333. It was, however, alleged it had been "duly" presented. That seems sufficient: see Form No. 6, Appendix C. I think that the decision in *Croft* v. *Hamlin et al.* is questionable. It is not in conformity with the form given in Appendix C, Section IV., Form No. 3, which is as follows:

"The plaintiff's claim is against the defendant, as maker of a promissory note for $250, dated 1st January, 1899, payable four months after date.

IRVING, J.A.

"Particulars:—

"Principal	$250.00
"Interest	10.00
"Amount due	$260.00

"Place of trial . . . ."

The name of the payee is not even mentioned. Nothing is said about presentation, nor that payment was refused; both these things go to the establishment of the cause of action.

As to the error in the computation of interest, when this was discovered—during the argument of the summons now under consideration—the plaintiffs' counsel at once offered to reduce the judgment. That seems to me to be practically an application to amend, and sufficient to bring it within *Armitage* v. *Parsons* (1908), 2 K.B. 410 at p. 418; 77 L.J., K.B. 853.

MARTIN, J.A.: With respect to the rate of interest, no good reason has been shewn, to my mind, why we should not put the same interpretation upon the word "liabilities" as did the

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Courts of Manitoba and Ontario in the three cases cited, and the fact that they were decisions on mortgages does not prevent the application of their reasoning to promissory notes. And I entirely agree with what my brother McPHILLIPS says about the great desirability of uniform opinions upon our Federal Acts of Parliament, and I have already given expression to my views on that subject in *Rex* v. *Nar Singh* (1909), 14 B.C. 192, in accordance with an opinion held in Ontario therein referred to. It follows that the interest herein should therefore have been charged and computed at 5 per cent. only. This brings us to the second point, *viz.*: that as judgment entered in default of defence was signed for too much, is the defendant entitled to have it set aside *ex debito justitiæ* in a case where, as I have no difficulty in finding here on the special facts, there is no defence that ought to go to trial, and no good ground for setting aside the judgment except that it was signed for too much, not by reason of a slip, but because of an unfounded claim for a higher rate of interest? In this respect only, *i.e.*, of merits, this case differs from that of *Donnelly* v. *Dryden* (assuming of course I am right in my view of an unlawful rate of interest having been charged), wherein, on the 18th of June, 1912, without imposing any terms, we set aside, *ex debito justitiæ*, a judgment entered in default of dispute note which had been signed for $54.15 too much, a *prima-facie* case of merits having been established. A consideration of the cases cited, and others, particularly *Hodges* v. *Callaghan* (1857), 2 C.B.N.S. 306; 109 R.R. 691; *Hughes* v. *Justin* (1894), 63 L.J., Q.B. 417; *Armitage* v. *Parsons* (1908), 77 L.J., K.B. 850; *Muir* v. *Jenks* (1913), 82 L.J., K.B. 703; and *MacGill* v. *Duplisea* (1913), 18 B.C. 600, shews that, apart from the question of merits, a default judgment which has been signed for too much cannot stand, and must be set aside unless the plaintiff moves to correct and reduce it to the proper sum. As the Court of Appeal held in *Muir* v. *Jenks, supra,* p. 706:

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"If the plaintiff, in the absence of the defendant, proceeding properly under the rules, signs judgment for a sum in excess of that which is due to him, the defendant is entitled to have that judgment set aside; unless the party who holds the judgment applies as he may to reduce it to the

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proper amount. If application to amend be duly made, it may be right not to set the judgment aside, but to reduce it to the proper sum; but unless the party who holds the judgment elects to put it right, then upon the authority of *Hughes* v. *Justin*, it seems to me, the defendant is entitled to say, 'This is a wrong judgment; set it right.' In the case of *Armitage* v. *Parsons* the right to amend, which I have mentioned, was exercised."

And the following language applies to the case at bar:

"In the present case the party holding the judgment has never availed himself of that right to bring it down to a proper sum."

On the contrary, he contended that he had the right to charge interest at 6 per cent., and therefore the judgment should be set aside, with the same order as to costs as we made in *Donnelly* v. *Dryden*. I note that in *Hodges* v. *Callaghan, supra,* the application to reduce the amount of the judgment had been made, alternatively, not by the plaintiff, but by the defendant, which explains some features of that judgment and gave the Court a free hand, as the defendant could not complain if the Court merely reduced the judgment upon his own request.

But assuming that the plaintiff was entitled to charge interest at six per cent. Even in that case it was admittedly signed for $6.07 too much, but no application was made by the plaintiff to correct his wrong judgment, under rule 319 or otherwise, either on account of its being signed for too much by "an accidental slip," or to reduce it to the true amount. A good illustration of such an application is to be found in *Barker* v. *Purvis* (1886), 66 L.T.N.S. 131. All the plaintiff did was to offer, when the defendant's application to set aside the judgment came on for hearing, to reduce it by $6.07. No facts, even, are in evidence before us, either by admission or shewn on affidavit, as they were, *e.g.,* in *Armitage* v. *Parsons* and *Barker* v. *Purvis,* to shew that this was "an accidental slip," *i.e.,* an erroneous instead of an intentional miscalculation. But supposing it were, *Muir* v. *Jenks, supra,* is the latest and direct authority for stating that (p. 706)

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"It is the duty of the creditor, if he obtains a wrong judgment, to have it set right. It is not the duty of the debtor against whom he has obtained the judgment to do so."

Here the creditor took no action at all, but when his judgment was attacked merely offered to reduce it. In my opinion he is not entitled to rid himself in this way of his obligation to

become the actor and make a substantive application, and until he does so he must be taken to be standing by his judgment as signed, and so long as he does so the defendant is entitled to attack it upon that basis. The plaintiff must, in short, "elect to put it right," as laid down in the passage above quoted, and till he does so he must be deemed to "elect to keep it wrong" and take all the consequences of that election. As Kennedy, L.J. puts it in the same case, p. 707:

". . . . It is important not merely that we should conform to the rules with regard to procedure, but that we should see that claims which are based upon a wrong judgment are not allowed to succeed when the course which has been deliberately taken by the creditor has alone prevented that amendment of the wrong judgment which might have been made."

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For these reasons I am of the opinion that in this second aspect of the case the judgment should be set aside in the same way, and the appeal dismissed, with costs.

GALLIHER, J.A.: This appeal is from an order of MURPHY, J. at chambers, setting aside a judgment signed in default of defence and allowing the defendant in to defend. The judgment was signed on the 5th of March, 1907, for the sum of $2,240.80, being principal, $1,500; interest at 6 per cent., $710; and $30.80 costs.

The defendant, in his affidavit, swears that he was not aware that judgment had been signed against him until June, 1913, but this is contradicted by the plaintiff, who swears that on the 11th of April, 1909, he, while going to Victoria, on the boat, met the defendant and asked him to pay something on account of the judgment, and the defendant admitted that there was a judgment against him and that he was liable thereunder, and there is no denial by Lewthwaite of this. Although the defendant admits he knew of the judgment in June, 1913, no steps were taken to set it aside until the 6th of January, 1914, and excuses the delay on the ground that he was absent from Vancouver most of this time.

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Failure to file a defence within the proper time is accounted for by the defendant's solicitor, who, in his affidavit, states that there was an understanding between himself and Mr. Wallbridge, a partner of the plaintiff's solicitor, after appearance

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entered, that nothing further would be done without the defendant's solicitor being first notified. This is flatly denied by Mr. Wallbridge. So far there is nothing, in my opinion, which would entitle the defendant to have judgment opened up, the onus cast upon him not being satisfied. Then it is alleged that the judgment is signed for too much. If the legal interest is to be calculated at 6 per cent. there is a slight error in calculation, and the judgment is for $6.07 too much. But this is for so trivial an amount that I think the proper course is to rectify the judgment to that extent, under the discretion given the Court by rule 319.

But there are other matters for consideration. First, as to the defences set up. These are that the note was an accommodation note and that it is barred by the Statute of Limitations. Both of these must, I think, fail, in view of the letter of the 26th of March, 1901, written by the defendant to the plaintiff acknowledging the indebtedness and agreeing to pay it off at the rate of $40 per month, supported as it is by the affidavit of the plaintiff. There still remains perhaps the most serious point of all, *viz.*: whether the rate of interest chargeable is 6 or only 5 per cent. If the latter, then admittedly the judgment is for too great an amount, and it is not a mere clerical error in computing interest, but the charging of too great a rate of

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interest. At the time the note was given the statutory rate of interest was 6 per cent: R.S.C. 1886, Cap. 127, Sec. 2. This was amended in 1900, 63 & 64 Vict., Cap. 29, Sec. 1, reducing the statutory rate to 5 per cent., with the proviso that the change should not apply to liabilities existing at the time of the passing of the Act. And in R.S.C. 1906, Cap. 120, section 3 reads as follows:

> "Except as to liabilities existing immediately before the 7th day of July, 1900, whenever any interest is payable by the agreement of parties or by law, and no rate is fixed by such agreement or by law, the rate of interest shall be 5 per centum per annum."

The difficulty arises over the interpretation to be put upon the word "liabilities." The matter has been before the Courts in Manitoba and Ontario. In the case of *British Canadian Loan & Agency Co.* v. *Farmer* (1904), 15 Man. L.R. 593 at p. 606, Richards, J. held the view that "liabilities" meant liabili-

ties respecting interest. This view was not followed by the Master in Ordinary in *Plenderleith* v. *Parsons* (1906), 9 O.W.R. 265, but on appeal (1907), 14 O.L.R. 619, Boyd, C. disagreed with the Master in Ordinary and expressed approval of the view taken by Richards, J., while in the later case of *Kerr* v. *Colquhoun* (1911), 18 O.W.R. 174, Middleton, J., while expressing himself as bound by the decision of Boyd, C. in *Plenderleith* v. *Parsons, supra,* stated that but for that decision he should have understood "liability" as referring to the debt and not to the liability as to interest.

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I have, with great respect for contrary opinions, and after full consultation with the Chief Justice, arrived at the same conclusion as he has and for the reasons given by him.

It follows that the appeal must be allowed.

McPHILLIPS, J.A.: This is an appeal from an order made by MURPHY, J. on the 19th of January, 1914, wherein it was ordered that the defendant be allowed in to defend—in the action—and setting aside the judgment entered on the 5th of March, 1907, for default on the part of the defendant in not delivering a statement of defence, judgment being signed for $2,210 debt and $30.80 costs, the particulars of the debt being $1,500, the principal sum due upon a promissory note dated 11th April, 1899, payable on demand, made by the defendant in favour of the plaintiffs, of which payment was demanded on the 12th of April, 1899, and interest thereon by statute, calculated at 6 per cent. per annum from the 12th of April, 1899, to the 5th of February, 1907, and claimed to be $710, but admitted to be in error, and should only have been $703.93. It therefore followed that judgment was entered for $6.07 too much, being excess interest even were it to be conceded that the interest was rightly claimable at 6 per cent., the defendant claiming, however, that interest could only be charged at 6 per cent. up to the time of the statutory change, and after that date at 5 per cent., the reduced rate.

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The application made to set aside the judgment and let in the defendant to defend was only made after the lapse of six years and ten months, the grounds being that (a) judgment was

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entered in violation of an agreement between the solicitors for both sides; (b) a defence upon the merits; and (c) judgment entered for a wrong and excessive amount.

The learned judge would not appear to have given any written reasons for the decision arrived at by him, but it is to be remarked that the solicitor for the plaintiffs unqualifiedly denies that there was any such agreement, and no cross-examination was had upon the affidavit. As to the attempt made to set up a defence upon the merits, I am by no means satisfied that any defence exists. It is a noteworthy fact that one of the plaintiffs, John M. McKinnon, denies the statement of the defendant that the promissory note was an accommodation note, and swore specifically that the principal sum of the promissory note was represented by money lent by the plaintiffs to the defendant, that sum being advanced to the defendant, and the promissory note was given at the time by the defendant; and that the defendant was aware of judgment having been signed against him—and no cross-examination took place upon this affidavit, nor does the defendant answer same in any way.

It is argued and strenuously contended for by counsel for the defendant that laches cannot be successfully urged in that judgment having been signed for an excessive amount, although that excess is but $6.07 (but of course would be very much greater if interest could only be claimed at 6 per cent. to the 7th of July, 1900, and at 5 per cent. thereafter), yet by reason thereof the defendant is entitled to have the judgment set aside *ex debito justitiæ,* and that therefore the order appealed from is right and ought to be upheld.

In support of the contention that 5 per cent. only may be claimed after the 7th of July, 1900, see the judgment of Richards, J. in *British Canadian Loan & Agency Co.* v. *Farmer* (1904), 15 Man. L.R. 593 at pp. 605-7. This judgment was considered by the Master in Ordinary of Ontario, and not followed by him in *Plenderleith* v. *Parsons* (1906), 9 O.W.R. 265 at p. 272. The decision of the Master in Ordinary, however, was appealed from—(1907), 14 O.L.R. 619—and Boyd, C. disagreed with the view of the Master in Ordinary, and at p. 622 said:

"The view of the statute taken by Mr. Justice Richards in *British Canadian Loan & Agency Co.* v. *Farmer*, 24 C.L.T. Occ. N. 278, 15 Man. L.R. 606, appears to me satisfactory, but I cannot follow the reading of it given by the Master. On this ground I allow the appeal, and direct interest to be computed at five per cent. after July, 1900."

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In view of the construction put upon the statute law by these two eminent judges, I do not venture to disagree, believing that it is in the interests of justice that in the construction of statute law applicable throughout the Dominion, there should be uniformity of judicial opinion where at all possible, and I cannot say that the conclusion arrived at is other than the true construction, notwithstanding the very careful and well-reasoned argument advanced from the bar by counsel for the appellants. Therefore, in my opinion, the judgment was not only entered for $6.07 too much, but for the excess amount represented by the difference between 5 per cent. and 6 per cent. from the 7th of July, 1900, to the 5th of February, 1907.

The question that now arises for consideration is: Was the order appealed from right in the circumstances disclosed to the learned judge in the Court below? To answer this question judicially it is proper and useful to look into the authorities.

In *Hodges and Another* v. *Callaghan* (1857), 2 C.B.N.S. 306, 315 (109 R.R. 691), it was held where a writ of summons was specially indorsed under the 25th section (now Order XIII., r. 6) of the Common Law Procedure Act, 1852, and judgment was signed for default of appearance pursuant to section 27 (now Order XIII., r. 3) after payments made by the defendant on account, that the plaintiff was not entitled to sign judgment for the sum indorsed upon the writ, but only for the balance remaining due after giving credit for the moneys paid. The defendant having been arrested under a *ca. sa.* upon the judgment, application was made to set aside the *ca. sa.* and the judgment. Cresswell, J. reduced the judgment from £37 9s. 7d. to £12 19s. 7d., and ordered the defendant's discharge, a debtor not being subject to arrest upon final process for a less sum than £20. An appeal was taken from the order of Cresswell, J. The appeal was dismissed. See *per* Crowder, J. at pp. 312-13, and Willes, J. at p. 315.

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It is apparent that even where the liberty of the subject was

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affected, and an improper arrest made, as it was subsequently proved, the Court merely reduced the judgment and refused costs to the defendant save upon terms that no action should be brought. In the present case no meritorious defence is sufficiently indicated. A promissory note imports valuable consideration, and the long delay in itself displaces all probability that there is even an arguable defence. The defendant has failed to even suggest, much less meet, what seems to me a well-founded cause of action, now for so many years merged in the judgment.

In *Huffer* v. *Allen* (1866), 36 L.J., Ex. 17, Kelly, C.B. at p. 18 said:

"It is always competent to the Court that is supposed to have pronounced the judgment to correct that judgment if it is wrong, especially when any error may appear upon the face of it which may work injustice to either of the parties, but until that is done it remains in contemplation of the law the judgment of the Court, and it remains in such a form that it cannot be contradicted or impeached by either of the parties to it, and if either of the parties to it be injured or prejudiced by the terms of the judgment, or any act that may be done with respect to the ulterior process of the Court in the form in which it appears on the record, it is always competent to the party to proceed by motion before the Court or judge at chambers, who will correct the judgment, and not only do justice, but enable justice to be obtained for any wrongful act that may be committed by virtue of its original judgment being incorrect."

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In the present case there is a delay of nearly seven years upon the part of the defendant in taking a step which was always open to him. In *Hughes* v. *Justin* (1894), 63 L.J., Q.B. 417, the plaintiff, after the claim had been settled, signed judgment for the amount of the claim and costs. Lopes, L.J. at p. 419 said:

"In my opinion, that was an irregular judgment, and must be set aside."

There no debt at all was owing when judgment was signed.

Hughes v. *Justin, supra,* was distinguished in *Armitage* v. *Parsons* (1908), 77 L.J., K.B. 850, upon the ground that in that case the whole debt had been paid, and only the costs remained unpaid, whilst the facts of the case under consideration were that the clerk to the plaintiff's solicitors inadvertently inserted the sum of £5 6s. for costs, and judgment was signed including that sum for costs, the proper sum to have been inserted in the judgment for costs being £4 14s. The

plaintiff having issued execution on the judgment, the defendant applied to have the judgment set aside on the ground that it had been entered for an amount in excess of that actually due. It was held that the defendant was not entitled *ex debito justitiæ* to have the judgment set aside, but that the Court ought, under the power conferred on it by Order XXVIII., r. 11, to order the judgment to be amended by substituting £4 14s. for £5 6s. for costs. See *per* Sir Gorell Barnes, P. at pp. 851-2.

In the present case it may be well said that the cases referred to by Sir Gorell Barnes, P. have no application. Here we have a very substantial debt due, also a substantial sum by way of interest due; the error made was in the wrong construction of the statute law with respect to the claim for interest, and error in computation thereof.

The case of *Armitage* v. *Parsons, supra,* was considered in *Muir* v. *Jenks* (1913), 108 L.T.N.S. 747, and it was held that the debtor was not precluded from succeeding in his application in having the judgment set aside, where judgment had been signed for £20 too much, that sum having been paid after the issue of the writ; but notwithstanding the payment, the creditor signed judgment in default of appearance for the whole amount sued for. It is to be observed, though, that the delay upon the part of the defendant was only from May, 1912, to January, 1913. Here we have nearly seven years of delay.

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It would appear to me that there is conflict between the two decisions, that is, between *Armitage* v. *Parsons, supra,* and *Muir* v. *Jenks, supra,* and I prefer to follow the opinion of Sir Gorell Barnes, P. and the effect, as I read it, of that decision (*Armitage* v. *Parsons, supra*), which is in conformity with *Hodges* v. *Callaghan, supra,* is that the Court may reduce the judgment and is not necessarily compelled to set it aside.

It will be noticed that Kennedy, L.J. in *Muir* v. *Jenks, supra,* regretted the result. At p. 750 he said:

"We may regret that all these proceedings have been taken and the result of them when there is unquestionably a very considerable debt due from the debtor to the creditor."

In the present case there is also a very considerable debt and very long delay upon the part of the debtor, not at all satisfac-

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torily explained. I cannot see that there is any authority which precludes this Court doing justice in this case, and justice, in my opinion, will be achieved by allowing the appeal, setting aside the order appealed from, and reducing the judgment in respect of the interest claim to 6 per cent. upon the $1,500 principal money due upon the promissory note, from the 12th of April, 1899, to the 7th of July, 1900, and at the rate of 5 per cent. from the 7th of July, 1900, to the date of the judgment, *viz.*: the 5th of March, 1907. In my opinion, however, this is not a case permitting of the costs of the appeal following the event. The judgment was signed for too much and the plaintiffs did not move to correct it. I think that good cause exists for refusing costs to the appellants.

Appeal allowed, Martin, J.A. dissenting.

Solicitors for appellants: *Bowser, Reid & Wallbridge.*
Solicitors for respondents: *MacGill & Grant.*

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Criminal law—Statements to constable previous to caution—Effect of, on subsequent statements to same constable after caution.

When a prisoner makes a statement to officers without being cautioned and subsequently makes the same statement to the same officers after being cautioned:—

Held, that the second statement is inadmissible.

TRIAL of the prisoner by GREGORY, J. and a jury at the Vancouver Spring Assizes, on the 18th of May, 1914, on an indictment for the murder of Mrs. Millard, who was killed at her residence in Vancouver on the 1st of April, 1914. Her husband left the house on the night of Tuesday, the 31st of March, to meet the incoming Australian boat and returned late on the following night. The household consisted of Mr. and Mrs. Millard and the prisoner, who had been in their employ for nearly three years. On his return he found his wife absent and telephoned to her mother's residence, in North Vancouver, where his wife often went during his absences, and found that she was not there. He concluded that she had gone to Kerrisdale to stay with one of her sisters. On the following morning he communicated with his brother-in-law, and finding that his wife had not been there, he returned home. No trace of Mrs. Millard having been found during the day, he put the matter into the hands of the police, and a search was made of the residence.

Statement

The prisoner stated to Millard that Mrs. Millard had had breakfast on Wednesday morning, and had left shortly after and that he had not seen her since, and that before going out she had instructed him not to go to school, as he was in the habit of doing, but to stay at home to wash. On the evening of Thursday some of Mrs. Millard's clothing was found hidden in the eaves of the attic, and late on Thursday night the prisoner was taken in charge by the police, not because they suspected him of the crime,

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but in view of the fact that he had been in the house during the day in question, and they thought it right to hold him pending their investigation of the matter. On Friday a quantity of bones were found in the furnace, other bones in the chimney, and in the ash-bin, having the appearance of human bones which had been subjected to fire. A large stain, apparently blood, was found in the dining-room, on the stairs leading to the basement, and in the basement similar stains were found. Rugs which had been on the dining-room floor and other articles newly washed were found in the basement. The stairs leading to the basement had been newly washed, and there were other signs from which it appeared that the woman had been killed in the house, her body burned, and an attempt made to destroy all traces of the crime. Late on Friday night at the police office Inspector Macrae and Chief Detective Jackson of the Vancouver City Police had an interview with the prisoner, he being then under arrest, and though he at first denied any knowledge of Mrs. Millard's disappearance, they insisted that he must have some knowledge of it, and finally succeeded in obtaining a statement in which the prisoner admitted that he had a quarrel with Mrs. Millard when she came down to breakfast, that she had threatened to cut off his ear with the carving knife, and that he had struck her on the head with a chair as she stood in the doorway leading from the dining-room to the kitchen; that she had fallen down senseless; that he had waited for some time and coming to the conclusion that she was dead, and, as he put it, that Mr. Millard would kill him if he came home and found the state of affairs, he had carried the body down to the basement, where he cut off the arms and legs, burned the body in the furnace, and then removed all traces of the crime as far as possible and hid the woman's street clothing in the attic. On Saturday afternoon the same officers had another interview with the prisoner and asked Mr. Kennedy, the city prosecutor, to be present. Inspector Macrae began to warn the prisoner, but Mr. Kennedy, thinking that the warning was not being put quite as it should be, intervened and gave the most explicit caution—one of the most explicit, as the learned trial judge stated, that could have

Statement

been made, and then the prisoner repeated the statements that he made on the previous night. It should be mentioned that, after the interview with the detectives on Friday, Mr. Millard had seen the prisoner and he had made a similar statement to him.

A. D. Taylor, K.C., for the Crown, called Mr. Kennedy to prove the caution given on Saturday afternoon and then offered evidence of the statements made by the prisoner.

Henderson, K.C., and *J. A. Russell,* for the prisoner, objected to the admissibility of the statements and asked that Inspector Macrae might be called so that he might be cross-examined on what had transpired on the previous night, before the judge decided the question as to the admissibility or non-admissibility of the statements made in the presence of Mr. Kennedy. They cited *Reg.* v. *Doherty* (1874), 13 Cox, C.C. 23; and *Reg.* v. *Rosa Rue* (1876), *ib.* 209.

Argument

It appeared from the cross-examination of Inspector Macrae that the statements made on Friday night were inadmissible, the inspector stating that at the time they put the questions to the prisoner and elicited the statements neither Chief Detective Jackson nor he suspected the prisoner and had not cautioned him, as they only thought that he might throw some light on the crime, and that it was a great surprise to them both when the prisoner made the statement he did.

Counsel for the Crown admitted that the statements made on the Friday night were inadmissible, as also the statements made to Millard, but took the position that, in view of the express caution of Mr. Kennedy on the Saturday afternoon, the statements made after that caution were admissible.

GREGORY, J.: There is some doubt in my mind, and in view of the fact that this is a trial for murder, the benefit of that doubt should be given to the prisoner. I therefore rule that the evidence is inadmissible. If Mr. Kennedy, when giving the caution on Saturday afternoon, had known of the previous statements made, and especially referred to the fact that the previous statements could not be used and that the prisoner need not repeat them or say anything further unless he desired,

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and that if he did say anything it might be used against him, etc., it would have removed my doubts. But as this was not done, I must hold that the evidence is not admissible. It must be remembered that the same officers were present and the prisoner might very well have felt that, having already confessed, it was useless now to take any other stand.

Judgment

[The trial proceeded, and the prisoner went into the box on his own behalf and told practically the same story that he had told on the Friday night to the officers, and in the presence of Mr. Kennedy on the Saturday afternoon, and was found guilty of manslaughter.]

Objection sustained.

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DAVIS v. VON ALVENSLEBEN AND GIBB

DAVIS v. VON ALVENSLEBEN, GIBB *ET AL.*

Vendor and purchaser—Agreement for sale of land—Default in payment of purchase-money—Foreclosure—Time for redemption.

In an action for foreclosure of the purchaser's interest under an agreement for sale of land, upon default in payment of the purchase-money, apart from special circumstances, one month (or at most two months) should be allowed as the time for redemption.

The security afforded the vendor by the terms of the agreement for sale, coupled with his right to enforce a vendor's lien, should not be treated as to time for redemption in the same way as a mortgage.

The purchaser is entitled to apply for further extension before the expiration of the limited time, if he can shew a reasonable prospect of payment by further indulgence, and that the property is worth more than the amount due the plaintiff.

Statement

ACTION by a vendor of land to recover payment of the purchase-money, and in default, for foreclosure of the purchaser's interest. Tried by MACDONALD, J. at Vancouver on the 15th of May, 1914. The facts are set out fully in the reasons for judgment.

Marshall, K.C., for plaintiff.
Fillmore, for defendant Gibb.

10th June, 1914.

MACDONALD, J.: Upon this action for foreclosure under an agreement for sale coming on for trial, no defence was offered on the part of the defendants. Counsel for the defendant Gibb contended that the time for redemption should be six months. It was pointed out that the action was analagous to foreclosure under a mortgage. The similarity of the two actions is referred to by Jessel, M.R. in *Lysaght* v. *Edwards* (1876), 2 Ch. D. 499 at p. 506:

"It appears to me that the effect of a contract for sale has been settled for more than two centuries. . . . . Their positions are analagous in another way. The unpaid mortgagee has a right to say to the mortgagor, 'Either pay me within a limited time, or you lose your estate,' and, in default of payment, he becomes absolute owner of it. So, although there has been a valid contract of sale, the vendor has a similar right in a Court of Equity; he has a right to say to the purchaser, 'Either pay me the purchase-money, or lose the estate.'"

As to the rights and liabilities of the parties, this is the settled law in the matter, but the question for consideration is, whether the time limited by the judgment for payment of the purchase price should follow the practice in foreclosure proceedings under a mortgage.

"The established rule is that a mortgagor has six months and six months only to redeem":
Chitty J. in *Platt* v. *Mendel* (1884), 27 Ch. D. 246 at p. 248.

Judgment

The security afforded the vendor by the terms of the agreement for sale, coupled with his right to enforce a vendor's lien, should not, in my opinion, be treated as to time for redemption in the same way as a mortgage. Generally speaking, the mortgagee has a substantial margin as between the amount of the mortgage and the value of the property provided as security, whereas very often only a small amount is paid at the time of the execution of the agreement for sale, and the balance of the purchase-price is payable by instalments. If the first deferred payment should not be made at maturity, the defendant might, as in this instance was disclosed, by a flimsy defence, compel the vendor to go to trial to enforce his rights. He would thus ward off payment for a considerable period and retard the

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vendor in either recovering payment of the purchase price or resuming the absolute ownership of the property. Should a further period of six months then be granted it would, in a new country, where the values are not ascertained, and, to say the least, are fluctuating, jeopardize the security of the vendor. It would enable the purchaser to retain an equity and speculate on the market for real estate. He has retained, on equitable principles, an interest in the property of the vendor after his default in payment, and I think in this Province such a lengthy period for redemption would be unreasonable.

Cyc., Vol. 39, p. 1874, refers to the time stipulated by a decree within which the purchaser must make payment of the purchase-money as follows:

"No definite rule as to time can be laid down. In any case the time should be reasonable in view of the circumstances of the case."

Even in a judgment for foreclosure under a mortgage the rule as to six months for redemption does not appear to be a hard and fast one, as Street, J. in *Gibson* v. *McCrimmon* (1889), 9 C.L.T. Occ. N. 40, granted immediate foreclosure and also immediate possession without any consent being given by the defendant, where it was shewn that the mortgage debt was in excess of the value of the land. In *Ardagh* v. *Wilson* (1866), 2 C.L.J. 270, three months was the time given for redemption where one of the encumbrancers had redeemed and was seeking foreclosure as against other encumbrancers.

Judgment

There is a practice in this Court of allowing one month, or at most two months, as the time for redemption under agreements for sale, unless special circumstances are disclosed. I would have preferred, before giving my judgment, to have consulted with my brother judges as to how this practice arose, but I have been prevented from such consultation by stress of their Court work. I think it well not to delay judgment, as the defendant may desire to appeal to the Court of Appeal at its present sittings.

I see no reason to depart from the practice thus established, and, as no special circumstances were suggested, two months from the date of judgment will be granted for redemption. I have not overlooked the fact that a defendant is entitled to

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apply, upon proper material, for further extension before the expiration of the limited time, especially if he can shew a reasonable prospect of payment by further indulgence and that the property is worth more than the amount due the plaintiff.

Judgment accordingly.

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Will—Last document—Presumption of revocation—Evidence in rebuttal—Sufficiency of—Custody of document after execution.

The plaintiff's deceased husband admittedly made a will in proper form, giving her all his property. After its execution he left it with his wife for safe keeping, she putting it away in the drawer of a desk with her own will. Upon the husband's decease she could not find the will where she had left it, and after diligent search it could not be produced. In an action to establish the will:—

Held, that the presumption of revocation which arises on the non-production of a will may be rebutted by evidence as to the relationship between the testator and his wife, his words and actions subsequent to the execution of the will and any evidence which may tend to rebut the presumption.

Held, further, that presumption is weakened where the testator did not have the custody of the will.

ACTION tried by MACDONALD, J. at Vancouver on the 12th of May, 1914, to establish the will of John Henry Unwin, deceased. The facts are set out fully in the reasons for judgment. Statement

McLellan, and *Savage*, for plaintiff.
Abbott, for defendant.

9th June, 1914.

MACDONALD, J.: Plaintiff seeks to have the will of her late husband, John Henry Unwin, established, though it cannot be Judgment

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produced for probate. He died on the 26th of September, 1913. I find that on the 2nd of November, 1911, the husband duly made his will, in accordance with the Wills Act, and in substance, or to the effect, outlined in the amended statement of claim. He devised and bequeathed all his real and personal property to the plaintiff and appointed her sole executrix. After the death, diligent search was made, but the will could not be found. She alleged that it never was revoked or destroyed by the testator and constituted, at the time of his death, his last will and testament. Plaintiff, under ordinary circumstances when the will is not produced, has to accept the burden of rebutting the presumption of law, that such will was destroyed by the testator with the intention of revoking same. She must adduce such evidence that the Court will be morally satisfied that revocation did not take place. In considering the evidence in support of the plaintiff's contention, I am not met with the difficult task of weighing the credibility of witnesses. Counsel for defendant frankly admitted that he did not doubt the correctness of the statements made by the plaintiff or her witnesses. The sole question thus left for me to decide is as to whether such evidence is sufficient to rebut the presumption. In arriving at a conclusion, I am entitled to consider the relationship existing between the husband and wife, also his words and actions subsequent to the execution of the will, and any circumstances which may tend to support or rebut the presumption of revocation. Plaintiff and her husband seem to have lived in harmony throughout their married life, except upon infrequent occasions, owing to intermittent failings on the part of the husband. These lapses were not accompanied by violence or bad temper, but were followed by repentance. It would appear that he was only too anxious in these circumstances to have his wife provided for, in the event of his death. He was employed as assistant janitor at the city hall, Vancouver, and this brought him in contact with Mr. Pitman, an English solicitor employed in the assessment office. He prepared a will which, after consultation between the parties, was not satisfactory. He then drew a will devising the husband's property to the wife, and at the same time a will devising the

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wife's property to the husband. Both wills, shortly after execution, were placed by the plaintiff in an envelope and then deposited by her in the drawer of a desk in which other papers and documents were usually kept. Thus there does not appear to have been any degree of care exercised in the safe keeping of these valuable documents. Still, plaintiff thought that after the death the will would be available, and was surprised that neither of the wills could be discovered. She could only account for their loss by the fact that at one time she had been destroying receipts and other papers, and this envelope and contents might have been accidentally destroyed at the time.

After having executed his will, the husband never expressed any intention of revoking the same, or even altering its terms, but, on the contrary, repeatedly expressed to his wife and other witnesses his self-satisfaction with the course he had pursued. For example, upon one occasion when the wife was upbraiding him for his condition, he told her she should not worry, that everything was left to her and that he knew she would take care of the children. Mr. and Mrs. Moore, friends of the parties, both gave evidence as to statements made by the husband after the execution of the will, in which he referred to the fact that he had left the property to his wife. Mr. Moore refers particularly to one conversation, in which the husband directed the wife never to give a deed of the property to the boys at any time—"Everything is left to you, and never give them a deed." The reason suggested was that if she did so, they might turn their mother out of the property. Mrs. Moore referred to a conversation in which the husband asked her why she did not have her will made, and that he used to say: "Why do you not get your will made or let Mr. Moore fix you up and make it to you all right, like I have done with Em?" (meaning the plaintiff). There was no evidence of any quarrel between the parties, and this would most likely occur before the husband would destroy his will, and of necessity, at the same time, criminally abstract the will of his wife, which was in the same envelope. "There is a presumption against the hypothesis of fraudulent extraction: see *Allan* v. *Morrison* (1900), A.C. 604 at p. 609.

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Further, it is unreasonable to suppose that after the husband had decided that it was desirable to have his property disposed of by will, and had pursued that course, that he would then, without any apparent motive, and without making a new will, destroy the one already executed. The husband repeatedly used expressions indicating recognition of the will and that it had been made in favour of his wife. It is true she was unable to state definitely when he had last so expressed himself before his death. She was in this respect untrammelled in her evidence. It shews her honesty, as, had she been so inclined, she could, without fear of contradiction, have stated that these expressions had occurred shortly before, or at the time of, his last illness. It was explained that the lack of reference to the will or disposition of the property during such illness arose through the husband not becoming aware, until too late, of his serious condition.

The strength of the presumption as to revocation through non-production is weakened, if the testator did not have the custody of the will. Parke, B. in *Welch* v. *Phillips* (1836), 1 Moore, P.C. 298 at p. 301 says:

"If a will, traced to the possession of the deceased, and last seen there, is not forthcoming on his death, it is presumed to have been destroyed by himself; and that presumption must have effect unless there is sufficient evidence to repel it."

Judgment

Then, again, Cockburn, C.J. in *Sugden* v. *Lord St. Leonards* (1876), 1 P.D. 154 at pp. 217-8 says:

"The presumption will be more or less strong according to the character of the custody which the testator had over the will."

Plaintiff in this action had received the will from her husband for safe custody, and, while he was not debarred from access, apparently he trusted to her to look after his papers and documents. Certainly the will was not last seen in the possession of the husband. Aside, however, from the presumption of revocation thus being weakened, in my opinion, it has been successfully rebutted. I am morally satisfied that the will executed was not revoked or destroyed by the testator *animo revocandi* or *animo cancellandi*.

The will is, therefore, established. Costs of all parties to be paid out of the estate.

Judgment for plaintiff.

REX v. VAN HORST.

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REX
v.
VAN HORST

Criminal law—Practice—Evidence—Statements made to constable after arrest on a charge of burglary and after warning—Admissibility of on a trial for murder.

The prisoner was arrested on a charge of burglary. After being given the usual caution he made certain statements to a constable; subsequently he was charged with murder, and on his trial the Crown sought to put his statements in evidence.

Held, that the statements were admissible.

TRIAL of the prisoner at the Vancouver Spring Assizes, on the 1st of June, 1914, by GREGORY, J. The prisoner was arrested at Lopez Island, in the State of Washington, on a charge of burglary alleged to have been committed in Vancouver on the 31st of October, 1913. He was given the usual caution and then proceeded to make a statement to the effect that "Lester must have squealed on me or has been talking too much," Lester being the alleged accomplice in the burglary charge.

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The prisoner came back to Vancouver on the burglary charge and was then charged with the murder of a Japanese fisherman in the waters of the Gulf of Georgia, on the 4th of November, 1913, four days after the alleged burglary.

A. D. Taylor, K.C., for the Crown, proved the arrest in the State of Washington and then gave evidence of the caution which was given by one of the Vancouver detectives, who was present at the arrest, and then proposed to put in statements then made by the prisoner as evidence against him on the charge of murder. He cited *Rex* v. *Kay* (1904), 11 B.C. 157, and also referred to section 1000 of the Code.

Argument

Powell (*Elmer W. Jones*, with him), for the prisoner, objected.

GREGORY, J.: I think that the evidence is admissible.

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IN RE RICHARD CARR, DECEASED. CARR v. CARR.

Will—Construction of—Devise in fee—Repugnancy—Condition—Restraint on alienation.

IN RE RICHARD CARR, DECEASED

A condition in absolute restraint of alienation annexed to a devise in fee, even though its operation is limited to a particular time, *e.g.*, to the life of the devisee, is void in law, as being repugnant to the nature of an estate in fee simple.

ORIGINATING summons heard by HUNTER, C.J.B.C. on the 9th of June, 1914.

Richard Carr, by a codicil to his will dated the 23rd of March, 1887, devised as follows:

"I give to my daughter, Edith, the following described lands . . . .

Statement but upon the express condition that my said daughter shall not sell or dispose of the said land during her lifetime, but only by will or deed to take effect after her death."

The question for the opinion of the Court was whether the said devise was an unconditional devise in fee simple or whether the devisee was restrained from disposing of the land during her lifetime.

Mayers, for the devisee: There is no doubt as to the law on this subject in England, but the Courts in Ontario appear to have adopted the opposite course. The English rule is that a condition in absolute restraint of alienation annexed to a devise in fee or to an absolute bequest, even though its operation is limited to a particular time, is void as being repugnant to the nature of the gift: *In re Rosher* (1884), 26 Ch. D. 801,

Argument *per* Pearson, J. at p. 811, citing Co. Litt. Sec. 360: to that rule an exception has been allowed to the effect that a restriction upon alienation prohibiting it to a particular class of individuals is good: *In re Macleay* (1875), L.R. 20 Eq. 186; but see criticism of this exception by Pearson, J. in *In re Rosher, supra.* See also *Corbett* v. *Corbett* (1888), 14 P.D. 7.

In Ontario the current of decision has been the other way, beginning with the case of *Earls* v. *McAlpine* (1881), 6 A.R.

145, and culminating in the case of *Re Porter* (1906), 13 O.L.R. 399, following the case of *Re Martin and Dagneau* (1906), 11 O.L.R. 349. In these cases, however, the decision in *Blackburn* v. *McCallum* (1903), 33 S.C.R. 65, seems to have been misunderstood, and the point decided was that a restraint on alienation restricted as to time is nevertheless bad; moreover, Davies, J. at pp. 80-1, in discussing the English cases, expressly follows *In re Rosher, supra,* and accords, seemingly, a grudging recognition to *In re Macleay;* while specifically stating that a limitation as to time will not enlarge the exceptions to the general rule. Mills, J. at p. 92, also affirms the general principle. Secondly, there is in this will no provision for forfeiture on breach of the condition, and this on the authority of *Renaud* v. *Tourangeau* (1867), L.R. 2 P.C. 4, as explained by the Chief Justice in *Blackburn* v. *McCallum, supra,* at p. 77, renders the condition nugatory: *Evanturel* v. *Evanturel* (1874), L.R. 6 P.C. 1 at p. 29.

Davie, for the heirs-at-law: The clause in the will under consideration does not prevent alienation, it merely limits the time at which the alienation shall be effected. It is not correct to say that the clause is indirectly and effectually a prevention of alienation, because it can well be conceived that the devisee could sell the land or will it to a trust or other investment company, which might be willing to advance moneys on the chance of the property rising in value. He referred to *In re Macleay* (1875), L.R. 20 Eq. 186; 44 L.J., Ch. 441. A condition attached to a devise is good if it be only a partial restraint on alienation; that is to say, so long as the alienation is not restricted in all ways. In this case the devisee is entitled to alienate in any way she sees fit, such alienation to take effect only after her death. The test is whether the condition takes away the whole power of alienation substantially. The testator in this case says, in effect, you may alienate in any way you please, but the alienation is not to take effect until after your death. Apparently, *In re Macleay* has not been reversed by any Court of Appeal, and on the authority of that case it is submitted that the condition in the will here is a valid one.

Argument

Blackburn v. *McCallum* (1903), 33 S.C.R. 65, prohibits the

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absolute disposal for a term of years. This takes the power of alienation out of the devisee's hands for the stated period, and if, during that time, devisee died, no alienation could possibly be made. Here it is entirely different. The devisee may alienate in any way and at any time, but the alienation is not to take effect until after her death.

Argument

Mayers, in reply: *In re Macleay* merely established an exception in the case of a prohibition of disposition to a person or a class. Whereas in this case there is a total prohibition of disposition during the lifetime of the devisee, and so this case is brought within the exact language of Davies, J. in *Blackburn* v. *McCallum, supra.*

Judgment

HUNTER, C.J.B.C.: Where there is a condition in restraint of alienation, the burden is upon the party supporting the condition to shew that it is not void as being repugnant to the well-established principles of law. No doubt the exception sanctioned in *In re Macleay,* founded upon section 361 of Coke upon Littleton, owed its origin to the instinctive desire of owners of land to perpetuate their title in their own families. Such a spirit is alien to the laws administered in this Province, and it may be that the exception itself will one day have to be reconsidered. It is sufficient, however, for the decision of this case to refer to the language used in *Blackburn* v. *McCallum* (1903), 33 S.C.R. 65, where *In re Rosher* (1884), 26 Ch. D. 801, was expressly followed, and where Davies, J. laid down the rule that a limitation as to time will not take a case out of the general rule against restraints upon alienation attached to an estate in fee simple. I, therefore, hold that the condition is repugnant and void, and that the devisee is entitled to exercise all the powers of alienation inherent in the owner of an estate in fee simple.

Order accordingly.

RAMSAY v. WESTWOOD AND UNITED STATES FIDELITY AND GUARANTY COMPANY.

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RAMSAY v. WESTWOOD AND UNITED STATES GUARANTY CO.

Contract—Building—Bond of indemnity to owner by guaranty company—Assignment of contract to guaranty company in event of default—Default taking place, liability of guaranty company to a sub-contractor.

A guaranty company, which gave a bond of indemnity to the owner of a building about to be constructed, for the due completion of said building by a construction company under contract, and to whom the construction company assigned the contract to take effect only on the default of the construction company, agreed, when the default had taken place, to allow the owner to complete the building. The construction company had sub-contracted to the plaintiff for certain work on the building, part of which was done before and part after the construction company's default. In an action for the value of the work against the guaranty company as assignee of the contract:—

Held, on appeal, that no liability could be attached to the guaranty company for the sub-contractor's debt.

Decision of GRANT, Co. J. reversed.

APPEAL by defendants from a decision of GRANT, Co. J. at the trial of the action in Vancouver on the 22nd of May, 1914. The facts are that the defendant Westwood had given a contract for the erection of a building in Vancouver to the Western Construction Company, who in turn sub-contracted to the plaintiff for the painting and decorating of the building. The defendant the United States Fidelity and Guaranty Insurance Company had given a bond of indemnity to Westwood for the due completion of the building, at the same time taking an assignment of the contract from the Construction Company, which assignment was to come into force only in the event of their being in default under the contract. The default occurred, and, with the consent of the Guaranty Company, the owner, Westwood, completed the contract. The plaintiff completed his contract with the exception of a small portion which was not ready to be proceeded with (part of which was done before the owner took the building contract over, and the

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remainder afterwards) and brought action for the value of the work against the United States Fidelity and Guaranty Company as assignees of the building contract, and against the owner, Westwood, who had taken over the premises.

The defence was a general denial, save as to the assignment of the contract to the Guaranty Company, and an allegation that no cause of action had been shewn. The trial judge was of opinion that, as the defendant Westwood and the Guaranty Company had virtually asked the plaintiff to proceed with the work after the default of the Construction Company, and had knowledge of the operations carried on by him, they had in reality contracted with him to finish the Construction Company's operations, and he gave judgment for the plaintiff. The defendants appealed.

The appeal was argued at Victoria on the 9th of June, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

McPhillips, K.C., for appellants (defendants): The defendant Company took over the contract, but there is nothing in the evidence to shew that they assumed this liability to the plaintiff. There is no privity of contract between us and the plaintiff.

Argument

Faulkner, for respondent (plaintiff): The whole question turns on the assignment, that is, whether by assuming the completion of the contract, the Company rendered themselves liable to the plaintiff. He referred to *Carte* v. *Dennis* (1901), 5 Terr. L.R. 30; *Shaw* v. *Foster* (1872), 42 L.J., Ch. 49 at p. 59; *Union Pac. Ry. Co.* v. *Douglas County Bank* (1894), 60 N.W. 886.

McPhillips, in reply.

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MACDONALD, C.J.A.: I think the appeal must be allowed and the action against the Guaranty Company dismissed. The judgment of the Court below must stand against Westwood, because Westwood has not appealed, and moreover, I think it is quite right as against Westwood. But I can see no principle upon which the plaintiff can succeed against the other defendant, the Guaranty Company.

IRVING, J.A.: I think the appeal must be allowed, on the short ground that when the contractor failed, Ramsay accepted Westwood as the person to whom he would look for payment. That released the Company from the $280 earned after that date. As to the $265 earned before that date, I do not see on what ground the Guaranty Company can be liable to Ramsay. The contract of the Guaranty Company was to indemnify the owner and did not in effect concern Ramsay in any way.

MARTIN, GALLIHER and MCPHILLIPS, JJ.A. agreed in allowing the appeal.

Appeal allowed.

Solicitors for appellants: *McPhillips & Wood.*
Solicitor for respondent: *J. H. Claughton.*

IN RE THE CANADIAN NORTHERN PACIFIC RAILWAY COMPANY AND P. FINCH.

Award—Remitting—Jurisdiction under the British Columbia Railway Act, R.S.B.C. 1911, Cap. 194.

There is no jurisdiction to remit an award in an arbitration held under the British Columbia Railway Act.

APPLICATION by the land owner to remit an award to the arbitrators for them to specify the several items allowed in respect of compensation for lands taken and lands injuriously affected, heard by HUNTER, C.J.B.C. at Victoria on the 9th of June, 1914.

Statement

F. C. Elliott, for the land owner: The award is ambiguous, inasmuch as it awards a lump sum to the land owner in respect of compensation for lands taken and lands injuriously affected. There should be separate items shewing what the arbitrators

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allowed for the land taken, for severance and for other heads of damage. There is power in the Court to remit an award under section 13 of the Arbitration Act: *Re Van Horne and Winnipeg & Northern R. Co.* (1913), 14 D.L.R. 897; *Montgomery, Jones, and Co.* v. *Liebenthal and Co.* (1898), 78 L.T.N.S. 406; *Humphreys* v. *Victoria* (1912), 17 B.C. 258.

Argument

Mayers, for the Railway Company: The British Columbia Railway Act contains a complete code applicable to arbitrations in respect of lands taken by railway companies, and the arbitration Act has no application. By section 56, subsection (2) the award is to be final and conclusive except as thereinafter provided. The provision referred to is section 68, which gives a right of appeal which is unknown in respect of ordinary arbitrations. The difference between the Provincial Act and the Dominion Act is seen in section 209 of the Dominion Act, R.S.C. 1906, Cap. 37, which, by subsection (4), expressly saves the existing jurisdiction in cases of arbitration. There is no such provision in the Provincial Act, and the omission, coupled with the provisions of section 56, subsection (2), and a consideration of the minute provisions made in the Provincial Railway Act with regard to arbitrations shews that the ordinary powers of remitting and setting aside awards are intended to be excluded. In any case the Court will not remit an award for the purpose of having the items of compensation segregated.

Ontario & Quebec R.W. Co. v. *Vallieres* (1909), 11 Can. Ry. Cas. 1.

Judgment

HUNTER, C.J.B.C.: I think that section 56, subsection (2) is conclusive upon the point, and prevents an award being dealt with by the Court otherwise than under the provisions of section 68. Once an award is made it is to be final and conclusive except for the right of appeal newly created by the statute, which I take to mean that it cannot be altered in any respect except by the Court upon the hearing of the appeal. Thus the powers of remitting and setting aside awards is excluded. Section 68, subsection (2) provides that upon the appeal the practice and proceedings shall be as nearly as may be as upon an appeal from the decision of an inferior Court

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to the Supreme Court, and I know of no jurisdiction in the Supreme Court to order a judge of an inferior Court to re-write his judgment. Moreover, even if there were power in the Court to remit the award, I do not think it should be remitted for the purpose of causing the arbitrators to specify the particular amounts which they have awarded in respect of particular items of damage. The whole scheme of arbitration proceedings is to arrive at some compromise between conflicting interests, and it may very well be that no two arbitrators agree upon any particular head of damage, but by a process of mutual concession succeed in arriving at an agreement as to the total amount to be awarded in respect of the entire claim.

Judgment

The application will be dismissed.

Application dismissed.

W. G. SCRIM LUMBER COMPANY v. ROSS.

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W. G. SCRIM LUMBER CO. v. ROSS

Practice—Pleading—Counterclaim—Application of to debt sued on.

The defendant held a promissory note of one Gray, who made an assignment for the benefit of his creditors to the plaintiff. On the note coming due the plaintiff and defendant arranged for the renewal thereof by the defendant signing a note in favour of the plaintiff, who carried the note in his account as assignee for Gray. In an action for payment of the note:—

Held, that there should be judgment for the plaintiff, but that the defendant was entitled to counterclaim for an accounting by the plaintiff of the moneys collected by him as assignee of the Gray estate which were applicable to the debt that Gray owed the defendant.

Macdonald v. *Carington* (1878), 4 C.P.D. 28, distinguished.

APPEAL by defendant from a decision of GRANT, Co. J. at the trial in Vancouver on the 9th of April, 1914, of an action upon a promissory note for $200. One Gray owed the defend-

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ant an account for $200, for which the latter held a promissory note. Plaintiff held a chattel mortgage from Gray. The latter assigned to the plaintiff. When the note fell due, it was renewed under an arrangement between the plaintiff and defendant; it was renewed by a note signed by the defendant in favour of the plaintiff. This note was renewed from time to time until eventually it was paid by the plaintiff, who sued for the amount. Defendant set up that it was an accommodation note to plaintiff as trustee for Gray, and counterclaimed for an accounting of Gray's estate. The trial judge gave judgment for plaintiff and refused to allow any evidence to be taken on the counterclaim. Defendant appealed.

The appeal was argued at Victoria on the 24th of June, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Steers, for appellant.

E. J. Deacon, for respondent.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: It does not seem to me that the whole transaction from its inception, the first renewal of the Gray note, was carried on between these parties in their representative capacity. Hence *Macdonald* v. *Carington* (1878), 4 C.P.D. 28, is not applicable. It appears very clearly from the judgment below, which recites that all evidence relating to the counterclaim was excluded, that the defendant was not allowed to shew that moneys had been collected by the trustee which were applicable to the debt which Gray owed this defendant. Such a term in the order is exceptional, and in my opinion ought not to have been included in it. But it is there, and probably was put there because of the fact that some evidence with respect to the counterclaim was admitted subject to objection, and I suppose it was sought to shew on the face of the judgment that the learned judge had finally excluded that evidence.

That being the state of the facts and the law, as I understand it, it seems to me the learned judge was wrong in excluding the evidence in respect of the counterclaim and, therefore, there must be a new trial. I think he was quite right in finding

the defendant liable upon the promissory note, but he should have taken into consideration the counterclaim, and made the appropriate set-off, if any.

IRVING, MARTIN and GALLIHER, JJ.A. agreed.

MCPHILLIPS, J.A.: I agree, and whilst there was a difficulty in regard to the names of the parties to this action, yet I look upon the claim sued upon as being sufficiently expansive to admit of evidence being introduced to shew that the W. G. Scrim Lumber Company have received moneys that they ought to account for. I am not incommoded to the extent that I have to say that the trustee in person is not made a party, as it may be that the Lumber Company have received moneys which ought to be applied in respect of this indebtedness.

MCPHILLIPS, J.A.

MACDONALD, C.J.A.: The Court is of opinion that there should be no costs to either side in this case. It is not a case of a claim and a set-off. It is a case of a claim on the note which the learned judge properly entered judgment for, and a counterclaim which is a cross-action. Mr. *Steers* has appealed with respect to both, has succeeded with respect to one and failed with respect to the other. In these circumstances we think there should be no costs of the appeal.

MACDONALD, C.J.A.

Appeal allowed in part.

Solicitor for appellant: *Edwin B. Ross.*
Solicitor for respondent: *E. J. Deacon.*

MARTIN, LO. J.A.

1914

June 19.

THE AURORA

THE AURORA.

Admiralty law—Wages—Statutory lien for "building, equipping or repairing" a ship—Lien for necessaries—Priority of claims—Costs.

A lien of a seaman for wages ranks before a statutory lien for "building, equipping or repairing" a ship under section 4 of The Admiralty Court Act, 1861; it also ranks before a lien for necessaries.

MOTION in chambers, heard by MARTIN, LO. J.A. at Vancouver on the 2nd of May, 1914, for the payment out of Court to Momsen *et al.* of $700, paid in as part of the proceeds of the sale of the ship by the marshal in the action of *Momsen* v. *The Aurora.* The facts are set out in the judgment.

Statement

E. A. Lucas, for Momsen's claim.
Sears, for Nosler's claim.

19th June, 1914.

MARTIN, LO. J.A.: This is a motion for the payment out of Court to Momsen *et al.,* who had recovered a judgment on the 19th of August, 1913, for their statutory lien for equipping the Aurora with an engine, for $925 and costs: *cf. Momsen* v. *The Aurora* (1913), 18 B.C. 353. On the 12th of November in the same year, Nosler recovered judgment for his wages as a seaman on the Aurora: *cf. Nosler* v. *The Aurora, ib.* 449. The ship was sold by the marshal in Momsen's action, and so far $700, part of the proceeds, have been paid into Court. It is contended on behalf of Momsen *et al.* that because they had a decree of this Court in their favour for the sale of the ship, they are entitled to priority over Nosler's claim, who did not begin his action till after the decree had been pronounced. The ship, after being arrested by Momsen, gave bail and was released, and later re-arrested after Nosler's claim had attached (*Momsen* v. *The Aurora, supra,* 355), and there are other facts and circumstances on which Nosler relies which it is unnecessary to mention, because, even taking the case to be wholly as Momsen *et al.* contend for, they are not entitled to the order asked, because

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there is no authority in support of the submission that a statutory lien for "building, equipping or repairing" a ship, under section 4 of The Admiralty Court Act, 1861 (*cf.* Roscoe's Admiralty Practice (1903), 64 (*f*)), or for necessaries (*cf. Victoria Machinery Depot Co.* v. *The Canada and The Triumph* (1913), 18 B.C. 511 at p. 514) can take priority over a lien for seamen's wages, in regard to which the authorities are thus summarized in Williams & Bruce's Admiralty Practice (1902), 217-8:

"It takes precedence of claims for bottomry or necessaries supplied to foreign or British ships and of payments for towage and for light and dock dues charged against the ship, but it ranks below maritime liens for damage done by collision, and for salvage rendered subsequently to the time when the wages were earned. Between the holder of a bottomry bond and a claimant for wages earned on the same voyage on which the bond was given, no distinction is to be drawn between the portion of such wages earned before and wages earned after the giving of the bond. . . ."

See *The William F. Safford* (1860), 2 L.T.N.S. 301; *The St. Lawrence* (1880), 5 P.D. 250; *The Andalina* (1886), 12 P.D. 1 (a case very similar to this); *The Africano* (1894), P. 141; Roscoe's Admiralty Practice, 3rd Ed., 76-7; *Neptune* (1824), 1 Hagg. 227 at pp. 237-9, wherein Lord Stowell says "a seaman [has] a right to cling to the last plank of his ship in satisfaction of his wages or part of them"; *The Cella* (1888), 13 P.D. 82, on the effect of the arrest; and *Munsen* v. *The Comrade* (1902), 7 Ex. C.R. 330 (a decision of this Court in its New Brunswick District) shew that claimants will be protected according to their priority if they make application before the money has actually been paid out. I note, however, in the last case, on the point of priority between claimants *in pari conditione* and the decree that should be made in such circumstances in the absence of laches, the decision is not in accord with that of the President of the Admiralty Court in *The Africano* (1894), P. 141, which was not cited to the Court in New Brunswick, and points out the change in the practice since the decree in *The Saracen* case was issued in 1845, 4 N. of Cas. 498; (1847), 6 Moore, P.C. 56; Williams & Bruce, *supra,* 289 (*z*).

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The order, therefore, to be made herein is that Nosler is entitled to be paid his wages in full and the balance will be

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applied in reduction of Momsen's judgment. With respect to the order that ought to be made as to costs, I refer to Williams & Bruce, *supra,* at pp. 469-70; and Roscoe's Admiralty Practice, 319, and the cases there cited, and if the parties do not agree upon the order to be made in the unusual facts, *e.g.,* the release and re-arrest, of this case, I am prepared to hear further argument thereupon, if it is desired, though counsel for Momsen *et al.* made no submission on this point, nor did either counsel cite any authority.

Order accordingly.

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McEWAN v. HESSON.

Practice—Appeal—Interlocutory order or judgment—Extension of time for application—Rule 879—Court of Appeal Act, B.C. Stats. 1913, Cap. 13, Sec. 14.

McEWAN v. HESSON

On an application under section 4 of the Court of Appeal Act, 1913, to extend the time for giving notice of appeal owing to a slip of the solicitor in not giving notice until after the expiration of the time allowed under marginal rule 879:—

Held, that there was not sufficient ground for granting special leave under said section.

Per MARTIN, J.A.: In all cases of application for extension of time to appeal under this rule very exceptional circumstances must be shewn. It is not the ordinary case when relief from slips of solicitors can be compensated with costs, because, in this particular class of case there is a limit placed upon the time within which the judgment that the successful party has obtained can be taken from him, and that is the principle which distinguishes it from ordinary cases of extension of time.

Per MCPHILLIPS, J.A.: Where a slip of a solicitor may result in loss of property to a client, relief should be granted.

Statement

APPEAL by plaintiff from a decision of CLEMENT, J. at Victoria, on the 17th of April, 1914, dismissing an application for a writ of *certiorari* in connection with the granting of a

liquor licence to the applicant Hesson, in respect of what is known as the "Wright Block," in Victoria.

Counsel for respondent raised the preliminary objection that the appellant had failed to give the necessary fifteen days' notice of appeal in *certiorari* proceedings after the pronouncement of judgment. Counsel for the appellant then moved for an extension of the time for giving notice of appeal under section 25 of the Court of Appeal Act, as amended by section 4 of the Act of 1913.

Statement

The application was heard at Victoria on the 17th of June, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

McDiarmid, for appellant.
Maclean, K.C., for respondent.

MACDONALD, C.J.A.: I would decline to accede to the motion to enlarge the time for setting down this appeal.

The slip here was a slip of the solicitor, and whatever may be said in some circumstances as to the desirability of relieving, I cannot see the desirability in this case. This appeal was taken on a technicality. I would grant no indulgence in a technical case against licencees who were such for many years, particularly when the trial judge has expressed himself strongly that the reason why the evidence was not taken under oath was the silence of the appellant and his solicitors to suggest that there was any contest about the matters which were then being dealt with. As the learned judge says, it was a case where apparently this appellant was keeping a card up his sleeve, very dishonestly. In a case of that kind, I think we ought not to relieve against a slip. That is to say, when the appellant is seeking to take advantage of a slip on the part of the respondent, and the respondent catches the appellant in a slip, I think he is quite justified in asking the Court not to relieve the appellant.

MACDONALD, C.J.A.

I express no opinion as to whether or not the slip of a solicitor alone in a case where there are merits will or will not be relieved against.

IRVING, J.A.: Having regard to the technical nature of the

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whole matter, I agree there should be no extension of time; but as a rule I would favour the most liberal treatment where there are slips of solicitors in cases of appeal in giving notice of appeal in interlocutory appeals. I think the reason stated by Bramwell, L.J. in *Collins* v. *Vestry of Paddington* (1880), 5 Q.B.D. 368, should be our guide in cases of the kind there dealt with, that is to say, when payment of costs would compensate.

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MARTIN, J.A.: I agree that this motion should not be acceded to, and I am further of opinion that in all cases of applications for extension of time to appeal under this rule, very exceptional circumstances must be shewn. It is not the ordinary case when relief from slips of solicitors can be compensated by costs, because, in this particular class of case, there is a limit placed upon the time within which the judgment that the successful party has obtained can be taken from him, and that is the principle which distinguishes it from ordinary cases of extension of time. I express no opinion on any general rule as to slips of solicitors with respect to interlocutory or final orders in ordinary cases, because it all depends upon what the slip may have been, and it will have to be so considered in each case. The rule we should follow is not to grant applications of the present class except under very special circumstances, and the circumstances shewn in this case are not such as to warrant it.

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GALLIHER, J.A.: I agree entirely in the remarks of my brother MARTIN.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I think the application should be refused. I do not consider that there are any meritorious questions to be adjudicated upon. There were evidently reasons for and against the transfer of the licence, and the board has decided that the transfer be granted. The Legislature provides for an inspector to pass upon the building. The inspector determined that question, and that is the only question that counsel has suggested on the question of merits—the inspector having passed the building, it seems to me it would be wrong that, upon some technicality, this Court should determine that the

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transfer is not effectual. With regard to the slip of a solicitor, that must always be looked upon from the point of view that when the solicitor makes a mistake he may be depriving his client of some property or determination of right to property, and possible denial of justice. Then, admittedly, relief should be granted. Such is not the case here. I would refuse the application.

Application dismissed.

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

REX v. WALLACE.

Criminal law—Practice—Evidence—Statement made to constable in answer to questions after arrest and after the usual caution—Admissibility of.

A prisoner, arrested and given the usual caution, was taken by motor to the police station, where he arrived about five minutes after the caution. There he made a statement in answer to questions put by the police.

Held, that the statement was admissible in evidence.

Regina v. *Day* (1890), 20 Ont. 209, followed.

TRIAL of prisoner by GREGORY, J. at the Vancouver Spring Assizes on the 29th of May, 1914, on indictment for having in his possession and using a counterfeit token of value with knowledge that it was of no value as money, and with fraudulent intent.

Statement

The prisoner was arrested in the City of Vancouver on a warrant issued in South Vancouver on the information of a Chinese laundryman, to whom the prisoner gave a ten-dollar bill on the Bank of Prince Edward Island, a counterfeit token of no value as money, in payment of a small amount

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due by the prisoner to the laundryman, receiving the difference in money. The prisoner was arrested on Hastings street by one of the City detectives and taken to a motor-car in which was a South Vancouver constable, who at once informed the prisoner of the nature of the charge against him and gave him the usual caution. The prisoner then got into the motor-car and was taken direct to the Vancouver police station, arriving there about five minutes after the caution. There he was asked certain questions.

A. D. Taylor, K.C., for the Crown, proposed to put in the statements made in answer to these questions as evidence against the prisoner as supporting guilty knowledge on his part. He cited the following cases: *Regina* v. *Day* (1890), 20 Ont. 209; *Regina* v. *Elliott* (1899), 31 Ont. 14; *Reg.* v. *Brackenbury* (1893), 17 Cox, C.C. 628; *Reg.* v. *Miller* (1895), 18 Cox, C.C. 54; *Rogers* v. *Hawken* (1898), 19 Cox, C.C. 122; and *Rex* v. *Best* (1909), 1 K.B. 692.

Argument

Killam, for the prisoner, objected.

His lordship adjourned the case until the afternoon, when he gave the following judgment:

I have looked at all the cases referred to in Crankshaw since the adjournment, and I find that I was to a certain extent wrong in my view, I think. The English practice evidently gives more protection to the accused than the Canadian practice. In the case of *Regina* v. *Day* (1890), 20 Ont. 209, decided by the King's Bench Division, Armour, C.J., who was a judge of the very highest standing, in his judgment, expresses his very strong disapproval of the practice of police officers questioning prisoners, but he said that no doubt the law is settled now that answers to those questions were admissible. And the same question came up again in *Regina* v. *Elliott* (1899), 31 Ont. 14, where Boyd, C. said that the practice had been settled by *Regina* v. *Day, supra,* and he followed that decision. And that was in the Court of Ontario, and the decisions are by very learned judges, and I do not think I am justified in refusing to follow the practice laid down by them, but I wish now to express

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my very strong disapproval of the practice of questioning prisoners.

I wish to say in addition that I make this ruling, not because I think all answers given by the prisoners after warning are admissible. I am far from coming to that conclusion. But as the evidence before me is that the caution was unequivocally given and only a short time elapsed, and apparently there was nothing done by any of the officers to in any way intimidate the man or take away the effect of the caution, etc., I must consider that there were no circumstances to justify the conclusion that the statements made were not voluntary.

Prisoner convicted.

IN RE ASSESSMENT ACT AND HEINZE. (No. 1.)

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IN RE ASSESSMENT ACT AND HEINZE

Assessment and taxes—Right to an interest in land—Recital in statute—Effect of—Taxation Act, R.S.B.C. 1911, Cap. 222, Sec. 47—B.C. Stats. 1913, Cap. 71, Sec. 5—Railway Subsidy Lands Repurchase Act, B.C. Stats. 1912, Cap. 37.

H. entered into an agreement on February the 11th, 1898, to sell to A. and S. all the stock and bonds in a Railway Company, including the land grant, subject to a proviso that A. and S. would, on the completion of the sale, cause a formal instrument to be executed by the Railway Company, in such form as H. might reasonably devise and present for that purpose, shewing that H. was entitled to an undivided one-half interest in the land grant. The instrument aforesaid was never presented by H. for execution. Later in an action for partition, in which A. and S. and the Railway Company were plaintiffs and H. was defendant, the Supreme Court of Canada held that under the agreement H. acquired neither a legal nor an equitable interest in the lands in question. Subsequently the Government agreed, by instrument in writing, dated the 31st of January, 1912, to repurchase the lands from the Railway Company, which agreement was ratified, confirmed and embodied in an Act of Parliament (Cap. 37, B.C. Stats. 1912). The agreement recited that H. had become entitled to a one-

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half interest in the said lands under the agreement of 1898, first referred to. Under subsection (2) of section 5 of the Taxation Act Amendment Act, 1913, H. was assessed for an undivided one-half interest in said lands. On appeal to a special Court of review it was held that the interest acquired by H. in the land in question under the agreement of 1898 was subject to taxation under said statute.

Held, on appeal, that by the recitals in the agreement of the 31st of January, 1912, which is embodied in the Railway Subsidy Lands Repurchase Act, supplemented by certain operative declarations in the covenants therein contained, the Legislature has declared that H. is entitled to an undivided one-half interest in the land grants in question, which must be given effect to by the Court, rendering his interest liable to assessment.

Labrador Company v. *The Queen* (1893), A.C. 104, and *Norton* v. *Spooner* (1854), 9 Moore, P.C. 103, followed.

Semble, that were it not for the Railway Subsidy Lands Repurchase Act, it would have been decided in view of the decision of the Supreme Court of Canada in *Angus* v. *Heinze* (1909), 42 S.C.R. 416, that H. under his agreement of the 11th of February, 1898, with A. and S. acquired neither "a legal nor an equitable interest in the lands in question," and therefore should not have been assessed for the same.

APPEAL by F. August Heinze from the judgment of R. S. Lennie, sitting as judge of a special Court of Revision (appointed by order of the Lieutenant-Governor in Council on the 22nd of January, 1914), at Nelson on the 17th of March, 1914. The facts are, that under an agreement dated the 11th of February, 1898, F. August Heinze sold to Messrs. Angus and Shaughnessy, of Montreal, all the shares and bonds of the Columbia and Western Railway Company, the sale also embracing certain other properties in West Kootenay, including the Trail smelter, and the Railway with its appurtenances running from Rossland to the town of Trail. The consideration

Statement

was $800,000. This agreement contained a provision that as soon as the said shares and bonds and control be transferred and made over to the purchasers they would forthwith cause a formal and valid instrument to be executed by the Columbia and Western Railway Company in such form as the vendor might reasonably devise and present for that purpose, shewing that he was entitled to an equal moiety of all lands which said Company had earned at the time of the transfer by way of subsidy from the Government of British Columbia and which the Company became entitled to by reason of the construction

of the Company's railway. The vendor duly received the consideration set forth in the agreement, and the stock, bonds and land were formally conveyed to the purchasers. The lands in question were, under the charter of the Columbia and Western Railway Company, exempt from taxation for ten years. Heinze never presented for execution by the railway company the instrument that was to set forth his interest in the lands. Under memorandum of agreement of the 31st of January, 1912, the Columbia and Western Railway Company sold to the British Columbia government said land grant, and executed conveyances therefor subject to the estate and interest of Heinze, paragraph six of which protected and excepted Heinze's estate and interest therein. On the 27th of February, 1912, an Act was passed ratifying and confirming this sale, and setting forth in full the agreement, which contained the following recital:

"And whereas by agreement bearing date the 11th day of February, 1898, and made between F. August Heinze of the one part and Richard B. Angus and Thomas G. Shaughnessy of the other part, the said Heinze became entitled to an undivided one-half interest in certain portions of the said Crown grants to the Columbia and Western Railway Company, containing approximately 615,600 acres, and detailed in the document hereunto annexed, marked 'Schedule B' hereto, and signed by the parties hereto."

Conveyances were then made, in accordance with the agreement, to the Crown, and the title in said lands became vested in His Majesty, subject to Heinze's interest as aforesaid, prior to the assessments contested in this proceeding. The agreement of the 11th of February, 1898, was made in Montreal, Messrs. Angus and Shaughnessy being residents of Montreal and Heinze a resident of the United States. The assessment in question was made in November, 1913, under authority of the Taxation Act Amendment Act, 1913, Sec. 5, Subsec. (2), which enacts as follows:

Statement

"Where the title to any land has become vested in His Majesty in right of the Province, subject to any estate or interest therein of any person, or where the title to any lands is vested in His Majesty and it appears that any person had, prior to the vesting of such title in His Majesty, acquired or had such a right, whether legal or equitable, to an interest in such lands as would be enforceable against a private individual if such title were vested in a private individual, and that such person has such right though he may not have actually acquired such interest, it shall be lawful for the assessor to assess the interest of such person or the right of such person to an interest in such lands by estimating the value of the whole

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of said lands at their cash value per acre, and the proportion thereof representing the value of the interest or of the right to an interest of such person shall be set down by the assessor upon his roll."

The appellant contended (a) that as he was not a party to the agreement between the railway company and the Crown, he could not be bound by its terms or anything recited in it; (b) that because in a partition action between Angus and Shaughnessy and the Columbia and Western Railway as plaintiffs and himself as defendant, based on the agreement of the 11th of February, 1898, the Supreme Court of Canada held that the parties thereto had neither a legal nor an equitable interest in the lands in question (42 S.C.R. 416), he cannot be assessed or taxed in respect thereof. The learned judge held that the Columbia and Western Railway Company had ratified and adopted the agreement of the 11th of February, 1898, by the agreement with the Crown of the 31st of January, 1912, that the interest of Heinze in the land in question acquired under the agreement of 1898, was within the expression, "a right, whether legal or equitable, to an interest in such lands," in subsection (2) of section 5, of the Taxation Act Amendment Act, 1913, and the assessment should therefore be affirmed. Heinze appealed.

Statement

The appeal was argued at Vancouver on the 17th of April, 1914, before MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Hamilton, K.C., for appellant: The assessments in question were made under the provisions of section 47, subsection (2) of the Taxation Act as amended in 1913. Heinze's affidavit filed under the provisions of that section shews he makes no claim except as contained in his agreement of the 11th of February, 1898, with Angus and Shaughnessy, which is limited to an understanding with Angus and Shaughnessy (who have not and never had any interest in the lands in question) to obtain a document from the Columbia and Western Railway Company, the owners, when he asks for it, shewing he is entitled to a half interest in such lands.

Argument

The subsection in question is confined to an interest in land, or a right to an interest not yet acquired. Heinze's interest is not an interest in land. The Supreme Court of Canada have

specifically so decided: see *Angus* v. *Heinze* (1909), 42 S.C.R. 416. The Crown contend the situation is changed since that judgment, (a) because the agreement of 1898 has been ratified or adopted by the Columbia and Western Railway, who are owners of the land, and (b) because chapter 37 of the statutes of 1912 has in effect declared as a matter of law that Heinze is the owner of an undivided one-half interest.

There can only be ratification or adoption of a contract in agency cases by a principal either disclosed or undisclosed. The Supreme Court of Canada have decided the Columbia and Western Railway Company is not a party to this agreement. This is clearly so, because the Railway Company have not authority to buy or operate a smelter, which was one of the objects of this agreement; nor could they purchase their own shares, which is the other main part of the agreement. The Railway Company was a party plaintiff to the suit before the Supreme Court of Canada, which was to enforce the terms of this agreement. There could be no more complete attempt at ratification or adoption than this; yet in the face of it the Supreme Court of Canada has decided that the Company is not a party to this agreement. Nothing short of novation would help the Crown, and of this there is no evidence or suggestion. Chapter 37 of the statutes of 1912 was not enacted with any reference to Heinze; it is merely an Act confirming an agreement between the Crown and the Columbia and Western Railway in pursuance of the requirements of a previous Act, to all of which Heinze was an entire stranger. Nor is Heinze's claim such a right to an interest as described in said subsection. It is not a right, to call for a conveyance from Angus and Shaughnessy, but merely a right to a personal undertaking on their part. In any event, this subsection does not propose to deal with taxation, but only with assessment; taxation is left to the other provisions of the Act, and it is clear by the definitions therein of "land" and "personal property" that his claim falls within the latter definition, for which the tax is one-half of one per cent. instead of 4 per cent., as imposed. But personal property to be taxable must be within the Province: see Secs. 4; 8, Subsec. (11); and 66 of the Taxation Act. This

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agreement was made in Montreal, where Angus and Shaughnessy then and ever since have resided, and Heinze is and always has been a citizen of the United States of America.

Maclean, K.C., for the Crown: The statute says the assessor must estimate what the whole property is worth. The right that Heinze has as against Angus and Shaughnessy can be enforced in this Province. He has the same right as in a chose in action: see Dicey's Conflict of Laws, 2nd Ed., 751. His interest is mixed up with realty; it is an interest in land.

Under the 1913 amendment to the Taxation Act he must file an affidavit setting forth what interest he has in the land in question. He has no right of appeal, as he has not complied with the statute, not having filed the affidavit setting forth his interest. The Columbia and Western Railway was really a party to the agreement of 1898, as Heinze owned all the stock. In any event the railway company ratified and adopted the agreement: see B.C. Stats. 1912, Cap. 37. It is the old doctrine of use, and it is contended they hold this land for Heinze: see Encyclopædia of the Laws of England, Vol. 4, p. 159; Vol. 13, p. 216; Vol. 14, p. 401. He has an actual fee in an undivided one-half interest in these lands.

Argument

Hamilton, in reply: There is error in the ratification and adoption argument, as the third party acted alone. There can be no agreement without the assent of the parties. It is urged that we are at fault in not putting in an affidavit; this objection should have been taken as a preliminary objection both here and below.

Cur. adv. vult.

On the 14th of July, 1914, the judgment of the Court was delivered by

MARTIN, J.A.: This is an appeal by F. August Heinze from a judgment of Mr. R. S. Lennie, sitting as a special Court of Revision at Nelson, on the two grounds permitted by subsection (3) of section 5 of the Taxation Act Amendment Act, 1913, *viz.*: "(a) that the assessment is excessive, and (b) that the person assessed has no interest in the lands assessed or any part thereof."

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With respect to the latter ground, we are of opinion that were it not for the statute hereinafter referred to it would have been decided, in view of the decision of the Supreme Court of Canada in *Angus* v. *Heinze* (1909), 42 S.C.R. 416, that the appellant, under his agreement of the 11th of February, 1898, with Angus and Shaughnessy, acquired neither "a legal nor an equitable interest in the lands in question," and therefore he should not have been assessed for the same.

It was, however, held by the learned judge below that the Columbia and Western Railway Company, which was not a party to said agreement, had ratified and adopted the same by the agreement it entered into on the 31st of January, 1912 (set out in the Act respecting the Repurchase by the Crown of Certain Railway Subsidy Lands, B.C. Stats. 1912, Cap. 37), which was subsequent to the said decision of the Supreme Court and had the effect of distinguishing that decision in a way which is not explained and was not made clear to us, because the fact is that the said Railway Company had already ratified and adopted the said agreement of 1898 in as full a manner as possible before that decision by giving the notice of the 13th of March, 1906, set out in the admissions herein (which was before the Supreme Court), and by joining with Angus and Shaughnessy as party plaintiffs in said action to partition said lands in that Court.

The learned judge also was of the opinion that the expression "a right, whether legal or equitable, to an interest in such lands" in subsection (2) of said section 5 was sufficient to cover and define, for the purposes of taxation, the "right" the appellant had acquired under said agreement of 1898 against Angus and Shaughnessy for breach of contract. It is difficult, however, to draw any practical distinction between "a legal or equitable interest" and the "right" to the same; if there is no interest there can be no right to what does not exist, and what would go to make up the interest would make up the right, and *vice versa;* and there are serious obstacles in the way of giving practical effect to such vague language. It is not necessary, however, to further pursue this question, because we are of the opinion that from another point of view the said Railway Sub-

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sidy Lands Repurchase Act, Cap. 37, may be resorted to so as to bring the case within these opening words of said sub-section (2):

"Where the title to any land has become vested in His Majesty in right of the Province, subject to any estate or interest therein of any person, ... it shall be lawful for the assessor to assess the interest of such person," etc.

It is admitted, par. 9 of the admissions,

"That prior to the making of the assessments contested in this proceeding the title to the said lands had become vested in His Majesty in the right of the Province of British Columbia subject to the alleged estate or interest therein of the said F. Aug. Heinze and that the said lands are now so vested in His Majesty."

There are in the statute itself certain recitals and operative declarations which have the effect of sufficiently defining the "estate or interest" of the appellant so as to render it liable for assessment.

The question of the weight to be attached to recitals and statements in Acts of Parliament was considered in *Attorney-General* v. *Ludgate* (1901), 8 B.C. 242 at pp. 244-5, wherein various authorities were reviewed and a recital of fact in a private Act was not given effect to. The case therein cited of *The King* v. *Greene* (1837), 6 A. & E. 548, is a striking one, in which the Court received and gave effect to evidence shewing that there had been a mistake in the recital in a public statute, while *Labrador Company* v. *The Queen* (1892), 62 L.J., P.C. 33 at p. 43; (1893), A.C. 104 at p. 123, is an illustration of the adoption by the Courts of—

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". . . . an absolute statement by the Legislature that there was a seigneurie of Mingan. Even if it could be proved that the Legislature was deceived, it would not be competent for a Court of law to disregard its enactments. If a mistake has been made, the Legislature alone can correct it. The Act of Parliament has declared that there was a seigneurie of Mingan, and that thenceforward its tenure shall be changed into that of *franc aleu roturier*. The Courts of law cannot sit in judgment on the Legislature, but must obey and give effect to its determination."

Other authorities are cited in Taylor on Evidence, 10th Ed., par. 1660; Craies's Statute Law, 2nd Ed., 44-7; and Maxwell on Statutes, 5th Ed., 506-7, and I cite the following remarks of Collins, M.R. in *Headland* v. *Coster* (1905), 1 K.B. 219 at p. 231 (affirmed by the House of Lords (1906), A.C. 286) on "misrecitals" in public Acts:

"In that limited sense the recital may perhaps be looked upon as true, but it is also possible that it may be a misrecital. Such misrecitals are not absolutely unknown even in Acts which have been framed by skilled and careful draftsmen. In any case, however, the argument for the plaintiff seems to me so overwhelming that, even if the adoption of it would involve that there was a misrecital in the Act of 1849, I should feel bound to give effect to it."

See also the decision of the Privy Council in *Norton* v. *Spooner* (1854), 9 Moore, P.C. 103, at p. 129, wherein a public ordinance whose "main object . . . . was to introduce and regulate the trial by jury" in British Guiana, was yet held to recognize the fact that an action for *nim. con.* could be maintained in the Colony because such action was recited amongst those which could be tried by jury, their Lordships, on the effect thereof, saying:

"This goes far beyond a recital in an Act of legislation, which may, according to circumstances, be of more or less weight, and be often not conclusive. This is an express and distinct enactment . . . . "

In the case at bar the statute is a public one, in every case dealing with the acquisition by the Province of a very large area of land for public purposes, and with an agreement, dated the 31st of January, 1912, between the Crown and three railway companies, including the Columbia and Western, which is set out in the schedule, and is ratified and confirmed and the parties thereto "empowered to do whatever is necessary to give full effect thereto," and it is further declared that its "provisions . . . . are to be taken as if they had been expressly enacted hereby and formed an integral part of this Act." Among other recitals is the following:

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"And whereas by agreement bearing date the 11th day of February, 1898, and made between F. August Heinze of the one part, and Richard B. Angus and Thomas G. Shaughnessy of the other part, the said Heinze became entitled to an undivided one-half interest in certain portions of the said Crown grants to the Columbia and Western Railway Company, containing approximately 615,600 acres, and detailed in the document hereunto annexed, marked Schedule 'B' hereto, and signed by the parties hereto."

The agreement goes on to witness "that as a complete settlement of all the matters hereinbefore recited the parties hereto do mutually covenant and agree each with the other as follows"; setting out various covenants, the second of which is stated to be:

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"subject to the estate and interest held by F. August Heinze under the agreement bearing date the 11th day of February, 1898, hereinbefore mentioned."

The 4th has this reference:

". . . . excepting from the computation of the amount payable under this paragraph one-half of the total area in which the said F. August Heinze is entitled to an undivided one-half interest, as detailed in Schedule B hereto, under the terms of the agreement hereinbefore mentioned; the said compensation to be payable on the execution and delivery of conveyances of the said lands subject to the interest of the said F. August Heinze therein, and otherwise free from encumbrances."

The 6th is as follows:

"The Crown in right of the Province of British Columbia agrees to accept the conveyance of the lands mentioned in paragraph 2 hereof, subject to the estate and interest of the said F. August Heinze, his heirs and assigns therein; and so that the estate and interest of the said F. August Heinze, his heirs and assigns, in the said lands and his rights to a conveyance or partition thereof shall not be impaired by the execution and delivery of this agreement, and the Crown will not refuse or neglect to grant, convey, or partition the interest of the said Heinze in the said lands upon proof of right, title and interest."

The 12th provides for confirmation of the agreement by an Act of the Legislature of British Columbia.

These expressions in the covenants supplement the recital and give force and effect thereto by taking action thereon, and in effect are equivalent to operative clauses in the statute itself, so this is far removed from the case of a mere erroneous recital. The Legislature has undertaken to define the estate of Heinze, and to declare that he "is entitled to an undivided one-half interest" in the lands in question, and has not only provided that compensation shall be payable "subject to the interest" of Heinze, but undertaken that "the Crown will not refuse or neglect to grant, convey or partition the interest of the said Heinze in the said lands upon proof of right, title and interest." In view of all this I find it impossible in principle to draw a distinction between this case and the *Labrador* and *Norton* cases, and the matter comes within the scope of the rule already cited. Parliament has deliberately made the "absolute statement" that Heinze had an interest in the lands, which it defined, and it has acted on that assumption, therefore this "Court of law cannot sit in judgment on the Legislature, but must obey and give effect to its determination," which it does by declaring that he has

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that assessable interest in the lands in question, which is defined by said statute.

There remains the claim of excessive assessment, with respect to which it will be sufficient to say, briefly, that in our opinion, though two of the assessment notices might have been fuller and differently worded, yet the object of the statute has in the somewhat unusual circumstances been substantially attained in all four notices, and, therefore, the assessment and the judgment appealed from should be confirmed.

Appeal dismissed.

Solicitors for appellant: *Hamilton & Wragge.*
Solicitor for the Crown: *The Attorney-General.*

RICHARDS v. PRODUCERS ROCK AND GRAVEL COMPANY, LIMITED.

Sheriff—Poundage—Part payment to execution creditor after seizure under fi. fa.—Payment through pressure of seizure—Order for winding up of debtor before seizure—Winding-up Act, R.S.C. 1906, Cap. 144, Secs. 23 and 84; Can. Stats. 1908, Cap. 75, Sec. 1.

Where a sheriff has seized under a writ of *fi. fa.* and a compromise payment is made by the execution debtor, the sheriff is not entitled to poundage unless the payment is the result of seizure, and the onus is on the sheriff to shew that the payment was so made.

Where an order was made prior to seizure, by the Supreme Court of Ontario winding up the company (judgment debtor), the execution is void under section 23 of the Winding-up Act, and after the making of the order the power of dealing with, and collecting the assets of the company is vested solely in the liquidator.

APPEAL by plaintiff from a decision of MURPHY, J. in an action tried by him at Victoria on the 17th of February, 1914, dismissing the plaintiff's action for fees and disbursements inci- Statement

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dental to levying under a writ of *fi. fa.* The plaintiff seized certain goods of the Canadian Mineral Rubber Company on the 26th of September, 1913. On the 30th of the same month he received a letter from the solicitor of the defendant Company to withdraw from possession, the defendant Company having, on the 27th, received a cheque from the Canadian Mineral Rubber Company on account of the claim in respect of which the levy was made. The submission of the plaintiff was that his act of levying was the effectual means of getting the payment. The defence was that the money was paid under an arrangement arrived at before there was any knowledge on their part of the sheriff being in possession. MURPHY, J. dismissed the claim, being of opinion that the payment was not made in consequence of the seizure. A further reason of the learned trial judge was that an order had been made in Ontario on the 19th of September for the winding up of the Company, and this had the effect of rendering the seizure void. Plaintiff appealed.

Statement

Higgins, for plaintiff.
A. Moresby White, for defendant.

27th February, 1914.

MURPHY, J.: Action by the sheriff of the County of Victoria to recover poundage fees and expenses consequent on an execution levied by him under writ of *fi. fa.* at the suit of defendant against the Canadian Mineral Rubber Company, Limited.

Dealing first with the question of poundage, defendant had a judgment for some $8,000 against the Rubber Company, and had been pressing for payment, but was put off from time to time. Finally, on the 24th of September, 1913, Mr. Lucas, local manager for the Rubber Company, made an arrangement with defendant's solicitors to pay $3,000 on account. He explained that the cheque had to go to Vancouver for an additional signature. The understanding was that this cheque would be forwarded from Vancouver on the 25th of September, and if this were done it would arrive in Victoria in due course of post on the morning of September 26th. It did not arrive, and in the afternoon of that day defendant's solicitor placed a

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writ of *fi. fa.* in the sheriff's hands. The cheque arrived on the next day, Saturday the 27th of September, and on the 29th defendant's solicitor wrote a letter requesting the sheriff to withdraw from possession. There is a dispute as to what then occurred, but such dispute does not affect the question of poundage.

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Under the common law the sheriff was not entitled to poundage, as he was executing the King's writ: *Graham* v. *Grill* (1814), 2 M. & S. 294 at p. 297. He acquired the right thereto under 29 Eliz., c. 4. The process of execution is explained by Brett, C.J. in *Mortimore* v. *Cragg* (1878), 3 C.P.D. 216 at p. 219, as follows:

"Where an execution issues the transaction may be divided into four parts: 1. The delivery of the writ to the sheriff: 2. Seizure: 3. The possible payment of money after seizure: 4. If no payment, sale. The first step does not entitle the sheriff to poundage; and if he does not seize, *Nash* v. *Dickenson* (1867), L.R. 2 C.P. 252, is an authority that he is not entitled to poundage. Although he seizes, nothing may be realized, because the seizure may be wrongful; it may be withdrawn by direction of law; then the sheriff would receive no poundage. Then comes the case after seizure. The money may be paid by the execution debtor either directly or indirectly: directly by virtue of the seizure to the sheriff; indirectly where payment is made by means of a compromise which is the consequence of the seizure; in either of those cases the sheriff is entitled to poundage. If a sale takes place, again the sheriff is entitled to poundage."

This being the law, it is doubtful, on the facts, that the sheriff is entitled to poundage in this case. Assuming for the moment a legal seizure, the only head under which he would be is "payment by means of a compromise which is the consequence of a seizure." At the trial I thought that the dates were so significant that the inference could well be drawn that the fact of seizure had been communicated to Vancouver and that the cheque was forwarded in consequence, and not in pursuance of the original arrangement.

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Further consideration causes me to doubt. The onus is on the sheriff to make out his case, and the above citation shews that such compromise payment must be a consequence of the seizure. No evidence beyond the fact of payment was given, and although I think this, in connection with the dates, is some evidence, it does not, I think, satisfy the onus when the evidence of McDermot is taken into account.

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Hall swears on discovery that the cheque was marked according to agreement. I think, on the whole, that I cannot find it to be proven as a fact that this payment was the result of the seizure and not of the previous arrangement. But if I am in error as to this, the claim for poundage, in my opinion, still fails. The fact was, though none of the parties seem to have been aware of it, that an order to wind up the Rubber Company had been made on the 19th of September, 1913, by order of the Supreme Court of Ontario, so that when the sheriff seized, the Company was in liquidation by virtue of such order. By section 23 of the Winding-up Act, every execution against the estate or effects of the Company after the making of the winding-up order shall be void. By section 84, as amended by 7 & 8 Edw. VII., Cap. 75, Sec. 1, no lien or privilege upon the real or personal property of the Company for the amount of any judgment debt by levy or seizure is acquired if before the actual payment over to the plaintiff the winding up has commenced. The effect of these sections and others contained in the Act have been held to "conclusively shew that the power of dealing with and collecting the assets after the making of the winding-up order is made is vested in the liquidator alone: *per* Osler, J.A. in *Shaver* v. *Cotton* (1896), 23 A.R. 426 at p. 434. If this be so, the first step set out above to entitle the sheriff to poundage, *viz.*, seizure (which I think must mean a legal seizure), is wanting. In *Keating* v. *Graham* (1895), 26 Ont. 361, it was held that a judgment obtained after a winding-up order had been made was wholly void and nugatory.

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Further, it follows, I think, from these cases, that the $3,000 payment out of the Company's funds was an illegal payment, and that such sum can be demanded back by the liquidator. The defendant, therefore, has derived no fructuary benefit from the execution, and is not liable to poundage: *In re Thomas* (1899), 1 Q.B. 460. As, in my opinion, the seizure was void from its inception, the claim for possession money fails with the claim for poundage.

Then remains the question of the costs paid by the sheriff incurred in resisting the application for an injunction to restrain him and defendant from proceeding

further under the writ of *fi. fa.* It is alleged that he opposed this application by request of Mr. *McDiarmid.* Here I have a direct conflict of evidence; the sheriff asserts and Mr. *McDiarmid* denies the giving of such instructions. I am unable to say that the onus resting on the plaintiff to prove affirmatively this part of his case has been satisfied.

In the result the action must be dismissed.

The appeal was argued at Victoria on the 25th of June, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

H. W. R. Moore, for appellant (plaintiff): If the sheriff does his duty and acts legally he is entitled to be paid, even in the case of the execution creditors not profiting by it: see *Stanton* v. *Suliard* (1599), 1 Cro. Eliz. 654. As to the liability of the execution creditor to the sheriff, see *Goodman* v. *Blake* (1887), 19 Q.B.D. 77; *Smith* v. *Darlow* (1884), 26 Ch. D. 605. Even when the sheriff is unsuccessful his costs must be paid: *Alchin* v. *Wells* (1793), 5 Term Rep. 470; *Mortimore* v. *Cragg* (1878), 3 C.P.D. 216 at p. 219. The Court will presume that it was the pressure from the sheriff's seizure under the writ that brought about the $3,000 payment by the execution debtor to the execution creditor: *In re Thomas* (1899), 1 Q.B. 460; *Miles* v. *Harris* (1862), 12 C.B.N.S. 550. Argument

As to the effect of the winding up, when a writ and judgment are set aside for irregularity, and moneys have to be paid back, the sheriff is nevertheless entitled to his poundage: see *Rawstorne* v. *Wilkinson* (1815), 4 M. & S. 256. In this case neither the execution creditors nor the sheriff knew there was a winding-up order.

Maclean, K.C., for respondent (defendant), not called upon.

MACDONALD, C.J.A.: I think the appeal should be dismissed. I am quite satisfied, however unfortunate it may be to the sheriff, that we cannot interfere with the order made in the Court below, which order, I think, was right. MACDONALD, C.J.A.

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IRVING, J.A.: I agree, and I only add this, that I think the sheriff ought to get his instructions in writing instead of over the telephone, and so prevent these unhappy differences in memory.

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MARTIN, J.A.: I also take the view that, under the operation of the Winding-up Act, it is impossible for the sheriff to get costs or poundage on these goods, as that Act prevented them from being seized at all; they are of a prohibited class. The question is: How can the sheriff get poundage on goods when it is not possible to levy? So as to avoid any misapprehension, my remarks are directed only to this case, and in taking the view that no special instructions were given; if they had been, the result might have been different.

GALLIHER, J.A.

GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree. I merely add that fees go to a sheriff only when acting in accordance with the law—unless the execution creditor steps in and adopts the illegal act of the sheriff, which would undoubtedly then make the execution creditor liable. Here the learned judge has found to the contrary, and I see no reason for disturbing this finding.

Appeal dismissed.

Solicitor for appellant: *H. W. R. Moore.*
Solicitors for respondent: *Elliott, Maclean & Shandley.*

THOMPSON v. COLUMBIA COAST MISSION *ET AL.*

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THOMPSON v. COLUMBIA COAST MISSION

Negligence — Medical treatment in hospital under contract — Physician employed by hospital—Negligence of—Finding of jury—Liability of hospital and of physician.

While employed as a labourer in a sawmill the plaintiff made a monthly payment of $1 to a hospital in order to secure treatment and medical attendance in the event of illness. Under this arrangement he entered the hospital and was treated by the superintendent, Dr. Tidey, who was the resident physician and an employee of the hospital, and subject to dismissal. He was treated for rheumatism in the shoulder, and, not improving, was sent to another hospital, where it was found he had a dislocated shoulder. He brought action for damages, alleging negligence against both the hospital and the superintendent, basing the action on the contract. At the trial the jury found negligence on the part of the superintendent, assessing the damages at $1,000, and the learned trial judge directed that judgment be entered against both defendants.

Held, on appeal, that the judgment against the defendant Tidey be affirmed, but that the appeal of the Columbia Coast Mission be allowed, as their legal obligation, which they discharged, extended only to providing reasonably skilled and competent medical attendance for the patient.

APPEAL from a decision of MACDONALD, J. and the verdict of a jury in an action tried at Vancouver on the 4th of December, 1913, for negligence in the treatment of the plaintiff as a patient in the hospital of the defendant the Columbia Coast Mission, by the defendant Tidey, the superintendent. The facts are set out in the head-note and reasons for judgment. Statement

Woodworth, for plaintiff.
Kitto, for the defendant Mission.
Martin, K.C., for defendant Tidey.

5th January, 1914.

MACDONALD, J.: Plaintiff was in the employ of the Hastings Sawmill Company at Rock Bay, B.C., and as such employee for a considerable period paid a monthly fee of one dollar to the defendant Columbia Coast Mission in order to MACDONALD, J.

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secure hospital treatment in the event of his illness. In the month of November, 1912, the plaintiff went to such hospital for treatment and the defendant Tidey, as superintendent in charge of the hospital, diagnosed his complaint as rheumatism in the shoulder and treated him accordingly. Subsequently plaintiff, not improving in health, entered the Vancouver General Hospital and it was found he was suffering from a dislocated shoulder; but that on account of his advanced age and the length of time since the accident it would be dangerous for him to undergo an operation. He thus remained seriously injured. Action was brought for negligence against the defendant Columbia Coast Mission and also the superintendent of the hospital. At the trial the jury found negligence on the part of defendant Tidey and assessed damages at $1,000. The Columbia Coast Mission contend that this does not render them liable and seek to escape liability for the negligence of their superintendent on the strength of the authorities referred to in Halsbury's Laws of England, Vol. 20, p. 334. Counsel for this defendant expressly declined to contend that his clients had any special privilege or escape from liability on the ground that it was a public body or charitable institution. He took the position that the matter was governed by contract and that the authorities referred to were binding on the facts of this case. He shortly put his position, that workmen have to run the risk that the physician (if competent) may make a mistake and the hospital ought not to be held liable for such neglect. The cases specially relied upon by the defendant are *Hillyer* v. *Governors of St. Bartholomew's Hospital* (1909), 2 K.B. 820, and *Evans* v. *Liverpool Corporation* (1906), 1 K.B. 160. These decisions on first consideration would appear to support defendant's contention but the manner in which hospitals are conducted in England and the circumstances surrounding these cases, to my mind, distinguish them from the present case. It is to be noted that in *Hillyer* v. *Governors of St. Bartholomew's Hospital, supra,* examination of the plaintiff was undertaken by the hospital gratuitously and conducted by a consulting surgeon attached to the hospital, without charge. In *Evans* v. *Liverpool Corporation, supra,* action was brought not as arising

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under a contract for services, but through the alleged neglect of a visiting physician who discharged an inmate from the hospital while still in an infectious condition and thus communicated disease to his father the plaintiff.

Farwell, L.J., in the *Hillyer* case, at p. 825, states:

"It is now settled that a public body is liable for the negligence of its servants in the same way as private individuals would be liable under similar circumstances, notwithstanding that it is acting in the performance of public duties, like a local board of health, or of eleemosynary and charitable functions, like a public hospital."

He also discusses the question as to whether the persons actually guilty of the negligence were the servants of the hospital so as to create responsibility, and, in otherwise deciding, refers with approval to the judgment of the Chief Justice in *Glavin* v. *Rhode Island Hospital* (1879), 34 Am. Rep. 675 at p. 679. Reference to American and English Encyclopædia of Law, Vol. 15, p. 763, shews that the decision in this case must have been in favour of the plaintiff, as the Legislature of Rhode Island subsequently passed an Act exempting hospitals incorporated by the Legislature, which were sustained by charitable contributions or endowments, from liability for neglect on the part of its physicians and surgeons in the care or treatment of patients.

It is admitted that the action of the plaintiff herein is based on contract, still that the statement of Farwell, L.J., in the *Hillyer* case, at p. 826, that the only duty undertaken by the defendants is to use due care and skill in selecting their medical staff, relieved the defendant from liability. To appreciate the application of this citation, the quotation from *Glavin* v. *Rhode Island Hospital, supra,* which it follows, should be considered. There it was pointed out that the relation of master and servant would not under a suppositious case be established between a party, out of charity, calling in a physician to attend his sick neighbour, and such physician.

MACDONALD, J.

"So there is no such relation [of master and servant] between the corporation and the physicians and surgeons who give their services at the hospital. It is true the corporation has power to dismiss them, but it has this power not because they are its servants, but because of its control of the hospital where their services are rendered."

A comparison of the facts referred to in that case with those

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pertaining to the present action shews a wide difference. Defendant Tidey was the servant of his co-defendant and subject to dismissal. The plaintiff in common with other workmen was required each month to pay one dollar to the hospital authorities. He surely had a right to expect, in the event of sickness, reasonable and proper care and treatment in return for his payments. Carried to its logical conclusion, if the contention of the defendant, the Columbia Coast Mission, be correct, it would mean that carelessness on the part of competent physicians might not only incur no liability upon the hospital, but it would apply to nurses in attendance and other matters pertaining to treatment of the patient. Plaintiff differed from patients in England, who might make a choice of the institution where they would be treated, as he must either apply for treatment to the Rock Bay hospital or forfeit any benefit from the moneys already paid for that purpose. The commendable practice of monthly payments for hospital and medical treatment is general throughout the Province, and it is unreasonable to suppose that in the event of want of care in such medical attendance the workman can only seek redress from the careless physician who may not be financially responsible and concerning whose appointment or dismissal they have no voice. In conclusion, I feel that the circumstances under which this plaintiff was treated by the defendant, Columbia Mission, differed so materially from the facts in the cases relied upon that, in my opinion, neither of the defendants should be relieved from liability.

MACDONALD, J.

There will be judgment accordingly for the plaintiff with costs.

The appeal was argued at Vancouver on the 14th and 15th of April, 1914, before MACDONALD, C.J.A., IRVING, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Sir C. H. Tupper, K.C., for appellants (defendants): As to the defendant Tidey, there is no evidence of negligence against him, and as to the Columbia Coast Mission, we say they discharged their whole duty in using due care in obtaining a proper and competent man to do the work; their duty is an implied

contract that they use due diligence in getting a competent man; they do not guarantee that he will not make mistakes. The facts are the plaintiff was 69 years old, he was a cripple and had a rupture. He was throwing gravel on a car when he suddenly dropped his spade and complained of a sharp pain in his shoulder. The doctor diagnosed rheumatism, and later, under an X-ray, he was found to have a dislocated shoulder. There are cases where a rheumatic condition will produce dislocation. We say the jury were misdirected, and the class of evidence that should be allowed in in such a case is discussed in the following authorities: *Seare* v. *Prentice* (1807), 8 East 348; 103 E.R. 376; *Purves* v. *Landell* (1845), 12 Cl. & F. 91; *Lanphier* v. *Phipos* (1838), 8 Car. & P. 475; *Hampton* v. *Macadam* (1912), 7 D.L.R. 880. The cases shew that what is required of a practitioner is a reasonable degree of ordinary care and skill: see *James* v. *Crockett* (1898), 34 N.B. 540; *Rich et Uxor* v. *Pierpont* (1862), 3 F. & F. 35; *Stamper* v. *Rhindress et al.* (1906), 41 N.S. 45. The mere failure to find a dislocation is not sufficient to find want of care. The point is: Was he guilty of such gross lack of skill that he was negligent? As to the hospital's liability on the ground of master and servant, see Halsbury's Laws of England, Vol. 21, p. 369, note (*f*). The old rule was that if there was a fee paid there was a liability, but if not, there was no liability. That rule is now exploded: see *Hillyer* v. *Governors of St. Bartholomew's Hospital* (1909), 2 K.B. 820; 78 L.J., K.B. 958; Halsbury's Laws of England, Vol. 20, p. 334, par. 818; *Wells* v. *Ferry-Baker Lumber Co.* (1910), 57 Wash. 658; 107 Pac. 869; *Evans* v. *Liverpool Corporation* (1905), 74 L.J., K.B. 742; (1906), 1 K.B. 160. The doctor is a professional man employed by the hospital; he is in no way under the direction or orders of the hospital, who is not responsible for his negligence, assuming he is guilty of negligence: see *Glavin* v. *Rhode Island Hospital* (1879), 34 Am. Rep. 675 at p. 690; *Foote* v. *Greenock Hospital Directors* (1912), S.C. 69; *Foot* v. *Shaw* (1911), 49 Sc. L.R. 39; *Smith* v. *Martin and Kingston-upon-Hull Corporation* (1911), 2 K.B. 775 at pp. 781 and 784.

Argument

Woodworth, for respondent (plaintiff): The evidence shews

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this man never suggested he had rheumatism. The doctor did not exercise that care he should have done, and the jury found negligence: see Beven on Negligence, 3rd Ed., 1162. As to the hospital, the liability in this case is the same as any other in the relation of master and servant. Doctor Tidey was not a mere appointee; he was an employee of the hospital, and the hospital was, therefore, liable for his negligence: see *The Mersey Docks Trustees* v. *Gibbs* (1866), L.R. 1 H.L. 93 at pp. 110, 122, 124; *Donaldson* v. *The Commissioners of the General Public Hospital in St. John* (1890), 30 N.B. 279 at p. 298. *Evans* v. *Liverpool Corporation* does not apply, as in that case the doctor was not an employee, there being a fixed rule that the patient should be under the doctor absolutely, and it was a clear case of charity which still, at times, does not relieve them of liability. In the case at bar there is an implied contract that the hospital shall be liable for hospital treatment in their contract to supply hospital accommodation, nurses and medical treatment. The *Hillyer* case can be distinguished for substantially the same reasons.

Argument

Tupper, in reply.

Cur. adv. vult.

2nd June, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The essential facts are that the plaintiff was an employee of a sawmill company which deducted $1 a month from the wages of their employees, including the plaintiff, and paid the sums so deducted to the defendant, the Mission, which conducted a hospital at Rock Bay, on the understanding that the hospital was to give such employees hospital attendance, and medical and surgical treatment as they might require it. There was no written contract between the parties, and the only evidence, other than what I have just stated, bearing upon the obligation of the Mission towards the plaintiff was brought out by the plaintiff's counsel on examination for discovery of the Mission's superintendent, and is to the effect that the purpose of the Mission was to give hospital aid to the loggers and others in that remote region; that the dollar a month above referred to partially compensated the

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Mission for the services given; that the resident physician employed by the Mission was the defendant Dr. Tidey, and that it was his duty to professionally treat the patients.

The jury found that Dr. Tidey had been negligent in the treatment of the plaintiff, and that injury resulted therefrom, and awarded him $1,000 damages. On this verdict judgment was entered against both defendants. Both defendants appealed, and their counsel contended that if the finding of negligence is sustainable, then the defendant Tidey alone is responsible in damages; that the Mission was not, on the facts of this case, liable in damages for his negligent treatment of the plaintiff.

With respect to Dr. Tidey, I am unable to say that the evidence does not support the verdict. It was conceded by his counsel that if the verdict of negligence must stand, then the judgment was properly entered against him.

There remains then only the question of the responsibility of the Mission for the negligence of its medical officer, where the negligence occurred in the discharge of his professional duty. There is no finding, and no evidence that Dr. Tidey was not a competent surgeon. Indeed, it is not alleged in the statement of claim that he was not competent, and his general competency was not made an issue at the trial, nor was the sufficiency of the hospital equipment and appliances disputed.

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The case, then, narrows down to one of law, and if not distinguishable on the facts, is concluded in the Mission's favour by *Evans* v. *Liverpool Corporation* (1906), 1 K.B. 160, approved by the Court of Appeal in *Hillyer* v. *Governors of St. Bartholomew's Hospital* (1909), 2 K.B. 820, and by the decision in the latter case itself. It was practically conceded by counsel that the Mission could claim no immunity from liability merely because its objects were charitable or partially so. In any case it could claim no greater immunity than was claimed by and denied the defendant in *The Mersey Docks Trustees* v. *Gibbs* (1866), L.R. 1 H.L. 93.

It was contended that this action being based on contract, the negligence of the physician was a breach of the contract, but the *Hillyer* case was also based on contract—the implied contract to use reasonable care and skill which arises by the accept-

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ance by the hospital of a patient for treatment. The circumstance that the plaintiff in this case paid for his admission to the hospital, while in the *Hillyer* case the plaintiff was a charity patient, does not alter the hospital's obligation: *Shiells* v. *Blackburne* (1789), 1 H. Bl. 158. Indeed, in the *Hillyer* case, the circumstance that the plaintiff was a charity patient does not appear to have in any way influenced the decision. The *ratio decidendi* in that case is that the contract to be implied was that the defendant should provide proper hospital facilities, and procure for him the services of a competent and careful surgeon; that a professional man cannot in the performance of a professional service be the servant, in the general legal sense of that term, of anyone, certainly not of a corporation or of a non-professional employer, because, in the exercise of his professional skill and care, he could not properly be subject to the control of a master, and hence, when a patient enters a hospital, whether as a paying patient or not, the hospital must not be negligent in those matters which they control, but as to their professional employees, they must be deemed to have performed their duty to the patient when they have taken care to select and provide a competent medical man to treat him, and that the ordinary rules of law as to the liability of a master for the negligence of a servant do not extend to professional employees exercising professional skill and care.

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The contrary view of the Mission's obligation is very succinctly stated by Potter, J. in *Glavin* v. *Rhode Island Hospital* (1879), 34 Am. Rep. 675 at p. 690, in these words:

> "The only safe ground, therefore, is to hold that the corporation is itself present, acting in and through its officer selected for the particular purpose, and is therefore liable to the same extent he would be himself."

It is true, as the learned trial judge supposed, that the judgment in that case was in favour of the plaintiff, but it will be found on a perusal of the report, to which the learned judge appears not to have had access, that that conclusion was arrived at by the majority of the judges, not because they thought the hospital would be responsible for the negligence of a competent surgeon, but because the negligence was that of a surgical interne, or house pupil, who himself treated the patient instead

of calling in a surgeon, as it was his duty to do. He was not a competent person to perform that operation, and moreover, was negligent of his ministerial duty to call in a surgeon. Had the unskilful operation been performed by a surgeon selected with due regard to his qualifications and devotion to duty, the reasons in that case shew that judgment would have been given for the defendant. *Glavin* v. *Rhode Island Hospital, supra,* was referred to with approval in *Hillyer* v. *Governors of St. Bartholomew's Hospital, supra.* It supports the respondent's contention and is opposed to the proposition of law stated by Potter, J., who differed from the majority of the judges on that point.

I am not, with great respect, able to follow the learned judge when he says that "plaintiff differed from patients in England, who might make a choice of the institution where they would be treated." It is part of the plaintiff's case that he contracted with the Mission for the treatment which he went there to receive, impliedly, of course, through the agency of his employer. He must be taken to have made his choice, if not, then his position is not different from that of the plaintiff in *Evans* v. *Liverpool Corporation, supra,* where the father had no choice but to submit to his son's removal to the isolation hospital, and where, by law, he might have been called upon to pay fees for his treatment. Nor is the learned judge quite correct in saying that the doctrine of the English cases, carried to its logical conclusion, would exempt hospitals from liability for the negligence of their nurses, and negligence in other matters pertaining to the patients' treatment. The law in that regard is explained in the English case referred to above, and is also touched upon in *Glavin* v. *Rhode Island Hospital, supra,* where it is pointed out that the surgical interne had failed in his duty, a ministerial, not a professional duty, to send for a surgeon.

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I am, therefore, of the opinion that the judgment against the Mission cannot be sustained, and that as against that defendant the action should have been dismissed.

IRVING, J.A.: So far as Dr. Tidey is concerned, I think the

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verdict and judgment must stand. There was, in my opinion, evidence proper to be submitted to the jury. The charge did not deal with the case as fully as it might have done. The cause of action, so far as Dr. Tidey was concerned, was for neglect of duty. The charge should have contained a definition of negligence, but did not. I think the substitution of the word "carelessness" for the usual word "negligence" would not help the jury to understand the standard of care required in a case of this kind. But, unfortunately for Dr. Tidey, no objection was taken to the charge, and Lord Halsbury said in *Nevill* v. *Fine Art and General Insurance Company* (1897), A.C. 69 at p. 76; 66 L.J., Q.B. 195 at pp. 199-200, that:

> "Where you are complaining of non-direction of the judge or that he did not leave a question to the jury, if you had an opportunity of asking him to do it and you abstained from asking for it, no Court would ever have granted you a new trial; for the obvious reason that if you thought you had got enough, you were not allowed to stand aside and let all the expense be incurred and a new trial ordered simply because of your own neglect."

IRVING, J.A.

As to the defendant the Mission Society, the action against it is for breach of contract between the plaintiff and it, and the first question is: What is that contract?

I do not see anything in the evidence from which we can imply that there was any further duty on the part of the Mission Society to take care to select a competent man as its professional adviser. I think the learned judge should not have allowed the case to go to the jury.

GALLIHER, J.A.

GALLIHER, J.A.: I would dismiss the appeal of the defendant Tidey, as I think there was evidence upon which the jury might reasonably find negligence, and I do not think there is anything in the charge of the learned trial judge that was likely to influence the jury unfavourably to the prejudice of the defendant, or which would be likely to lead them to come to an erroneous conclusion upon wrong premises.

As to the defendant the Columbia Coast Mission, the appeal should be allowed.

The only negligence complained of is that of the physician

in charge of the hospital, in the manner in which he diagnosed the case and treated the plaintiff.

While I note the difference pointed out by the learned trial judge, I think the principle laid down in *Evans* v. *Liverpool Corporation* (1905), 74 L.J., K.B. 742, and approved of in *Hillyer* v. *Governors of St. Bartholomew's Hospital* (1909), 78 L.J., K.B. 958, is applicable here.

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McPHILLIPS, J.A.: This is an appeal from a decision of MACDONALD, J., entered against both the defendants (appellants) after trial with a jury, the jury's finding being in these terms:

"We find carelessness on the part of Dr. Tidey, and place the damages at $1,000 and costs."

The defendants appeal by separate notices of appeal, but were represented upon the hearing by the same counsel, and the appeals were heard together.

It may be rightly assumed, in my opinion, that the verdict of the jury amounts to the finding of a general verdict of negligence against the defendant Dr. Stuart Tidey. It cannot be at all assumed that there is any finding against the other defendant. The learned trial judge has, however, given judgment against both of the defendants for the amount found by the jury, *viz.*: $1,000.

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The defendant the Columbia Coast Mission is an incorporated society incorporated under the Benevolent Societies Act, R.S.B.C. 1911, Cap. 19, carried on by members of the Anglican Church, and is a charitable organization, the Bishop of Columbia being the president, and the Bishop of Westminster vice-president. The defendant Stuart Tidey was the physician at the Rock Bay Hospital, the society maintaining three hospitals on the Pacific Coast in British Columbia, the object being to give medical aid and treatment to loggers, miners and others, for which services the society receives from employers in the neighbourhood of the hospitals $1 per month for each employee, the plaintiff (respondent) being one of the class for whom $1 per month was to be received.

The plaintiff, a man of 69 years of age, an employee of the

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Hastings Mill Company, came into the hospital on the 22nd of November, 1912, stating that he had a pain in his shoulder and that he had been suffering with it for some days. There was a considerable amount of swelling, and Dr. Tidey deemed it either dislocation of the shoulder or chronic rheumatism, and finally deciding that the plaintiff was suffering from chronic rheumatism and that there was no dislocation. The advice given by the doctor was that the plaintiff should leave the wet climate of the coast and go to a warm and dry climate, the doctor saying: "As long as you remain at Rock Bay your condition will not improve, and you had better get away as quickly as you can." The plaintiff left the hospital on the 26th of November, without the knowledge of the doctor.

Dr. Tidey states that the plaintiff did not advise him that whilst shovelling gravel up above his head he felt a pain in his shoulder, and had to desist from his work owing to acute pain, although the plaintiff states he did tell him this.

Some two months after the plaintiff was in the hospital at Rock Bay he was in the city hospital at Vancouver and was seen there and examined by Dr. James L. Turnbull, who pronounced his case as one of dislocation of the shoulder, and an X-ray examination was made, which clearly confirmed the opinion as expressed by Dr. Turnbull. But, in the opinion of Dr. Turnbull, owing to adhesions that had formed consequent upon delay, and the plaintiff being an old man, the arteries and blood vessels being degenerated to some extent, it was not deemed safe to reduce the joint, as it would mean opening the joint, and it would be too severe an operation; but in the opinion of Dr. Turnbull, it would have been possible to so treat the case at the inception of the injury. In the light of the subsequent events and the X-ray examination, Dr. Tidey admitted that the case was evidently one of dislocation of the shoulder, and in answer to a question put by the Court he made answer as follows:

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"What do you think about it now? A. I think there is dislocation. I think that it is possible that it was dislocated at the time, but the signs of dislocation were obscured by the fact that it was three or four days after the injury, and he was suffering with rheumatism, and the swelling caused by the injury, to a considerable extent, had obscured the signs of dislocation."

Dr. Tidey is a member of the Royal College of Physicians and Surgeons (England) and holds the Swiss Federal diploma, and it was admitted on the hearing of the appeal that he is in good standing and upon the British Columbia Medical Register.

It is provided in the Medical Act, R.S.B.C. 1911, Cap. 155, Sec. 24, as follows:

"Those only whose names are inscribed in the book or register above mentioned shall be deemed to be qualified and licenced to practice medicine, surgery and midwifery in this Province."

The defendant the Columbia Coast Mission, in my opinion, discharged its duty when it had a duly qualified medical practitioner at its hospital.

It is questionable, in view of the provisions of the Medical Act, whether there is any responsibility in law other than the providing of a duly-qualified practitioner, as all those whose names are upon the British Columbia Medical Register must be deemed to be persons of professional competence. Possibly cases might arise where there would be responsibility if it were known that the practitioner employed in a hospital were, owing to habits or conduct, unfit to properly discharge the duties entrusted to him. But nothing of that kind arises here.

Now, at most, what was the duty which the Columbia Coast Mission owed to the plaintiff? In answering this question, it seems to me that it is hardly necessary to travel further afield than the case of *Hillyer* v. *Governors of St. Bartholomew's Hospital* (1909), 78 L.J., K.B. 958, and with all deference to the learned trial judge, I cannot agree with him in his view that that case is not a controlling one in the present case. In my opinion, nothing turns upon the consideration that the services in that case were gratuitous; a close examination of the case well portrays this. It is only necessary to quote the first portion of the judgment of Farwell, L.J. in *Hillyer* v. *Governors of St. Bartholomew's Hospital, supra,* to shew its complete applicability to the present case. At p. 960 he says:

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"It is now settled that a public body is liable for the negligence of its servants in the same way as private individuals would be liable under similar circumstances, notwithstanding that it is acting in the performance of public duties like a local board of health, or of eleemosynary and charitable functions like a public hospital."

Then, what was the position of Dr. Tidey? The contention

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strenuously advanced by the learned counsel for the plaintiff was that the relation of master and servant existed, and that Dr. Tidey was the servant of the Columbia Coast Mission. In my opinion this is clearly untenable. The Columbia Coast Mission could only employ one who was upon the British Columbia Medical Register as its house surgeon, and, as previously stated, I question whether, in view of the statute law existing with us, there is any responsibility such as is set forth in the judgment of Kennedy, L.J. in *Hillyer* v. *Governors of St. Bartholomew's Hospital, supra,* where, at p. 963, he said:

> "The governors of a public hospital, by their admission of the patient to enjoy in the hospital the gratuitous benefit of its care, do, I think, undertake that the patient whilst there shall be treated only by experts—whether surgeons, physicians, or nurses—of whose professional competence the governors have taken reasonable care to assure themselves."

It must be deemed sufficient in this Province to employ as a house surgeon one who is in good standing upon the British Columbia Medical Register, as such a person has "professional competence" by virtue of the statute law.

Reverting to the question of master and servant, it is clear that Dr. Tidey was not the servant of the Columbia Coast Mission when other portions of the judgment of Farwell, L.J. in *Hillyer* v. *Governors of St. Bartholomew's Hospital, supra,* are read: see pp. 961 and 962; and also the remarks of Kennedy, L.J. at p. 963.

MCPHILLIPS, J.A.

In the present case there is no evidence whatever of a breach of duty, even if the duty of using reasonable care in selecting the house surgeon was upon the defendant the Columbia Coast Mission. Dr. Tidey, being in good standing upon the British Columbia Medical Register, must be considered competent, and further, the Columbia Coast Mission did take reasonable care to assure themselves of his standing and competency. This, the evidence makes amply clear.

That the plaintiff was entitled to be treated at the hospital of the Columbia Coast Mission, and that $1 per month from his wages went to that institution for hospital treatment, in my opinion in no way affects the question of liability. That express point came up for consideration in *Foote* v. *Greenock Hospital Directors* (1912), S.C. 69, where it was held—

"Apart from special contract the managers of a public hospital are not responsible to the patients whom they receive (whether paying or non-paying) for unskilful or negligent medical treatment, provided they have exercised due care in the selection of a competent staff. *Hillyer* v. *St. Bartholomew's Hospital Governors* (78 L.J., K.B. 958; (1909), 2 K.B. 820) followed."

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In the present case there is no evidence of any special contract which would establish any legal responsibility for the negligence of the surgeon.

It follows that, in my opinion, the appeal of the defendant the Columbia Coast Mission must be allowed, and the action as against it dismissed in the Court below, with costs here and below.

With respect to the appeal of the defendant Dr. Tidey, I am by no means clearly satisfied in my mind that there was negligence, but, notwithstanding the able argument of counsel for the appellant, and his careful analysis of the evidence, I feel constrained to say that there is, in the circumstances of the case, some evidence which, viewed, makes it probable that there was negligence upon the part of the defendant Dr. Tidey in the, perhaps, too cursory examination made of the plaintiff's shoulder upon the facts as shewn. But in coming to this conclusion, I do so with considerable misgiving; yet, can it be successfully said that there was not some fit and proper evidence to be submitted to a jury, and being submitted, and the jury having found a verdict of negligence against the defendant Dr. Tidey, it was right not to interfere with their verdict? It therefore follows that, in my opinion, the appeal of the defendant Dr. Tidey should be dismissed, and the judgment of the learned trial judge to this extent is approved.

MCPHILLIPS, J.A.

Appeal of the Coast Mission allowed and of defendant Tidey dismissed.

Solicitors for appellants: *Tupper, Kitto & Wightman.*
Solicitors for respondent: *Woodworth & Fisher.*

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AIREY v. EMPIRE STEVEDORING CO.

AIREY v. EMPIRE STEVEDORING COMPANY, LIMITED.

Master and servant—Injury to servant—Negligence—Statutory and common-law liability—Statute not pleaded—Mistrial—New trial—Employers' Liability Act, R.S.B.C. 1911, Cap. 74.

In an action for damages under the common law and under the Employers' Liability Act, in which the question of the statutory liability was not properly raised on the pleadings, but was brought up during the proceedings, and the trial judge, without the formal allowance of an amendment, gave the case to the jury on both branches of the case, upon which he gave them specific directions, and subsequently set aside the verdict given under the statute on the ground that the verdict rested on an issue which had not been pleaded:—

Held, on appeal (IRVING, J.A. dissenting), that there was a mistrial, and that the case be sent back for a new trial under the Act.

Per IRVING, J.A.: The Employers' Liability Act having been invoked by the plaintiff, and such having been assumed at the trial, therefore the plaintiff was entitled to hold the verdict in his favour under the Act.

APPEAL by plaintiff from a decision of MURPHY, J. in an action tried by him with a jury at Vancouver on the 12th and 13th of March, 1914. The plaintiff claimed damages at common law and under the Employers' Liability Act for injuries sustained while working for the defendant Company as a stevedore, owing, as he claimed, to the defendant's negligence. He, with other workmen, had been ordered to take to pieces, and move to another position, a temporary skidway which had been constructed for the purpose of carrying freight from a wharf onto a certain ship. On top of the skidway were rails, attached to timbers by spikes. While taking out the spikes one of the rails suddenly became free, and falling, struck the plaintiff and broke his left leg. It appeared from the evidence that the foreman provided the workmen with peevies to do this work, when the defendant Company had in stock at Vancouver proper tools in the way of clutch bars, which were at the disposal of the foreman, but with which he neglected to supply the men on this occa-

Statement

sion. It was admitted that the work could not be done with peevies without danger to the workmen. On the trial, it appearing to counsel for the plaintiff that he had not properly pleaded the Employers' Liability Act, he moved to amend the statement of claim and was given an opportunity to do so, but in order to avoid a possible postponement of the trial he did not amend. There was a misunderstanding as to whether the matter was left open, but the result was that the learned judge submitted the case to the jury both at common law and under the Employers' Liability Act. The jury found against the plaintiff on the common-law branch, but in his favour under the Act. The learned judge then took the case under advisement, and on the 25th of March dismissed the action, on the ground that the verdict rested on an issue which was not pleaded. The plaintiff appealed.

Statement

C. W. Craig, for plaintiff.

S. S. Taylor, K.C., for defendant.

25th March, 1914.

MURPHY, J.: In my opinion the verdict rests on an issue not raised in the pleadings. It is true that one construction of a paragraph in the statement of defence might be utilized to found this issue upon, but I consider the paragraph is open to a different meaning. Whilst the Court of Appeal in *Cook* v. *Newport Timber Co.* (1913), 18 B.C. 624, did express the opinion that an issue not specifically raised by the statement of claim might be tried if raised by the statement of defence, some of the learned judges animadverted strongly on the carelessness of pleading too prevalent in our Courts. I think, also, the Court of Appeal in that case came to the conclusion that the issue was fairly fought out at the trial. That counsel in this case thought the pleadings defective is shewn by his applying for an amendment, but he did not press for one to the extent of having the question of terms raised. From the outset of the trial, counsel for the defence objected to the particular issue on which the verdict rests being raised. In my opinion that issue was not fully tried out. It was not made the subject of discovery examination, and the defendant clearly might possibly have had witnesses to offset the evidence for the plaintiff if the

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plea were spread on the record. It is true that evidence justifying the verdict was admitted without objection, but it is quite true that such evidence was relevant to the common-law issue which was on the record. Possibly counsel ought to have made it clear that he objected to its admission except on the issue to which it was relevant, but his not having done so does not, it seems to me, prevent him from taking his present position, particularly as it is merely a re-assertion of a position taken at the opening and persisted in throughout the trial. I must refuse to act on the verdict and enter a judgment for the defendant. If it is desired to bring a fresh action under the Employers' Liability Act, and if it is necessary to obtain any declaration that this judgment should be without prejudice to the right to bring such action, I will hear counsel thereon. This action is dismissed, with costs, leave being reserved to move as aforesaid if plaintiff is so advised.

The appeal was argued at Vancouver on the 22nd of April, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

C. W. Craig, for appellant (plaintiff): The jury found in our favour under the Employers' Liability Act. The plaintiff was employed, with others, in prying up rails, and they were not provided with proper tools for that purpose. At common law they must provide a safe place to work and proper tools and adequate appliances: see *Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326; *Grant* v. *Acadia Coal Co.* (1902), 32 S.C.R. 427; *Longmore* v. *J. D. McArthur Co.* (1910), 43 S.C.R. 640; *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420; *Canada Woollen Mills* v. *Traplin* (1904), 35 S.C.R. 424; *Brooks, Scanlon, O'Brien Co.* v. *Fakkema* (1911), 44 S.C.R. 412; *Hastings* v. *Le Roi No. 2* (1903), 34 S.C.R. 177; Beven on Negligence, 3rd Ed., 611; *Waugh-Milburn Construction Co.* v. *Slater* (1913), 48 S.C.R. 609. In this case the defendant Company had proper tools in a place in Vancouver where the foreman (acknowledged to be competent) could go and get them, but he did not do so, and as a conse-

quence they used wrong tools which caused the injury. An amendment to the statement of claim was applied for, but refused by the trial judge.

S. S. Taylor, K.C., for respondent (defendant): There is no merit in the case at all. They were provided with peevies, and these were the proper tools to work with. The jury said we had a proper system for getting tools to the job. *Wilson* v. *Merry* is binding on every Court: *Searle* v. *Lindsay* (1861), 11 C.B.N.S. 428. On the question of the Employers' Liability Act and the right to amend the pleadings, see *Cook* v. *Newport Timber Co.* (1913), 18 B.C. 624; *Scott* v. *Fernie* (1904), 11 B.C. 91; *Johnson* v. *Johnson* (1913), 18 B.C. 563; *Clough* v. *London and North Western Railway Co.* (1871), L.R. 7 Ex. 26 at p. 30.

Argument

Craig, in reply: The important point is that the trial judge did not consider it proper to make the amendment at the late stage at which the application was made.

Cur. adv. vult.

2nd June, 1914.

MACDONALD, C.J.A.: The jury found a verdict for the plaintiff under the Employers' Liability Act, but the learned judge dismissed the action after verdict, on the ground that it could not be sustained on the pleadings, which, in his opinion, did not make a claim under the Act. Disregard by the plaintiff of rule 229, which declares that every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, has brought about the unfortunate result that while the plaintiff was, in the opinion of the jury, entitled to $1,750 by way of damages for his injury, he must lose that sum because his claim was not properly presented to the Court. His counsel applied for and was given the opportunity of amending the statement of claim at the opening of the trial, but, apparently for the purpose of avoiding the possible postponement of the trial, and the payment of the costs of the postponement to enable the other side to meet the case set up in the amended pleadings, he did not take advantage of the leave given. It is to be regretted that the question of amend-

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ment was not then definitely settled and an amendment in writing then made. Instead of this, the question appears to have been to a certain extent left open, and a consequent misunderstanding arose between counsel and the learned judge, which resulted in the learned judge submitting the case to the jury not only at common law but under the Employers' Liability Act, and after the jury had found against the plaintiff on the common-law branch and in his favour under the Act, the learned judge thought that it would be unjust, in the state of the pleadings and because of the misunderstanding, to enter up judgment upon that verdict, and, hence, dismissed the action. In my opinion there has been a mistrial. The result has been brought about largely by the fault of plaintiff's counsel, though not entirely.

MACDONALD, C.J.A.

I would, therefore, send this case back for a new trial, but only under the Employers' Liability Act. On the common-law branch of the case I would confirm the verdict of the jury. The appellant should have no costs of this appeal, because it was largely his fault that an appeal became necessary. He should also pay to the respondent all the costs of the former trial. All such to be costs to the respondent, in any event, in the cause.

IRVING, J.A.

IRVING, J.A.: I do not think the plaintiff has established a defective system by shewing that the foreman neglected to bring to the scene of operations the tools which had been supplied to him by the defendant.

As to the question whether the Employers' Liability Act was invoked by the plaintiff, I think it was, and that at the trial it was assumed that it had been invoked. I would allow the appeal on that ground. I do not see that there was any misdirection.

MARTIN, J.A.

MARTIN, J.A.: As regards the common-law branch of this action the appeal should, I think, be dismissed, because the following instruction the learned trial judge gave to the jury on the question of defective system was correct in the circumstances of the case:

"Now, it has been contended that that (the common-law duty) goes so far as to require a company, operating as this company does in a great

many different points, to see that it has the tools that are necessary, even down to the small tools of that nature (*i.e.*, claw bars) actually on the job, and that that duty cannot be delegated to anyone else. In my opinion, that is not the law. If you find that there was a defective system in the distribution of their tools then there would be a common law action against them; but if they have a central depot, and if they have a proper distribution of their tools, then because a competent man forgot or overlooked in some way the getting of those tools from the central depot for instance, there is no action against them in common law."

Then, as to the claim under the Employers' Liability Act, there should, in my opinion, be a new trial, because what took place amounts to a mistrial, which in Wharton's Law Lexicon and Mozeley & White's Law Dictionary is succinctly defined as an "erroneous" or "false and erroneous trial," examples of which, in civil cases, are cited in Holmested & Langton's Judicature Act, 3rd Ed., p. 1024, and in criminal cases I need only cite *Reg.* v. *Yeadon* (1861), 31 L.J., M.C. 70; and *Rex* v. *Fowler* (1821), 4 B. & Ald. 273, wherein at p. 276 it is said that "the first trial is to be considered a mistrial, and therefore a nullity." In this Court on the 1st of May, 1913, we held that there had been a mistrial in the case of *Hvynczak* v. *B.C. Electric Ry. Co.*, because it had fallen into inextricable confusion, and sent it back for a new trial. I note that in *The Germ Milling Company* v. *Robinson* (1886), 3 T.L.R. 71 at p. 72, the Court of Appeal held that in a special case, and upon great caution, it "had power to grant a new trial when something had been done inadvertently or by mistake, or where there had been a mere slip, even at the instance of the defeated party." In the present case I think the trial that was had must be held to be a "mistake," on the ground that no issue was really joined between the parties on the question of the Employers' Liability Act: see American and English Encyclopædia of Law, 2nd Ed., Vol. 20, p. 833. This question, which clearly was not originally raised upon the pleadings by the plaintiff, yet was permitted by the learned trial judge to crop up during the proceedings before him, and though it does not appear from the appeal book that he actually allowed in terms any amendment, yet, in spite of objection, he gave the case to the jury on that branch, and specifically directed them upon it, which he could not properly have done unless he considered that

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what had happened in the course of the trial was tantamount to an amendment having been granted, or that the case had been fought out on that question: *Scott* v. *Fernie* (1904), 11 B.C. 91. And his subsequent action in deciding that after all, as a matter of law, there had in any event been no case to go to the jury and, consequently, in setting aside its verdict that had been given on his direction in that respect, points further to the unusual uncertainty in these unusual proceedings. The truth is that the trial drifted into confusion because the plaintiff was neither definitely required to put in a written amendment if he desired to amend, nor was he restricted to the case that was open to him on his statement of claim, as he ought to have been in default of amendment. And I also feel that the uncertainty was contributed to from a third quarter, the defendant's (but in a much less degree), by not making its position at all times as clear as it might have been, *e.g.*, in respect to the admission of the notice of injury, though I recognize that it was placed in a somewhat difficult position. It is because of this common participation in this confusion and uncertainty that I find it impossible to say with necessary legal exactitude what the true state of affairs was when the case went to the jury, and so I can only come to the conclusion that there has been "a false and erroneous trial," otherwise judgment should be given in favour of the defendant. To order a new trial because of a mistrial, properly so-called, is, fortunately, a very unusual thing, in this Province at least, and I can only recall two other instances in civil cases in over fifteen years of judicial experience. But it is the only course open to us in the circumstances, otherwise justice would be frustrated. It is not easy to make a wholly satisfactory disposition of costs depending upon such unusual circumstances. In the present case the first trial —the mistrial—has not been abortive, because the defendant has been able to free itself from any liability at common law, which is a substantial benefit, and for that reason I think the plaintiff, who was the original author of the difficulty, should pay the defendant the costs of the mistrial in any event. There also should not be any costs of this appeal, which must as a matter of procedure be nominally allowed in part, and a new trial

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ordered as to the defendant's liability under the Employers' Liability Act.

GALLIHER and MCPHILLIPS, JJ.A. agreed with MACDONALD, C.J.A.

Appeal allowed and new trial ordered, Irving, J.A. dissenting.

Solicitors for appellant: *Martin, Craig, Parkes & Anderson.*
Solicitors for respondent: *Taylor, Harvey, Grant, Stockton & Smith.*

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CREVELLING v. CANADIAN BRIDGE COMPANY.

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Master and servant—Injury to servant—Negligence—Common-law liability—Liability under Employers' Liability Act, R.S.B.C. 1911, Cap. 74, Sec. 3, Subsec. (5)—Failure of fellow servant to give warning—New trial.

The plaintiff brought action at common law, and in the alternative under the Employers' Liability Act, to recover damages for injuries sustained by him while working for the defendant Company on a bridge in course of construction. Rails were laid on the bridge and a "traveller," worked by steam, travelled backward and forward on the rails. The engineer had orders to blow the whistle when starting to move in either direction. The plaintiff's hand was crushed on one of the rails by the "traveller," when it was making a forward movement. On this occasion the engineer had not blown the whistle before starting.

Held, that the system of warning would have been a sufficient protection if it had been carried out, and the plaintiff had no cause of action at common law.

Held, further, that the "traveller" was operated on a "railway" or "tramway" within the meaning of subsection (5) of section 3 of the Employers' Liability Act, and the defendant Company is responsible in damages to be assessed under the Act.

Held, further, that the jury having found a general verdict at common law, there must be a new trial.

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Statement

APPEAL by defendant Company from a decision of MURPHY, J. and the verdict of a jury, awarding plaintiff $9,000, in an action for damages for injuries sustained while working for the defendant Company, tried by him at Vancouver on the 10th of March, 1914. The plaintiff was working as a riveter on a steel cantilever bridge while under construction by the defendant Company. A railway or tramway, the rails of which ran onto the bridge and up to where the work was proceeding, connected the bridge with the Canadian Pacific Railway about three miles away. A machine propelled by steam, and known as a "traveller," was operated by the defendant on this railway or tramway, for placing steel cords and otherwise distributing material required on the work. The plaintiff was working on a swinging scaffold which was attached to a beam below the rails, and had to be moved from time to time. At the time of the accident the plaintiff was moving this scaffold, and in doing so placed his left hand on top of one of the rails above, when the "traveller" moved on the rails above towards the end of the bridge and ran over and crushed his hand, necessitating the amputation of three fingers and a portion of the palm of his hand. The engineer of the traveller had had instructions to blow the whistle whenever he set the traveller in motion, but neglected to do so on this occasion.

The appeal was argued at Vancouver on the 21st and 22nd of April, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

C. W. Craig, for appellant (defendant): The plaintiff was a riveter on a bridge and earned $5 a day; the verdict was excessive: *Farquharson* v. *B.C. Electric Ry. Co.* (1910), 15 B.C. 280; *Taylor* v. *B.C. Electric Ry. Co.* (1912), 16 B.C. 420. They did not find *volens,* but gave a general verdict, on which point see *McPhee* v. *Esquimalt and Nanaimo Ry. Co.* (1913), 49 S.C.R. 43; *Smith* v. *Baker & Sons* (1891), A.C. 325. Unless there is an actual agreement to accept the risk, it is a question for the jury, and they can conclude as they see fit. It is contended that there should have been a guard in front of the traveller, but that would not have prevented the accident.

S. S. Taylor, K.C., for respondent (plaintiff): Our case is based on the fact that this was an unsafe place to work. The plaintiff earned $1,300 a year, and the verdict should not be disturbed: see *Johnston* v. *Great Western Railway* (1904), 2 K.B. 250; *Watt* v. *Watt* (1905), A.C. 115 at p. 118; *Praed* v. *Graham* (1889), 24 Q.B.D. 53 at p. 55; *Phillips* v. *London and South Western Railway Co.* (1879), 5 Q.B.D. 78 at p. 85; 8 Camp. R.C. 447; *Love* v. *Fairview* (1904), 10 B.C. 330. The plaintiff's disfigurement must be considered.

Craig, in reply.

Cur. adv. vult.

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MACDONALD, C.J.A.: I do not think the plaintiff has made out a case of negligence at common law. The system under which defendant was carrying on the work provided for the protection of its employees from such an injury as the plaintiff suffered by a warning signal to be given by the engineer in charge of the car, called a "traveller," which injured the plaintiff. The plaintiff admitted that that system, if properly followed, provided a sufficient protection.

Alternatively, the plaintiff claimed under the Employers' Liability Act. He was employed in the erection of a large steel bridge over the Thompson River at Ashcroft, for the Canadian Northern Pacific Railway Company. Rails were laid upon the floor of the bridge, and the car, propelled by an engine placed on it, travelled backward and forward on these rails. It was the engineer's duty to give a signal whistle when about to move the car either way. This signal he did not give before making the forward movement which resulted in the plaintiff's injury. Was the way upon which this car was operated a tramway or railway within the meaning of subsection (5) of section 3 of said Act?

I think it was, and that the defendant cannot rely on the doctrine of common employment, and is responsible in damages to be assessed as provided in the Act.

In *Doughty* v. *Firbank* (1883), 10 Q.B.D. 358, the natural, as distinguished from the technical, meaning was given to the

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term "railway," and it was pointed out that that term was not to be confined to those railways only which are operated by railway companies; that a railway is "a way upon which trains pass by means of rails"; and in *McCord* v. *Cammell and Company* (1895), A.C. 57, Lord Halsbury thought that the term "train" was not to be narrowly construed.

Subsection (5) of our Act is wider than the corresponding English section, and under it there can, I think, be no great doubt that the "traveller" in question falls within it: see also *Cox* v. *Great Western Railway Co.* (1882), 9 Q.B.D. 106.

As the jury, in awarding $9,000 damages, must of necessity have found their verdict at common law, the case must go back for assessment of damages under the Act.

The appeal should be allowed and a new trial ordered, confined to the assessment of damages under the Act.

IRVING, J.A.: I do not think the plaintiff is entitled to a judgment at common law. Nor if he were, could I approve of the amount of the verdict. The proper direction to a jury is set out by Brett, J. (as he then was) in *Rowley* v. *London and North Western Railway Co.* (1873), L.R. 8 Ex. 221 at p. 231; 42 L.J., Ex. 153 at p. 159:

> "'They must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider, under all the circumstances, a fair compensation.'"

The jury must have ignored this rule or measured the damages by some measure which ought not to have applied: *Johnston* v. *Great Western Railway* (1904), 2 K.B. 250; 73 L.J., K.B. 568. The Court of Sessions (Scotland) has recently discussed the principle to be applied on the hearing of an application for a new trial on the ground of excessive damages in *Thomas* v. *Caledonian Rail. Co.* (1913), S.C. 804.

IRVING, J.A.

The plaintiff, in my opinion, can maintain an action under subsection (5) of section 3 of the Employers' Liability Act, and I would send the case back for a new trial. Were it open to us to do so, I would like to send the case back for an assessment of damages under that statute, without interfering with

the question of negligence, but Order XXXIX. of the English rules has not been carried into our British Columbia rules.

Whether 869a, Order LVIII., r. 5*a* applied to a case like this, where the damages are only recoverable by virtue of a statute, is doubtful, to say the least of it.

MARTIN, J.A.: This verdict at common law cannot, I think, be supported, because there was an adequate system of warning by whistling, and the plaintiff admits that the accident would have been averted if the engineer on the traveller had whistled, as he ought to have done, before moving the traveller forward on the bridge. The consequence is that there should be a new trial on the Employers' Liability Act branch of the case, as the parties will not agree on the damages thereunder.

MARTIN, J.A.

The appellant should have the costs of this appeal, and those of the former trial should abide the event of the new one.

GALLIHER, J.A. agreed that there should be a new trial.

GALLIHER, J.A.

MCPHILLIPS, J.A.: This is an appeal by the defendant Company from a decision of MURPHY, J. in a negligence action, the jury having found a general verdict for $9,000 and the learned trial judge having ordered that judgment be entered for that amount. The action was one alleging liability both at common law and under the Employers' Liability Act.

The learned judge, in his charge to the jury, fully explained that the damages under the Employers' Liability Act were limited, and I think it must be assumed that the jury, in giving damages to the extent of $9,000, found that the defendant Company was liable to the plaintiff at common law, as the maximum, as I read the evidence, following the provisions of section 8 of the Employers' Liability Act (R.S.B.C. 1911, Cap. 74), that could have been allowed under the Act would have been $1,200 a year, and $350 a year extra for overtime, in all $4,650, as being three years' wages.

MCPHILLIPS, J.A.

The plaintiff was a riveter working for the defendant Company, the work under construction being a steel bridge on the Canadian Northern Pacific Railway near Ashcroft, B.C., and on the 4th of June, 1913, whilst engaged at his work, met with the injury complained of, *viz.*: The first three fingers of his

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left hand and a portion of the palm of the hand crushed, necessitating amputation, and alleged complete incapacity for further work in his avocation as a riveter.

The injury was occasioned by a machine known as a "traveller," used for placing steel cords and other material, the bridge being of cantilever construction, the plaintiff working on a swinging scaffold attached to the top cord; and the plaintiff, at the moment of the accident, was engaged in moving the swinging scaffold and placed his hand upon one of the rails over which the "traveller" ran, and owing to the signal not having been given of the approach of the "traveller," his hand was caught and crushed. These are the facts and circumstances, as proved in the plaintiff's case.

It was strongly argued that there should have been a guard in front of the "traveller," although no satisfactory evidence, in my opinion, was given which went to prove that a guard would be effective, or that there was any well-known mechanical device which would have been of any practical use in the way of protecting a workman from injury, in the circumstances. The system in vogue, known to the plaintiff, was the giving of two whistles or blasts. The "traveller" was working along a distance of some 300 yards. The plaintiff admitted that he well knew there was no guard in front of the "traveller," and did not consider that the situation was one of danger if the warning by whistle was given, and if the whistle had been blown the plaintiff asserted he would not have met with the injury—*ie.*, the plaintiff admits that the system was a safe one if it had been adhered to.

MCPHILLIPS, J.A.

No question of any statutory duty entered into the consideration of this case.

The duty to give the warning by whistle was upon Blanchard, the engineer in charge of the "traveller," an employee of the defendant Company. Blanchard, in his evidence, states that he did give the signals by whistle when he first started up or moved the "traveller" along, but he stopped at about 100 feet from the place where the accident took place. Upon a careful consideration of the evidence, I think it can be well said that he gave no signals by whistle when he again started

up, claiming that it was not his duty to do so following upon what he called "a momentary stop."

In my opinion, the evidence establishes that Blanchard, the engineer, was a competent servant, selected by the defendant Company, to be in charge of the "traveller," and that the system of operation of the "traveller" was proper, with the requirement upon the engineer to give the signal by whistle, and that by reason of Blanchard's failure to give the signals—he being a person in the service of the defendant Company, having superintendence, and charged with the control of the "traveller"—his omission to give the signals constituted negligence imputable to the defendant Company, and that there is liability upon the defendant Company under the Employers' Liability Act. It is clear, in my opinion, that the defendant Company is in no way liable at common law, and I do not consider it necessary to analyze the evidence to demonstrate this. I would refer to *Shearer* v. *Canadian Collieries (Dunsmuir), Limited* (1914), [19 B.C. 277 at pp. 283-7]; 6 W.W.R. 469 at pp. 473-7, where I lately considered the authorities bearing upon liability at common law, and under the Employers' Liability Act. That case was similar to the present case in that the verdict of the jury was in amount greater than that which could be allowed under the Act. In that case my view was as stated so succinctly in the headnote:

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"Where, under such circumstances, it can be inferred that the jury found generally in favour of the plaintiff, upon facts reasonably sufficient to found liability under the Employers' Liability Act, it is the duty of the Court of Appeal to enter judgment for the reduced amount. (*Paquin, Limited* v. *Beauclerk* (1906), A.C. 148, referred to.)"

The majority of the Court, however, took the view that there should be a new trial.

The circumstances of this case, though, may be somewhat different, as we have the statement made to the Court, upon the argument by Mr. *Craig,* counsel for the appellant, that if the Court were of the opinion that there is liability under the Employers' Liability Act, he consented to the damages being fixed by the Court; and Mr. *Taylor,* counsel for the respondent, during the argument, never contended that the scale of wages

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could be placed higher than $1,550 per annum, which would mean damages in the sum of $4,650.

In view of *Shearer* v. *Canadian Collieries (Dunsmuir), Limited, supra,* where it was held that damages not being assessed under the Employers' Liability Act, there must be a new trial, it follows that in the present case, in default of the parties agreeing, there must be a new trial, the costs of the first trial to abide the event of the second trial, the appeal being allowed.

Appeal allowed, new trial ordered.

Solicitors for appellant: *Martin, Craig, Parkes & Anderson.*

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

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THOMPSON v. COLUMBIA COAST MISSION

THOMPSON v. THE COLUMBIA COAST MISSION *ET AL.* (No. 2).

Costs—Undertaking of counsel—Court of Appeal—Application for return of costs—Not within province of Court—Independent action.

Upon an application of a successful appellant to include in the minutes of the order for judgment a direction to return the costs of the trial paid upon counsel's undertaking to refund in case the appellant were successful:—

Held (MCPHILLIPS, J.A. dissenting), that it is not within the province of the Court to make the order.

Per MACDONALD, C.J.A.: After taxation has taken place the parties may then apply in the proper quarter to have an undertaking carried out according to its true intent and meaning.

APPLICATION by defendant, the Columbia Coast Mission (appellant), to the Court of Appeal, to include in the minutes of the order pronounced by the Court on the 2nd of June, 1914, a direction that the costs of the trial paid the respondent's

solicitors be returned, in compliance with their undertaking. The facts were that the plaintiff having been successful on the trial against both defendants, the defendant, the Columbia Coast Mission, paid their solicitors the amount of the plaintiff's taxed costs of the trial, who in turn paid the plaintiff's solicitors, receiving from them the usual undertaking that they would refund the money in the event of the appellants being successful on the appeal. The Court of Appeal allowed the appeal of the Columbia Coast Mission, but dismissed Stuart Tidey's appeal. The plaintiff set up that the enforcement of an undertaking was an independent course of action, and in any event he was entitled to set off the amount he had received against the costs payable by the defendant Tidey. Heard by MACDONALD, C.J.A., IRVING, GALLIHER and MCPHILLIPS, JJ.A. at Victoria, on the 24th of June, 1914.

Statement

Sir C. H. Tupper, K.C., for the application.
Maclean, K.C., contra.

MACDONALD, C.J.A.: I do not think we should make any order at all, but leave the parties to their rights after a taxation has taken place. They may then apply in the proper quarter to have the undertaking carried out according to its true intent and meaning. I think it would be introducing a wrong practice to have parties come to this Court after the appeal has been disposed of to ask us to make an order based upon the undertaking of counsel in respect of costs paid over to a solicitor.

MACDONALD, C.J.A.

I refuse the application.

IRVING, J.A.: The application to us is to settle the order relating to costs. I think that application ought to be acceded to, but I do not think it is a convenient practice to ask us to enforce an undertaking when we are engaged on settling the form of the order. The order, in my opinion, ought to set aside the joint judgment, and with costs here and below to the Coast Mission, and direct a new taxation against Tidey, in which taxation Tidey should be charged with the costs below, less such additional amount as was occasioned to him by the

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plaintiff unnecessarily adding the Columbia Coast Mission as a party.

I do not wish anything I say to be construed as against the right of the Columbia Coast Mission to have this money refunded on the undertaking.

GALLIHER, J.A.: I think, as the Chief Justice thinks, that now is not the time for us to decide that—that the order is settled in so far as this Court is concerned, and the parties will have their remedy when the costs are taxed. I do not express any opinion as to what the rights of the respective parties will be then.

GALLIHER, J.A.

McPHILLIPS, J.A.: This matter is one easy of solution; the order should be made: see *Davies* v. *McMillan* (1893), 3 B.C. 72, Mr. Justice WALKEM there making the order, following *Rodger* v. *The Comptoir D'Escompte de Paris* (1871), L.R. 3 P.C. 465. When the Court inadvertently makes an order without the knowledge of the true facts, it is not beyond repair. Now, in *Davies* v. *McMillan,* the Supreme Court of Canada, when it made its order as to costs, was not aware of the facts, and it is an analogous case that *Sir Charles Hibbert Tupper* has brought to our notice today. If the Supreme Court of Canada had known the facts, without a question of a doubt an order would have been made that moneys paid in respect of costs should be returned. The Supreme Court of Canada, not being acquainted with the facts, did not make the order. The order came here silent as to that. The question was how the costs could be got back. An application was made to WALKEM, J. after the order was made effective by being entered. *Rodger* v. *The Comptoir D'Escompte de Paris, supra,* was referred to, and when that case was looked at it was found that inadvertently certain facts were not brought to the notice of the Privy Council, which, if brought, would have affected the form of the order, and the Court of Hong Kong would not deal with the question, as the Privy Council had not. Upon further appeal to the Privy Council, it was held that the order should have been made, and it was the duty of all Courts to take care that no injury was done to suitors.

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Now, I hold that it is open to us to accept the facts put upon affidavit, and stated by counsel that some $423.60 have been paid under a judgment reversed by this Court, and this Court ought to order this money to be returned to the party litigant who paid the money, the Columbia Coast Mission. And as our order has not yet been issued or entered, we should make it a term of the order that any money which has been paid by the Columbia Coast Mission in respect of costs in respect of a judgment which is now set aside should be returned. I do not think any order should be made now in respect to the solicitor who received the money. If perchance, later on, the money is not returned, which I cannot at this moment apprehend, then application can be made, based upon the undertaking, to compel the solicitors to repay the amount.

MCPHILLIPS, J.A.

That is the view I have.

Application dismissed, McPhillips, J.A. dissenting.

REX v. SPRAY.

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REX v. SPRAY

Criminal law—Seduction—Under promise of marriage—Words from which a promise of marriage may be inferred.

On a charge of seduction under a promise of marriage the words, "Do you love me enough to live with me? I have enough money for two," are not capable of bearing the inference that there was a promise of marriage.

CRIMINAL APPEAL by way of case stated by GREGORY, J. The accused was found guilty at the Assizes in Vancouver on the 8th of May, 1914, on a charge of seduction under promise of marriage. The seduction was admitted, but the promise of marriage was denied, and there was no corroborative evidence

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of such promise. The alleged promise was a statement by the accused: "Do you love me enough to live with me? I have enough money for two"; to which the complainant answered "yes."

The appeal was argued at Victoria on the 8th of June, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Mellish, for the appellant.
C. G. White, for the Crown.

The judgment of the Court was delivered by

MACDONALD, C.J.A.: I think the conviction cannot stand. I do not think there is any evidence upon which a jury can say there has been a promise of marriage. This is apart altogether from the question of corroboration. There is no promise of marriage shewn. The words used are not to my mind, in the circumstances of the case, capable of bearing the inference which the jury drew from them. I would answer the question in favour of the appellant.

Judgment

Conviction quashed.

Solicitor for appellant: *A. J. B. Mellish.*
Solicitors for the Crown: *Taylor & Hulme.*

IN RE ASSESSMENT ACT AND HEINZE. (No. 2.)

MARTIN, J.A. (At Chambers)

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July 30.

IN RE ASSESSMENT ACT AND HEINZE

Practice—Appeal—Motion for special sitting in vacation—Application for leave to appeal—Privy Council—Court of Appeal Act, R.S.B.C. 1911, Cap. 51, Sec. 14.

The Court of Appeal, in the exercise of the authority which has been delegated to it by the Privy Council, to grant leave to appeal, is, strictly speaking, acting as a matter of judicial comity and assistance, and not in discharge of its statutory duty as a Canadian Court, and the power to hold such sittings is not affected by section 14 of the Court of Appeal Act, since that only applies to the hearing of appeals.

A special sitting of the Court of Appeal for a hearing of a motion for leave to appeal to the Privy Council, should only be granted by a judge upon proof to his satisfaction of urgency and of special circumstances, rendering the holding of such special sittings necessary in the interests of justice; the rule that the Court must grant leave "as of right" where the amount in dispute is £500 or upwards only applies when the Court is sitting in term.

Statement

APPLICATION heard by MARTIN, J.A. at chambers in Victoria on the 30th of July, 1914, for a special sitting of the Court of Appeal to hear a motion for leave to appeal to the Judicial Committee of the Privy Council from the judgment of the Court of Appeal.

Heisterman, for the application.
Maclean, K.C., contra.

Judgment

MARTIN, J.A.: This is an application made in vacation to me as one of the Justices of this Court (I happening to be available owing to my holding chambers this week on the day we appointed therefor, *i.e.,* Thursday in each week) to arrange with my brother judges for a special sitting of this Court to be held in vacation, on or before Monday next, which date is stated by the applicant's counsel to be the last day on which an application can be made to this Court for leave to appeal to His Majesty in Council from a final judgment of this Court (composed in this case of my brothers GALLIHER, MCPHILLIPS and myself)

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delivered on the 14th instant during vacation. It was so delivered because the Court, owing to pressure of business, and particularly of a matter of Imperial importance (I refer to the case of *Re Munshi Singh*), had to prolong its usual sittings for two weeks into vacation instead of rising on the 30th of June, at the end of the term.

Upon the application being made, counsel for the applicant very properly drew my attention to the language of section 14 of the Court of Appeal Act, under the last paragraph of which the application is made, which reads thus:

"In addition to the above sittings, the Court of Appeal may hold special sittings, either at Victoria or Vancouver, for the hearing of any appeal or appeals which might be heard at the next regular sitting at either of such places."

This, in terms, provides only for special sittings in the case of "appeals which might be heard at the next regular sitting," and the present motion is not an appeal to be heard by this Court, but a motion for leave to appeal to the Privy Council from an appeal already heard by us. I am of the opinion, however, that this section presents no real obstacle to this Court to sit, whenever it is expedient, for such purposes as the present, because, in the exercise of the authority which has been delegated to it by their Lordships of the Privy Council to grant leave to appeal, it is, strictly speaking, acting as a matter of judicial comity and assistance, and not as a Canadian Court in the ordinary and true sense. Whatever may be said as to the legal obligations imposed upon Courts of Canada before the passing of the British North America Act, it is, in my opinion at least, clear that since the delegation of Imperial authority by that Act, the Courts and judges of Canada can only be required to perform those duties which are imposed upon them by the National Parliament of Canada, or the Provincial Legislatures, as the case may be. This has, indeed, been brought out and noticed recently by their Lordships in their judgment in the Fisheries case, *Attorney-General for British Columbia* v. *Attorney-General for Canada* (1914), A.C. 153 at p. 162, wherein the Lord Chancellor said:

Judgment

"The business of the Supreme Court of Canada is to do what is laid down as its duty by the Dominion Parliament, and the duty of the

Judicial Committee, although not bound by any Canadian statute, is to give it as a Court of review such assistance as is within its power."

So, also, the Supreme Court of Canada is not bound by any Imperial statute, and applying that principle to this Court, it is our business as Federal judges, exercising jurisdiction in Feredal or Provincial Courts, as the case may be, to do what the Federal and Provincial Parliaments of Canada lay down as our duties within their respective spheres of legislation. We, for example, in addition to our ordinary duties as judges of this Court, are constituted by a recent Federal statute the Court of Appeal for the Federal Yukon Territory (Cap. 56, 2 Geo. V., Sec. 2, 1912). And by section 33 of the Judges Act, Cap. 138, R.S.C. 1906, our duties are further defined and even our private affairs restricted by various prohibitions, in a manner beneficial, doubtless, to our country.

But there is nothing that I can see in the foregoing which debars us from the pleasure of continuing to be at all times of such humble assistance, as we fortunately may, to their Lordships in the discharge of their duty "as a Court of Review," though, as I have said, in exercising that portion of the powers which they have delegated to us by the order in council of the 11th of January, 1911, we are doing something that is outside our statutory duty as a Canadian Court, and therefore we are not prevented by said section 14 from sitting specially, in a proper case, to hear a motion of this sort.

Judgment

This brings me to the merits of the present application, and in so doing it is necessary to notice the issues which were involved in the appeal before us. These are in no sense of a general character, or of any public importance in any true sense of the word, and will not, however decided, create a precedent for future guidance. On the contrary, they are local and particular in an unusual degree, and the question simply is whether or no the passing of the British Columbia Act Respecting the Re-purchase by the Crown of certain Railway Subsidy Lands, Cap. 37, 1912, has so affected the decision of the Supreme Court of Canada in *Angus* v. *Heinze* (1909), 42 S.C.R. 416, that the interest of Heinze in certain railway lands is now taxable, though it would not have been under said decision before that Act, which contains certain recitals and statements refer-

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ring to Heinze's interest therein that led us to answer unanimously the question in the affirmative. It would be difficult to have a case more local in its character and circumscribed in its effect, affecting as it does the liability of one citizen only to be taxed under a special statute in a state of circumstances that are unique. Such being the case, I am unable to see any ground whatever for their Lordships of the Privy Council being troubled with this appeal, and my brother GALLIHER, with whom, fortunately, I was able to confer (though not with my brother MCPHILLIPS, the other member of the Court, who was away from town), authorizes me to say that this is his opinion, which, therefore, represents at least that of a majority of said Court. It is, moreover, a case which we think should go before the Supreme Court of Canada, if an appeal is desired to be taken, in view of the judgment already delivered by that Court, which has stood unchallenged for several years, and without any later decision affecting it, and which no one suggested before us was in any respect doubtful, and therefore we think it proper that that Court should be given the opportunity of saying how far its decision has been affected by the subsequent statute referred to. If a case of this description should not be finally determined by the Supreme Court of Canada, it is difficult to imagine what class of cases that Court of last resort in Canada was established to determine, or why any appeals should be brought to it at all.

Judgment

We have observed the remarks of their Lordships of the Privy Council in the late case of *Carey* v. *Roots and Brown* (1914), noted in 6 W.W.R. 1060, wherein occur the following apt remarks of the Lord Chancellor in delivering judgment, refusing leave to appeal:

"The Dominion of Canada had made the Supreme Court of Canada the final Court of Appeal. The Act constituting that Court could not be read without seeing that those who framed it intended that in this class of case there should be no going beyond that Court—in fact, that there should be no going beyond that Court in any case. The prerogative, however, was not taken away, and it was only on the footing of the continued existence of the prerogative that there was power to question the Supreme Court. With reference to a case cited, in which a petition for special leave to appeal from the Supreme Court had been granted by the Board,

the Lord Chancellor thought that such leave was granted when the practice of the Board was more lax than it should have been. In respect of the divergence of judicial opinion in the Courts below, the Lord Chancellor said that that was only an element which was to be taken into account, and intimated that the Board was of opinion that this was not the class of case in which the prerogative ought to be exercised."

From this judgment, we can only reach the conclusion that if an application were made to their Lordships for leave to appeal direct from this Court to them, it would be refused, and therefore, this application is without merits, and it would be our duty in ordinary circumstances to refuse it.

But it is urged, nevertheless, that if it were not vacation, and this Court happened to be sitting, it would be our unavoidable duty to grant the application if it were made, and therefore, we should sit specially in vacation to give the applicant that leave which he would be entitled to as a matter of right, if he made a motion to the Court sitting in term. I am quite unable, however, to follow this line of reasoning, which entirely begs the question of what is our duty in the absence of merits. It is true that when we are sitting in term, and so long as we continue to exercise the said specially delegated power, which is now invoked, a party who wishes to appeal to the Privy Council from our final judgment is entitled to obtain leave from us to do so "as of right," where the amount in dispute is £500 or upwards (Privy Council Rule 2), and it has been held that we have no discretion whatever in such cases, but must simply automatically go through the form of hearing the motion and granting the leave, subject to certain conditions as to security and otherwise set out in rules 5 and 6. I draw attention to this effect of the rules because I notice in reading the reports of some of the arguments and proceedings in appeals from us before their Lordships, that references have been made to the fact that we have granted leave, overlooking the fact that our hands are tied in the matter by the positive language of the rule, and we have been powerless to prevent leave being given in many cases where a majority at least have felt very strongly that it was oppressive upon litigants and contrary to the public interest to grant such leave, and have so expressed ourselves at the time we were reluctantly compelled to grant it. I feel it proper to refer to this matter because the recent language of

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the Lord Chancellor in *Carey* v. *Roots and Brown,* above quoted, also expresses the feeling now experienced in many quarters in Canada regarding the former laxity of giving leave to appeal, and the beneficial effect of the change in the practice. The policy of not allowing this Court any discretion in granting leave in the circumstances above mentioned has a strange and unexpected result, *viz.*: that leave must be given by this Court here, as a delegate of the Privy Council, in many cases where it would be refused by the Privy Council itself, and therefore, the present most salutary rule of their Lordships, as applied by them in London, can be and is defeated by our unwilling action as their delegates, without discretion, in Victoria, who cannot here apply their Lordships' own rule, because, once leave is given to appeal by us here, the appeal must be heard in London, though if leave had been applied for originally to their Lordships in London, it would have been refused. An indirect means, in short, is provided by the present rules to defeat by a side wind the expressed intention of their Lordships that only appeals of a special class should be entertained by them. The present case, if I am right in my view of it, is an example of an attempt to obtain here through the medium of a special sitting in vacation, indirectly, that leave which would have been refused if applied for in London directly, and such being the case, we are of the opinion that the application should not be granted. We do not, in short, conceive it to be our duty to take a special and avoidable step in the furtherance of that which is contrary to the interests of justice. There is no denial of justice in any event in the effect of this view, because the applicant can appeal in the ordinary way to the Supreme Court of Canada, or make an application to their Lordships in London for leave to appeal to them.

Judgment

I observe that though the present section 14 of the Court of Appeal Act (which is substantially the same as section 2, Cap. 14, of the Supreme Court Act Amendment Act, 1901, *mutatis mutandis*) does not mention any grounds upon which a special sitting should be granted, yet the old rule upon which we proceeded in the former Full Court, our predecessor, in granting such an application, is set out in section 75 of the Supreme Court Act, R.S.B.C. 1897, Cap. 56, which provided that:

"Upon proof to his satisfaction of urgency, and of special circumstances rendering the holding of such special sittings necessary in the interests of justice, the judge may make an order for the holding of a special sittings . . . ."

and in hearing applications of this nature, in this Court, I have felt that this section still forms a safe guide for me here as to the principle upon which I should act, as it continued to do when I was a member of the Full Court. I must still proceed upon some principle, and none better has been suggested.

The present application, be it noted, is not only to hold a special sitting outside of our regular ones, but to hold it during vacation, which is something of a very unusual nature, and should not be encouraged. Vacation is still vacation, and it is necessary that it should be observed as far as possible, and though we were forced in this vacation, for special reasons above mentioned, to encroach upon it for two weeks, it places an additional and undesirable strain upon the Court, which, for example, has prevented me from obtaining any respite from continuous labour, with no prospect of it in the near future, and it must also be remembered that it takes three out of the five judges of this Court to make a quorum, and if we are to be subject to these applications in vacation, then three of us will have to keep within call, on the chance of a motion of this kind being made, for three weeks after we have delivered judgments on the last day of term, or so soon thereafter as possible, as we do frequently so as not to keep litigants waiting any longer than is necessary for our judgment. Some provision should, I therefore resepectfully suggest, be made to meet this difficulty, which is proving onerous and inconvenient, by empowering one Justice of Appeal to grant leave in vacation, or to extend the time, or otherwise, as their Lordships may deem best, if, indeed, it is thought desirable that the present practice of our being forced to give leave against our convictions is to be continued.

Judgment

Finally, it is to be observed that in the present case no explanation of any kind has been made of the long delay in waiting till the time has nearly expired before applying, on such short and inconvenient notice, that we should be summoned to sit yet again, and for the third time already in the present vacation, if it can properly be so styled in such unusual circumstances.

Application refused.

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CHAMPION v. WORLD BUILDING, LIMITED

CHAMPION AND WHITE v. THE WORLD BUILDING, LIMITED, *ET AL.*

Mechanic's lien—Contract containing conditions precedent to payment—Repudiation of contract—Contractor proceeding with work under the contract—Contract inter alia—Premature action—Mechanics' Lien Act, R.S.B.C. 1911, Cap. 154.

Where there is a contract containing conditions precedent to payment, no action can be brought to enforce a lien alleged to arise out of labour performed and materials supplied under such contract until the conditions have been complied with.

Failure to pay an instalment of money due under a contract does not necessarily constitute a repudiation of the contract.

An action can no more be brought under the Mechanics' Lien Act than in any other case, until a cause of action has arisen.

Statement

THE plaintiffs entered into a contract in writing for the performance of certain work upon a building belonging to the defendant The World Building, Limited. By the terms of the contract, payments were to be made upon production of the architect's certificate, and all extras were only to be performed upon a written order from the owner. The plaintiffs obtained one certificate from the architect, upon which they alleged the owner refused to pay. The plaintiffs then completed the work, and, without obtaining any other certificates from the architect, they filed their affidavits and brought their action under the Mechanics' Lien Act, for the full amount of the contract price, together with certain charges for alleged extras. There were no written orders from the owner for these extras, but there were written orders from the architect. The World Building, Limited, had entered into an agreement in writing with its co-defendants, by which these co-defendants were to advance money for payment of the labour performed and material supplied in the erection of the building in question. In the actions, tried in the County Court of Vancouver on the 4th of February, 1914, GRANT, Co. J. gave judgment for the plaintiffs for $6,000, the amount for which the single certificate had been

given, and dismissed the actions for the residue of the claim. The plaintiffs appealed and the defendants gave notice of cross-appeal as to the $6,000, on the ground that no notice of intention to claim a lien had been given.

The appeal was argued at Vancouver on the 16th of April, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

R. M. Macdonald, for appellants (plaintiffs): In actions under the Mechanics' Lien Act it is not open to the defendants to set up special conditions under a written contract; it is sufficient for the attachment of a lien that work has been done and material supplied. Even if the conditions of the contract are imported into this action, the defendant repudiated the contract by refusing to pay upon production of the architect's certificate, and the plaintiffs, having completed the work, can sue upon a *quantum meruit.* The agreement between the defendants providing for an advance by the Coughlans to the World Building, Limited, for payment of the work of erecting the building constituted a trust in favour of the plaintiffs which they can enforce. Even if the plaintiffs cannot now obtain payment, they are entitled to a declaration that they will have a lien when they have obtained the necessary certificates; otherwise they will lose their lien, inasmuch as the action to enforce the lien must be brought within 31 days of the filing of the affidavit. If this were not so, a dishonest architect might withhold the certificate till after 31 days from the completion of the contract, and so deprive the lien-holder of the possibility of "realizing his lien."

Argument

Mayers, for respondents (defendants): Sections 7 and 8 of the Mechanics' Lien Act shew that no action can be brought until there is some money owing to the plaintiffs, and then only for the amount actually payable to them. Until the conditions of the contract are fulfilled there is no money either owing or payable: *Walkley* v. *City of Victoria* (1900), 7 B.C. 481; *Leroy* v. *Smith* (1901), 8 B.C. 293; *Sherlock* v. *Powell* (1899), 26 A.R. 407. The same considerations apply to the extras: *Russell* v. *Da Bandeira* (1862), 13 C.B.N.S. 149 at p.

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200; *McKinnon* v. *Pabst* (1901), 8 B.C. 265. The parties expressly stipulated that the extras should be ordered by the owner, and not the architect. Failure to pay any one instalment does not constitute, *ipso facto,* a repudiation of the contract: *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1884), 9 App. Cas. 434; *Freeth* v. *Burr* (1874), L.R. 9 C.P. 208; besides, the plaintiffs did not treat the failure to pay as a repudiation, but continued with the contract, thereby keeping it alive, with all its incidents: *Avery* v. *Bowden* (1856), 6 El. & Bl. 953. It has been well settled, ever since *Tweddle* v. *Atkinson* (1861), 1 B. & S. 393, that no one other than the parties to a contract can sue to enforce it. There was nothing to prevent the defendants from revoking their agreement as to the advances without paying any regard to the plaintiffs: *In re Empress Engineering Company* (1880), 16 Ch. D. 125. With regard to making a declaration that the plaintiffs will eventually have a lien, it is submitted that one cannot bring an action until one has a cause of action; there cannot be a prophetic judgment.

Argument

Macdonald, in reply.

Cur. adv. vult.

14th July, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: By the contract between the appellants and the World Building, Limited, the price was to be paid to the appellants upon the production of architect's certificates from time to time as the work progressed. They obtained one certificate entitling them to the payment of $6,000, which The World Building, Limited, neglected to pay. Thereafter the appellants made no application to the architect for further certificates, but completed the building, as they allege, and filed claims under the Mechanics' Lien Act, and brought two actions to enforce payment and realization of their liens, which actions were consolidated and tried by GRANT, Co. J. He gave judgment against The World Building, Limited, for the $6,000 above mentioned, and for realization upon the liens to that extent, but disallowed the claim for the balance of the contract moneys for which the certificates had not been obtained. From that judgment the plaintiffs in the action appealed, and the

defendants the Coughlans, mortgagees of the property in question, cross-appealed.

The reason alleged by the plaintiffs for their neglect to obtain certificates of the architect was that because the owners or the mortgagees who were supplying the moneys for the erection of the building neglected or refused to pay the amount called for by the certificate already obtained, they had thereby repudiated the authority of the architect and dispensed with the necessity for obtaining his certificates. That contention is, in my opinion, untenable. When these actions were commenced, the $6,000 only was due and payable.

Assuming it to have been proved that the appellants were entitled to a lien or liens, and that they complied with the provisions of section 19 of the Mechanics' Lien Act requiring the filing of a claim within the time there specified, the rights thereby obtained could only be preserved by the taking of legal proceedings within 30 days thereafter to realize their lien, which in this case took the form of the actions in which this appeal is taken. In said actions they prayed for judgment against the defendants, not only for the $6,000, but for the balance of the contract price with respect to which they have not obtained architect's certificates, and for the enforcement of their lien by sale of the property. In my opinion, an action to enforce, or, to use the words of the Act, "to realize the lien," cannot be brought until the money sought to be recovered by such proceedings has become payable. Neither a personal judgment, nor a judgment affecting the property, could be given in such an action. No relief of any kind could be given. The suggestion of appellants' counsel is that the actions could properly have been brought for the purpose of keeping the lien *in esse,* but he was unable to cite any authority to support that submission, indeed, I should have been surprised had he been able to find any such authority grounded on legislation similar to ours. The argument advanced that great hardship might ensue to lien holders where the due date, whether by agreement or by reason of circumstances such as we find here, should be deferred beyond the time within which action is to be brought, might very well be directed to the Legislature, which could

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remedy what I think is a *casus omissus,* but hardship cannot be ground for extending by judicial construction the operation of statutory laws.

This conclusion renders it unnecessary to consider the other matters raised in the plaintiffs' appeal, for, if my view be the correct one, the actions as to all matters outside the claim founded on the $6,000 certificate could not be maintained, and were, therefore, as to those matters, rightly dismissed. This dismissal should not, of course, preclude the plaintiffs from suing again if and when they have obtained a proper status to do so.

This leaves the cross-appeal of the defendants, the Coughlans, to be dealt with. This raises a question which has already been decided in this Court against these appellants' contention in *Irvin* v. *Victoria Home Construction and Investment Co.* (1913), 18 B.C. 318.

Both appeals should be dismissed, with costs.

IRVING, J.A. IRVING, J.A.: I concur in the opinion of the Chief Justice.

MARTIN, J.A. MARTIN, J.A.: In my opinion the learned trial judge was right in refusing to enter judgment for the plaintiffs for an amount greater than was certified to by the architect's first certificate for $6,000. It is admitted that he was never even asked for another one, and also that there was no reason to suppose he would have refused it, if asked, and no attack was or is made upon his *bona fides* or otherwise. The excuse advanced by the plaintiffs' manager for this strange conduct is simply and solely that because the said first certificate was not paid it would be "a mere farce" to get others, "as they would not honour the one we had." It is hard to treat seriously such a lame excuse for failure to comply with the express condition of a contract upon which alone payment can be obtained. It is sufficient to say that if people will act in such a petulant manner they must be prepared to go without payment. It was sought to avoid the consequences of the absence of a certificate by setting up the establishment of a trust that the money to be raised on the security of the property should be paid out for

the complete construction of the whole building, but suffice it to say that I am unable to take that view of the facts.

Then, as to the contention that the plaintiff can nevertheless acquire a lien for a greater amount than he can maintain an action for, I should have expected some authority in support of such a contention, but we have been referred to none, either in the statute or otherwise. On the contrary, section 7 expressly says that "the amount of such lien shall not exceed the sum actually owing to the person entitled to the lien . . . .," and section 19, in pursuance thereof, requires the affidavit to state "(*d*) The sum claimed to be owing, and when due." So, assuming that the lien may primarily attach for the full amount, yet it is only enforceable for "the sum actually owing." The lien becomes merged in the action which is brought under section 23 to "realize" it, and judgment can only be given to the extent that such action is maintainable under section 7, *i.e.*, for "the sum actually owing" to the claimant.

MARTIN, J.A.

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

With respect to the cross-appeal founded on the pay-roll, section 15, that should also be dismissed: *cf. Fuller* v. *Turner and Beech* (1913), 18 B.C. 69.

GALLIHER, J.A.

MCPHILLIPS, J.A.

GALLIHER and MCPHILLIPS, JJ.A. concurred with MACDONALD, C.J.A. in dismissing the appeals.

Appeals dismissed.

Solicitors for appellants: *MacNeill, Bird, Macdonald & Darling.*

Solicitors for respondents: *Bodwell & Lawson.*

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MURRAY v. STENTIFORD

MURRAY *ET AL.* v. STENTIFORD *ET AL.*

Vendor and purchaser—Agreement for sale of land—Assignment to third party subject to prior agreement—Right of grantee to recover from prior vendee—Notice of assignment—Laws Declaratory Act, R.S.B.C. 1911, Cap. 133, Sec. 2, Subsec. (25).

A limited company sold lots to S. under an agreement of sale. After payment of an instalment on the purchase price, the limited company assigned to M. all its interest in the lots subject to the agreement of sale to S. On S. being in default in his payments, M. brought action for cancellation of the agreement and applied for an order *nisi* of foreclosure on default of delivery of a statement of defence.

Held, that as there was no allegation in the statement of claim of the service on the debtor of notice of an assignment by the original vendor to the plaintiff as required by the Laws Declaratory Act, the application should be dismissed.

Held, further, that without such notice the assignment must be regarded as an equitable assignment of a legal chose in action, in which case the assignor should be made a party to the action either as plaintiff or defendant.

Dell v. *Saunders* (1914), 19 B.C. 500, followed.

Order of GREGORY, J. affirmed.

APPEAL by plaintiffs from an order of GREGORY, J. made at Vancouver on the 6th of February, 1914, dismissing the plaintiffs' application for an order that an account be taken of money due under an agreement of sale of certain lots in Vancouver, for payment of the amount found to be due and in default for cancellation of the agreement. The facts are set out in the head-note and reasons for judgment.

Statement

The appeal was argued at Vancouver on the 1st of May, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

McPhillips, K.C., for appellants (plaintiffs): This is an application for judgment under Order XXVII., rule 1, for foreclosure of an agreement of sale on account of default of

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payment of purchase-money. The defendants are in default in not filing their defence. If we ask for a common-law remedy we are entitled to enforce the covenant to pay: see *Dell* v. *Saunders* (1914), 19 B.C. 500; 6 W.W.R. 657; *Kilmer* v. *British Columbia Orchard Lands, Limited* (1913), A.C. 319. The deed itself is an assignment, but an agreement for sale is a charge: see Halsbury's Laws of England, Vol. 21, p. 308; *Wallace* v. *Kelsall* (1840), 7 M. & W. 263; *Powell* v. *Brodhurst* (1901), 2 Ch. 160 at p. 167. It is only enforcing the legal remedy which would relieve us of the agreement: *Steeds* v. *Steeds* (1889), 22 Q.B.D. 537; *Matson* v. *Dennis* (1864), 10 L.T.N.S. 391; 46 E.R. 952.

Argument

Alfred Bull, for respondents (defendants): The debt in this case is a legal chose in action, and plaintiffs have no right to go to Court until it is properly assigned: Fisher on Mortgages, 6th Ed., 844; *Lowe* v. *Morgan* (1784), 1 Bro. C.C. 368; *Palmer* v. *Earl of Carlisle* (1823), 1 Sim. & S. 423; *In re Continental Oxygen Company* (1897), 1 Ch. 511; Bullen & Leake's Precedents of Pleading, 6th Ed., 19. The money being a debt is a legal chose in action: *Torkington* v. *Magee* (1902), 2 K.B. 427. There was no assignment in writing and no notice of assignment.

McPhillips, in reply.

Cur. adv. vult.

14th July, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiffs' motion being one for an order *nisi* of foreclosure based on default in the delivery of the statement of defence, they must make it appear that every allegation necessary to sustain the order sought is contained in the statement of claim.

Now it is settled practice that all the mortgagees or persons in analogous positions must be joined either as plaintiffs, or where that is impracticable, as defendants: *Luke* v. *South Kensington Hotel Company* (1879), 11 Ch. D. 121; Halsbury's Laws of England, Vol. 21, p. 279. The plaintiff Murray claims by assignment from the Elder Murray Company, Limited. The assignment was in writing, but there is no allegation in

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the statement of claim of the service on the debtor or debtors of the written notice thereof required under the Laws Declaratory Act, which I think is necessary to entitle the plaintiff Murray to sue in his own name. Treating the assignment therefore as an equitable assignment of a legal chose in action, which without such notice it must be regarded, the assignor ought to have been made a party to the action either as plaintiff or defendant: see *Dell* v. *Saunders* (1914), 19 B.C. 500; 6 W.W.R. 657. It may be, but I express no final opinion, that had the statement of claim contained the allegation that the Elder Murray Company, Limited, had been legally dissolved, as was stated by counsel, and therefore could not be made either plaintiff or defendant, that the practice above referred to would have to be modified in order to meet the exigencies of this case, but no allegation of the dissolution of that company appears in the statement of claim, and hence it is not open to me to deal with that phase of the case. It may not yet be too late to remedy the omission to give notice of the assignment or to plead the dissolution of the Company, and to thereupon pursue such course with respect to the present action or the bringing of a new action, as may appear proper to the plaintiffs' advisers.

I would, therefore, dismiss the appeal.

IRVING, J.A.: On the pleadings I think the learned judge was right in dismissing the application; there is no allegation that would justify him in assuming that the Company was defunct and so could not be made a party to the action.

IRVING, J.A.

It is possible that had the statement of claim contained the notice of the 8th of August, 1913, in full, the difficulty of want of notice might have been got over: see *Denny, Gasquet and Metcalfe* v. *Conklin* (1913), 3 K.B. 177.

As the case now stands, our decision in *Dell* v. *Saunders* (1914), 19 B.C. 500; 6 W.W.R. 657, is a bar to the plaintiffs' success.

MARTIN, J.A.: In agreeing that the appeal should be dismissed (the plaintiffs being bound and restricted by the facts set up in their statement of claim) I only desire to say that in view of our recent decision in *Dell* v. *Saunders*, it is merely

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necessary to add that as the transaction must be regarded, in its present aspect at least, in the light of a mortgage, it requires the presence before the Court of all those who are entitled to the mortgage money before foreclosure can be granted: *Lowe* v. *Morgan* (1784), 1 Bro. C.C. 368; *Palmer* v. *Earl of Carlisle* (1823), 1 Sim. & S. 423; and *In re Continental Oxygen Company* (1897), 1 Ch. 511. No facts have been shewn here as there were in *Drage* v. *Hartopp* (1885), 28 Ch. D. 414, which would justify us in treating this case as an exception to the rule.

MARTIN, J.A.

GALLIHER, J.A.

MCPHILLIPS, J.A.

GALLIHER and MCPHILLIPS, JJ.A. agreed in dismissing the appeal for the reasons stated by MACDONALD, C.J.A.

Appeal dismissed.

Solicitor for appellants: *A. C. Sutton.*
Solicitor for respondents: *Leo Buchanan.*

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THE BRITISH COLUMBIA HOP COMPANY, LIMITED, E. CLEMENS-HORST CO. AND THE BANK OF MONTREAL v. THE FIDELITY-PHENIX FIRE INSURANCE COMPANY.

Fire insurance—Interest of the assured—Double insurance—R.S.B.C. 1911, Cap. 114—Statutory conditions—Bank Act, R.S.C. 1906, Cap. 29.

Certain parcels of cotton warp were consigned in April, 1910, by Cookson & Co., of Manchester, England, to one Matthews in Vancouver, the Bank of Montreal acting as receiving agent for Cookson & Co. A contract of insurance was entered into between the Bank of Montreal, through their Vancouver office, and the defendant, on the 9th of May, 1910, covering the cotton warp, and the contract was evidenced by five policies, expiring on the 9th of May, 1911. Each of the policies purported to insure the Bank of Montreal against loss by fire on certain bales of cotton warp; "their own or held by them in trust, or on commission, or sold but not delivered or on which they may have an interest or a liability"; and by these five policies, concurrent insurance was permitted.

Matthews failed to take delivery and pay for the warp, and on the 26th of July, 1910, the Bank of Montreal sold the warp to the British

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Columbia Hop Company. The sale was negotiated through the Chilliwack office of the Bank and was made by it on behalf of Cookson & Co. The consideration for the warp was $2,704.91, $704.91 being payable in cash, and $2,000 by a promissory note given to the Bank. Subsequently to the sale, the location of the warp was changed, and in consequence the agents of the defendant were applied to to sanction and provide for the change of location. The defendant assented to the change, and on the 3rd of August, 1910, the five policies were cancelled and a single policy issued in their stead. The single policy, like the five policies, expressed the insurance to continue till the 9th of May, 1911, and was in the sum of $3,300, the total insured by the five policies, but, unlike the five policies, it contained no clause permitting concurrent insurance. The words descriptive of the subject-matter insured were identical with those used in the five policies. All the policies contained the statutory conditions. On the 5th of August, 1910, the Bank took from the British Columbia Hop Company a warehouse receipt for the cotton warp. The warp was destroyed by fire on the 30th of October, 1910, and the promissory note for $2,000 was paid to the Bank by their company plaintiff on the 3rd of November, 1910. It was proved that the accountant of the Bank at Vancouver had stated that the Bank were only insuring their own interest; but the manager of the Bank at Chilliwack lodged a claim with the defendant, wherein the warp was valued at $4,400. The British Columbia Hop Company held floating policies in American companies covering all goods, "as far as relates to any excess of value beyond the amount of liability of any specific insurance."

Held, per MACDONALD, C.J.A., that there was a double insurance.

Per IRVING, J.A.: That no interest other than that of the Bank was insured; that the condition precedent in the 10th statutory condition, requiring the interest of the assured to be stated where the assured is not the owner of the property insured, had not been complied with, and that, therefore, the defendant was not liable for the loss.

Per MARTIN, J.A., agreeing with MURPHY, J.: That the Bank's interest alone was insured, and that the change of ownership avoided the policy under statutory condition 4.

Per MACDONALD, C.J.A., IRVING and MARTIN, JJ.A. (MCPHILLIPS, J.A. dissenting): That the plaintiffs were not entitled to recover.

APPEAL from the decision of MURPHY, J. in an action tried by him at Vancouver on the 19th and 20th of March and the 18th of April, 1913. The facts were as stated in the headnote, with the addition that a telegram was put in evidence from the Bank of Montreal to their co-plaintiff, dated the 21st of February, 1911, reading as follows:

Statement

"Fidelity-Phenix policy covered interest of Bank of Montreal only and was voided when note held by Bank against owner was satisfied."

Wilson, K.C., for plaintiffs.
Bodwell, K.C., for defendant.

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MURPHY, J.: I do not think the Bank of Montreal ever intended to insure the interest of the E. Clemens-Horst Co. If the policy issued on the 3rd of August, 1910, is regarded as a new transaction, and not a mere substitution for the policies of the 9th of May, 1910, then the instructions to obtain it were sent from Chilliwack by Gault. It is clear, I think, from his evidence, that all he intended to cover was the Bank's interest. The fact that the policy is for a larger amount is explained by what happened in Vancouver. The goods were already insured for the higher sum, and that sum was allowed to remain merely because it was in the then existing policies, and not with any idea of covering the E. Clemens-Horst Co. The telegram of the 21st of February, 1911, bears out this view. If the policy of the 3rd of August, 1910, is to be regarded merely as a continuation of the insurance of the 9th of May, 1910, then there had been a change of ownership of the goods which was not communicated to the defendant Company. I think the policies of the 9th of May, 1910, were intended to cover the Bank and the English owners, but that of the 3rd of August was solely for the Bank's protection.

The action is dismissed.

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The appeal was argued at Vancouver on the 23rd of April, 1914, before MACDONALD, C.J.A., IRVING, MARTIN and MCPHILLIPS, JJ.A.

Wilson, K.C., for appellants (plaintiffs): The operative words of the policy, "their own or held by them in trust," etc., negative conditions 10 (a) and 4, and allow the Bank to recover as trustees for their co-plaintiff: *Waters* v. *Monarch Life Assurance Company* (1856), 5 El. & Bl. 870; *London and North Western Railway Co.* v. *Glyn* (1859), 1 El. & El. 652. There is no need to state the interest of the assured on the policy: *Gaines & Co.* v. *Anchor Fire & Marine Insurance Co.* (1913), 4 W.W.R. 900; *Keefer* v. *The Phœnix Insurance Co. of Hart-*

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ford (1901), 31 S.C.R. 144. With regard to the question of double insurance, the words "other concurrent insurance permitted" must be held to have been omitted from the policy of the 3rd of August, 1910, by mistake, and should be supplied. The objection that the property was assigned is met by the express words of the policy, which contemplate a sale.

Mayers, for respondent (defendant): The plaintiff cannot recover for four reasons: (a) The only interest insured was that of the Bank of Montreal, and the Bank of Montreal has sustained no loss; (b) the property insured was not owned by the Bank of Montreal, and the interest of the Bank was not stated in the policy, in violation of condition 10 (a); (c) the subject-matter of the insurance was twice assigned, namely, on the 26th of July, 1910, and the 5th of August, 1910; (d) there was a double insurance. It is not denied that the assured may insure other interests than his own, if he so intends; but it is in every case a question of intention (*Castellain* v. *Preston* (1883), 11 Q.B.D. 380), and the burden of proof of such an intention lies upon the plaintiffs. It is doubtful whether a mere undisclosed intention, resting in the breast of the assured, is sufficient, but in any case the evidence in this case shews that the Bank of Montreal intended to cover their own interest only; that interest was further secured by the promissory note of the British Columbia Hop Company, and had the defendant paid the Bank of Montreal, it would have been entitled, by subrogation, to enforce payment of that note: *Castellain* v. *Preston supra.* The promissory note was, however, paid subsequent to the fire, and the Bank has therefore sustained no loss. The contract of insurance is a contract of indemnity, and therefore, the Bank, having sustained no loss, cannot recover. With regard to condition 10 (a), the words of the policy descriptive of the subject insured, do not excuse compliance with this condition; there is a wide distinction between the subject-matter insured and the interests to be indemnified. The descriptive words "in trust or on commission . . . ." merely apply to the subject-matter which the defendant insures, and it is still necessary to insert in the policy the particular interest of the assured, if that is less than the absolute ownership. It is precisely the

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same as if the insurer were to say: "I am willing to insure these goods, whether they are held in trust, or on commission, or for sale, etc., but at the same time I require to be informed as to the parties who actually own and are interested in the goods." The property was twice assigned, in contravention of condition 4. This condition has been interpreted as meaning an absolute assignment, amounting to a transfer of property in the subject-matter. The goods in question were assigned by sale from Cookson & Co. to the British Columbia Hop Company on the 26th of July, 1910, and the effect of the taking of the warehouse receipt by the Bank of Montreal on the 5th of August, 1910, was to effect a transfer of the whole property in the goods from the British Columbia Hop Company to the Bank (R.S.C. 1906, Cap. 29, Sec. 86). *McBride* v. *Gore District Mutual Fire Ins. Co.* (1870), 30 U.C.Q.B. 451, is directly in point (see *per* Wilson, J. at p. 462). Therefore it is immaterial whether the Court regards the policy issued on the 3rd of August, 1910, as a new contract or merely substituted evidence of the old contract of the 9th of May, 1910. If it be a new contract, then there was an assignment on the 5th of August, 1910. If it merely be evidence of the old contract, then the goods were assigned twice. Mr. Justice Duff's remarks in *Guimond* v. *Fidelity-Phenix Fire Ins. Co.* (1912), 47 S.C.R. 216 at pp. 227 and 228, shew that a security under the Bank Act is not in the nature of a mortgage, but an absolute assignment.

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There was certainly a double insurance. The floating policies covered all goods whose value was in excess of any specific insurance existing on them. The cotton warp was insured with the defendant for $3,300; the plaintiffs swore the value at $4,400. Therefore, as to one-quarter of the value, there was insurance under the floating policies, and as to three-quarters under the specific policy. This constitutes double insurance, being insurance in respect of the same subject, risk, and interest. It is again immaterial whether one regards the policy of the 3rd of August, 1910, as a new contract or as evidence of the old contract. If it is a new contract, there is no clause allowing concurrent insurance. If it is evidence of the old contract,

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then the parties must be taken to have varied the old contract by mutual consent, a course which is quite open to them: *Goss* v. *Lord Nugent* (1833), 5 B. & Ad. 58 at p. 65. There can be no claim for rectification, for not only was there no evidence of a mutual mistake, there was not even evidence of a mistake on either side.

Wilson, in reply.

Cur. adv. vult.

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MACDONALD, C.J.A.: The policy sued on in terms insures the goods—not any particular interest in them. The intention of the parties, or more strictly speaking, the intention of the Bank to insure for the benefit of all parties concerned, is not, I think, in doubt, when all the oral and documentary evidence is considered in the light of the circumstances of the case. That conclusion is greatly strengthened by the fact that the policy is for $3,300, the insurable value of the goods, and not for $2,000, the sum advanced by the Bank. It would seem to me to be absurd to say that the Bank's interest alone was insured when the owner was paying a premium on an insurance of $1,300 in excess of the Bank's interest, for which, if the opposite contention be accepted as the correct one, no protection at all was afforded. The case is, therefore, within *Keefer* v. *The Phœnix Insurance Co. of Hartford* (1901), 31 S.C.R. 144.

But there is another defence pleaded, and I think proven, namely, that other insurance was taken without notification to the defendants and without their consent. The other insurance is alleged to consist of floating policies taken out in the United States and supposed to cover any balance of loss on the British Columbia Hop Company's assets situate anywhere in Canada or the United States except the State of New York, but limited in cases where the Company's goods are specifically insured to the excess of value beyond such specific insurance.

It seems to be common ground that these policies cover the goods in question here; but it was argued by Mr. *Wilson,* counsel for the appellants, that because these policies covered only the value of the goods in excess of the specific insurance,

that is to say, in excess of the value insured under the policy in question in this action, statutory condition No. 8 had no application to it, and hence did not bar the plaintiffs from recovering in this action. I find myself unable to accede to that contention. The policies are intended to cover the loss on the goods by fire, the one up to $3,300, the others as to the excess in value above that sum. It is not in dispute that these floating policies were either in existence and undisclosed at the time the policy in this action was obtained, or were procured or extended to cover these goods after said policy was obtained, and without the knowledge and consent of the defendants. That being so, there seems to me to be no escape from the conclusion that the plaintiffs are precluded from recovering by reason of said condition No. 8.

Mr. *Wilson* cited and relied upon *Australian Agricultural Co.* v. *Saunders* (1875), L.R. 10 C.P. 668, but in my opinion that case is clearly distinguishable from this. It inferentially supports my conclusion.

MACDONALD, C.J.A.

I would dismiss the appeal.

IRVING, J.A.: The case was argued by Mr. *Wilson* on the basis that the intention of the parties, as well as the language used in the policy, shewed that the insurance was for the benefit of the plaintiffs, by which expression I shall hereafter refer to the E. Clemens-Horst Co.

The description of the subject-matter of the insurance and the insurable interest therein is certainly wide enough to include the insurable interest of the plaintiffs, but according to *Castellain* v. *Preston* (1883), 11 Q.B.D. 380; 52 L.J., Q.B. 366, whether the intention was to include them or not is a question of fact. The onus of proof would be on the plaintiffs.

IRVING, J.A.

Mr. Bremner, for the Bank, as a condition to making the advance, required the goods to be insured for the benefit of the Bank, and the broker who obtained the insurance acted for the Bank. No instructions were given as to including the plaintiffs in the contract, and, notwithstanding that Mr. Eder, for the plaintiffs, fixed the amount of the insurance, and the plaintiffs were charged with the premium, I am unable to say that the

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plaintiffs have satisfied the onus which I think was upon them. If the wide language "on trust," etc., would shift the onus, I do not think we ought to interfere with the findings of fact reached by the learned trial judge. There must be grave reasons for interfering with the inferences drawn by the trial judge: *per* Lord Loreburn in *Sweeney* v. *Coote* (1907), A.C. 221.

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Section 86 of the Bank Act does not prevent the plaintiffs having an insurable interest.

The condition precedent in the 10th condition, requiring the insurable interest of any person other than the Bank to be stated in the policy, was not satisfied so as to make the plaintiffs a party to the policy.

The case of *Keighley, Maxsted & Co.* v. *Durant* (1901), A.C. 240, where it is laid down that undisclosed intentions will not make a contract, has apparently made it doubtful whether the intention of those who have contracted with the insurance company—not appearing in the policy and not communicated—is to be binding on the insurance company: see *Reliance Marine Insurance Company* v. *Duder* (1913), 1 K.B. 265, *per* Kennedy, L.J. at p. 276, citing a remark by Lord Atkinson in *Boston Fruit Co.* v. *British and Foreign Marine Insurance Co.* (1906), A.C. 336 at p. 343.

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On the second point, which can only arise if the policy of the 3rd of August does include the plaintiffs' interest, as to the insurance effected by the floating policy of the 27th of August, the subsequent facts establish that this was additional insurance contrary to the 12th condition.

There is no evidence of mutual mistake in omitting the clause allowing concurrent insurance. Mr. Bremner said the Bank must be protected, and no other instructions were received by the insurance Company.

I would dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: I have reached the conclusion that the appeal herein should be dismissed, substantially for the reasons given by the learned trial judge.

McPHILLIPS, J.A.: This is an appeal from a decision of MURPHY, J., who dismissed the action, which was one for the recovery of $3,300, claimed to be due and payable under a policy of insurance made by the defendants in favour of the Bank of Montreal, the insurance being on cotton warp in bales, the property of the Bank, or held by them in trust or on commission, or sold but not delivered, or in which they might have an interest or a liability. On the 30th of October, 1910, the cotton was destroyed by fire. At the date of the issuance of the policy the property in the cotton was vested in the Bank to secure repayment of moneys due by one of the plaintiffs, the E. Clemens-Horst Co. to the Bank. Subsequent to the fire these moneys were paid to the Bank.

It is contended by the plaintiffs other than the Bank, and by the Bank as well, that the situation is one of trusteeship, and the Bank is trustee of the policy and the moneys payable thereunder for the plaintiff the E. Clemens-Horst Co., who were being interested in the cotton warp to the full amount in which it was insured at the time of the issuance of the policy and loss.

The plaintiffs the British Columbia Hop Company are the assignees of the moneys due under the policy, the policy and all moneys secured thereby being assigned by the Bank at the request and by direction of the plaintiffs the E. Clemens-Horst Co. to the plaintiffs the British Columbia Hop Company. It is established in the evidence that the policy, the subject-matter of this action, under which the moneys are claimed to be due and payable, was issued in lieu of five other policies, then in existence, the five policies containing the words "concurrent insurance permitted," and it was contended at the trial that these words were omitted from the policy sued upon by mistake. It may be well said that due proof of loss was made, and it cannot be gainsaid, upon the evidence, that the goods were not of even greater value than the amount insured for, namely, $3,300.

Mr. *Wilson,* counsel for the appellants, in a very able argument, refined the case into what may be said small compass, and, notwithstanding the very careful argument of Mr. *Mayers,* counsel for the respondents, exhibiting much research, I am

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clearly of the opinion that liability is established under the terms of the policy sued upon.

The points relied upon by the respondents to escape liability may be said shortly to be as follows: (1) That the property in the goods insured was in the Bank at the time of the loss by fire (The Bank Act, 3 & 4 Geo. V., Cap. 9, Sec. 86; 53 Vict., c. 31); (2) that it was the Bank's interest only which was insured; (3) that change in ownership took place without notification to the respondents, in breach of terms of policy; (4) that there was double insurance in breach of terms of policy; and (5) the Bank being subsequently paid what was due to them, that there remains no liability.

The warehouse receipt held by the Bank on the goods in question is dated the 2nd of August, 1910, and from that date, in my opinion—and giving effect to section 86 of The Bank Act—the property in the goods was vested in the Bank.

The material clause of the policy issued to the Bank of Montreal calling for consideration, in my opinion, is the following:

"$3,300 on cotton warp in bales their own or held by them in trust or on commission or sold but not delivered or in which they may have an interest or a liability . . . ."

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In my opinion, this clause is the controlling clause, and operates to write out any of the other provisions of the policy, such as requirement to give notice of what may be termed the equitable ownership or change of ownership to that degree. The evidence is conclusive that at the time of the fire the situation was one of statutory ownership in the Bank, although the plaintiffs the E. Clemens-Horst Co. were in the position of being entitled to the goods, the indebtedness to the Bank being paid.

The situation, in effect, was that the property in the goods had not passed, but was still in the Bank, and in effect the situation was, as in the clause set forth, and to meet contemplated contingencies, "sold but not delivered," but "sold" would not mean that the Bank was divested of title, or that a change of title had occurred, until the Bank had made delivery—that is, upon the facts of this case, there was no change of owner-

ship at the time of the loss. In short, the position was that at the time the loss occurred, the property in the goods was in the Bank, with the right in the plaintiffs the E. Clemens-Horst Co. to bring about a transfer of title to themselves upon repayment of the moneys due to the Bank, and that was the legal position. That being the case, the Bank was insured, and rightly, as the owner of the goods, as the Bank was undoubtedly the owner, the words of the policy being apt words to cover all possible commercial relations with its customers. The plaintiffs the E. Clemens-Horst Co. were not the owners of the goods at the time of the loss, and any insurance which that Company had, which was in any way outstanding, was not, or could not be said to be, double insurance. Double insurance on what? How could the E. Clemens-Horst Co. insure goods in which they had no property? The answer must be, and can only be, that any such insurance would be upon goods other than these goods the subject-matter of the loss under consideration in this present case, and can have no bearing upon the consideration of this case. What privity of contract or relationship has the E. Clemens-Horst Co. with the respondents in regard to the conditions of the policy sued upon? None whatever, save by and through the Bank.

The situation, though, is this: That the Bank is entitled to insist upon, and it is insisted upon, that at the time of the loss it was the owner of the goods which were destroyed by fire, and at the time the situation in law was that the goods were so held in trust, agreed to be sold, but not delivered, to the E. Clemens-Horst Co., and that the policy of insurance was representative of the goods—a policy of indemnity not to the Bank alone, but to any of its customers who came within the category of contemplated dealings, which in ordinary course would be transpiring in connection with ordinary bank business, namely, that the goods might be, using the words of the clause, held "in trust or on commission, or sold but not delivered, or in which they may have an interest or a liability."

Let the matter be tried by this reasoning: Had the E. Clemens-Horst Co. repaid the indebtedness due to the Bank before the fire it would have undoubtedly followed that the

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Bank would have been compelled to make delivery of the goods. The fire takes place. In what way is the situation changed? The Bank is not able to deliver the goods. But there is the legal right to enforce the terms of the policy—that is, the indemnity for the loss of the goods—which the respondents, in my opinion, cannot successfully resist. That this enures to the benefit of the E. Clemens-Horst Co. is only that which was in contemplation at the time of the placing of the insurance.

To say that the indebtedness to the Bank is paid, in my opinion, is idle argument. The Bank was the owner of the goods, and as such insured them, and further insured against contingencies one of which has happened—that is, a loss occurred when the Bank was in the position of a trustee—a contemplated eventuality—and what principle of law stands in the way of effectuating justice here? I must fain confess I know of none, and loath indeed would I be to feel constrained to refuse a remedy where evidently all the possible genius of man and the use of apt words has been brought into play to safeguard any possible loss, by itemizing practically all possible contingencies that might arise in the complexity of commercial transactions. In Maclaren on Banks and Banking, 4th Ed., 248, we find this stated:

"A bank is bound to exercise ordinary diligence and care in looking after property which may be pledged to it in any of the ways authorized by the Act. As long as it does so, it is not liable for the loss of the property or for any damage done to it; nor is it prevented from suing for any amount of the secured debt: *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909."

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Counsel for the respondents, in his argument, referred to *McBride* v. *Gore District Mutual Fire Ins. Co.* (1870), 30 U.C.Q.B. 451, but it seems to me that the case displaces any possible contention that there was double insurance.

That the Bank could do what it did upon the facts of the case—that is, sell the goods but not make delivery thereof, and not be disturbed in its position, and be entitled to insist upon it that the insurance moneys be paid to it notwithstanding intervening repayment after the loss, the Bank to hold such moneys as trustees for the E. Clemens-Horst Co.—seems to me to be fully supported by *North-Western Bank* v. *Poynter, Son, & Macdonalds* (1894), 64 L.J., P.C. 27.

In my opinion *Castellain* v. *Preston* (1883), 52 L.J., Q.B. 366, is not helpful to the respondents. That decision makes it clear that a contract of insurance is a contract of full indemnity. How can there be full indemnity merely because of indebtedness due to the Bank being paid when preceding that payment the goods sold but not delivered, title thereto being still in the Bank, were destroyed by fire and the Bank is unable to make delivery of the goods? It would seem to me incontrovertible that the duty upon the Bank was to produce the goods and make delivery, or failing that, pay their value, unless in some way excused in law. But when we find the fact to be that the goods were insured, and a loss has occurred during the time of the ownership in the Bank, what answer can the respondents have to this present action at the suit of the Bank to have full indemnity? That the Bank did place and was in the possession of a policy of insurance which was one of protection not only to the Bank, but to any *cestui que trustents* or vendee of the goods, in my opinion is amply established upon the evidence, the intention being manifest.

The statements made by the clerk of the Bank, that the Bank had been paid and had no claim upon the policy, I place no reliance upon. They did not bring about any changed position whereby the respondents have been in any way prejudiced, and all I can say is that the action of this clerk, and the statements made by him, are so much at variance with true banking responsibilities of secrecy as to the state of customers' accounts that they exhibit absolute departure from duty upon his part, perhaps explainable by incompetency or want of proper knowledge or experience. The bank's first duty is to its customers: see Halsbury's Laws of England, Vol. 1, at pp. 640-43.

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Sir Joseph Napier, in *The South Australian Insurance Co.* v. *Randell* (1869), L.R. 3 P.C. 101 at p. 108, said:

> "A bailment on trust implies, that there is reserved to the bailor the right to claim a re-delivery of the property deposited in bailment."

In the present case, unquestionably the clause already referred to in the policy covered the situation of matters, and undoubtedly the identical goods covered by the warehouse receipt were to be delivered to the E. Clemens-Horst Co.

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Waters v. *Monarch Life Assurance Co.* (1856), 25 L.J., Q.B. 102, well demonstrates what the law is. *London and North Western Railway Co.* v. *Glyn* (1859), 28 L.J., Q.B. 188, is also a case very much in point. It was the case of some silk being destroyed by fire. The company had placed insurance upon it, but in that the property had not been declared, the company was not liable under the Carriers Act: see *per* Crompton and Hill, JJ. at pp. 196 and 197.

North British and Mercantile Insurance Co. v. *Moffatt* (1872), 41 L.J., C.P. 1, was a case where recovery upon the policy was denied, because at the time of the fire the property in the goods had passed to the purchasers and that the goods remained at their risk; the policy therefore reads "the assured's own in trust or on commission for which the assured was responsible." See the remarks of Keating, J., who delivered the judgment of the Court, at pp. 5 and 6.

Keefer v. *The Phœnix Insurance Co. of Hartford* (1901), 31 S.C.R. 144, in my opinion is an authority which is in support of the appellants' contention that there is liability upon the policy in the present case. Here the policy, in what seems to me to be absolute terms, covers insurance upon property which was held as the goods in question were held.

MCPHILLIPS, J.A.

A careful perusal of the judgment of Sedgewick, J. in *Keefer* v. *The Phœnix Insurance Co. of Hartford, supra,* at pp. 146-151, makes it clear beyond all peradventure that in the present case, where we have the apt words (see King, J. at p. 153) to cover beneficial interests, and we have not only the apt words, but the undoubted intention to insure the full value of the goods in the way of protection in case, among other contingencies, a sale be made but no delivery effected of the goods at the time of the loss, that there is liability under the policy, and the appellants are entitled to succeed in the action.

In the present case we have exactly the same clause as Sedgewick, J. is considering at p. 150, and I would also refer specifically to the judgment of Sedgewick, J. at p. 147.

Some question was raised upon the argument about salvage value, and that the goods could have been sold for something like 15 cents a pound, but when the letters are looked at, I am

not of the opinion that any attention need be given to this point. Further, the evidence, as advanced at the trial, is not such as would warrant any allowance to be made therefor, and certainly not warrant a new trial to be directed or a reference to the trial judge to find the amount due in respect of the loss.

Further, it is to be observed that the proof of loss was put in at $4,640.02, and if the respondent wished to contest the amount of the claimed loss it was open to do so by arbitration, under the terms of the policy, a course which the respondent did not pursue.

Further, section 2 of the Fire-insurance Policy Act, R.S.B.C. 1911, Cap. 114, would not appear to have been followed in the way of notifying the assured that the proof was objected to, and the particulars in which it was claimed to be defective, and in my opinion I consider it inequitable that the insurance should be deemed void or forfeited by reason of any imperfect compliance with conditions.

It therefore follows that in my opinion the appeal should be allowed and judgment entered for the plaintiffs for the sum of $3,300, with costs both here and in the Court below.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellants: *Wilson & Whealler.*
Solicitors for respondent: *Bodwell, Lawson & Lane.*

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CANADIAN BANK OF COMMERCE v. INDIAN RIVER GRAVEL CO.

THE CANADIAN BANK OF COMMERCE v. INDIAN RIVER GRAVEL COMPANY, LIMITED, *ET AL.*

Practice—Order XIV.—Summary judgment—Action on promissory notes—Defence.

Judgment should only be ordered under Order XIV., where, assuming all the facts in favour of the defendant, they do not amount to a defence in law.

On motion for summary judgment under Order XIV. in an action against the makers and guarantors of certain promissory notes, the defence was raised that the notes were given to act as vouchers for an overdraft which had previously been verbally arranged for between the Bank and the manager of the defendant Company, but the only evidence of the arrangement produced by the defence in the motion was the affidavit and cross-examination of one of the defendants who had received his information from the manager of the defendant Company, whose evidence was not given. The order for final judgment was made.

Held, on appeal (*per* MACDONALD, C.J.A. and GALLIHER, J.A.), that the appeal should be dismissed.

Per MARTIN and MCPHILLIPS, JJ.A.: That it could not be said that there was no defence, and no question of fact to be determined which might not support it. The defendants should, therefore, be allowed to go to trial.

The Court being equally divided, the appeal was dismissed.

Statement

APPEAL by the defendants from an order of GREGORY, J. made at Vancouver on the 4th of February, 1914, allowing the plaintiff to enter judgment under Order XIV. The plaintiff sued the defendant Company as makers of certain promissory notes and the defendants Voss, Bridgewater and Von Alvensleben as guarantors for the due payment of the notes. The defence was that in March, 1913, a verbal arrangement was entered into between the plaintiff Bank and the defendant Voss, who was manager of the defendant Company, to give the Company a credit of $10,000 up to the end of the year 1913, when the Bank would continue the credit to the extent of $5,000 for the year 1914, and that at the end of 1913 the defendant Company would pay off the Bank to the extent of the excess then

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owing over and above $5,000. On the faith of this arrangement, the defendants Voss, Bridgewater and Von Alvensleben agreed to give a guarantee for the due payment of the indebtedness of the defendant Company to the Bank up to $10,000. On the motion for judgment the only evidence of this defence was the affidavit and cross-examination of Von Alvensleben, who had received his information from Voss as to the arrangement with the Bank. The defendants were unable to obtain the evidence of Voss on the motion. From the learned judge's order the defendants appealed.

Statement

The appeal was argued at Vancouver on the 29th of April, 1914, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Abbott, for appellants (defendants): The plaintiff sued on certain promissory notes and obtained judgment under Order XIV. We contend we have a good defence. The original contract was that the plaintiff Bank was to give the defendant Company an overdraft. As money was advanced the defendant Company gave these notes to act as vouchers for the advances so made. They are not a new contract and do not vary in any way the original agreement: see *Jacobs* v. *Booth's Distillery* (1901), 50 W.R. 49; *Bank of Australasia* v. *Palmer* (1897), A.C. 540; 66 L.J., P.C. 105. We had originally a verbal arrangement, and the only question is whether we are allowed to prove the oral contract which precedes the giving of the notes.

Argument

C. B. Macneill, K.C., for respondent (plaintiff): There is nothing to be tried in this matter. Defendant does not swear he has a good defence. On the question of allowing in evidence of a parol agreement effecting the notes, see *Porteous et al.* v. *Muir et al.* (1884), 8 Ont. 127.

Abbott, in reply: If the note is preceded by an original oral agreement the evidence should be allowed in: see *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. 311.

Cur. adv. vult.

14th July, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal.

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MARTIN, J.A.: An order for judgment under Order XIV. should be made, according to the decision of the House of Lords in *Jacobs* v. *Booth's Distillery Company* (1901), 85 L.T.N.S. 262; 50 W.R. 49, only when the Court "can say to the person who opposes the order: 'You have no defence. You could not by general demurrer, if it were a point of law, raise a defence here. We think it impossible for you to go before any tribunal to determine the question of fact.'" And it must be remembered that this was laid down in a case where a defendant sought to escape liability on two promissory notes, and a memorandum of charge, which he and his co-defendant had signed, to secure advances, on the ground that he had been told that he incurred no liability by signing them and had done so relying on that representation; his co-defendant did not dispute his liability. Lord Halsbury said that Order XIV. was intended to put an end to dilatory pleas and sham defences. Can it be fairly said that the defence herein is of that complexion? After a very careful perusal of the affidavit and cross-examination of Von Alvensleben I think it cannot, though they are not convincing and leave not a little to be desired as to the definiteness and duration of the period of credit, and the absence of any affidavit from Voss was the subject of justifiable criticism. Yet I am unable to say that there is no defence, and no question of fact to be determined which might not support it. And if these facts set up can be established, then I do not doubt that the case comes within the sole exception mentioned by Chief Justice Cameron in *Porteous et al.* v. *Muir et al.* (1884), 8 Ont. 127 at p. 130, and is one wherein parol evidence could be given both by the defendant Company as the maker of the notes, and by the other defendants as guarantors, to shew that the

MARTIN, J.A.

> "notes were only an incident in, or part of, a larger agreement: that the larger agreement existing, the parties to it would be entitled to shew what it was; and if, by the agreement so shewn, there was a term giving a different effect to the notes from the legal effect of the notes themselves, the true agreement should prevail rather than the part."

The appeal, therefore, should be allowed.

GALLIHER, J.A.

GALLIHER, J.A.: I would dismiss the appeal.

McPHILLIPS, J.A. concurred in the judgment of MARTIN, J.A.

Appeal dismissed,
Martin and McPhillips, JJ.A. dissenting.

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Solicitors for appellants: *Abbott, Hart-McHarg, Duncan & Rennie.*

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

LEIGHTON v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

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LEIGHTON v. B.C. ELECTRIC RY. CO.

Nuisance—Power-house—Exercise of statutory authority—Injury to adjoining property—Absence of negligence—B.C. Stats. 1896, Cap. 55.

Where an electric railway company has statutory power to operate a street railway and construct, operate and maintain electric works, power-houses, generating plants, and such other appliances and conveniences as are necessary and proper for the generating of electricity or electric power, the building and operating of a power-house pursuant to such statute does not render the company liable, apart from any statutory right to compensation, for damages to an adjoining property owner owing to the noise and vibration, except upon proof of negligence.

The fact that the power-house has been placed in close proximity to the house of another does not increase the liability of the company.

London and Brighton Railway Co. v. *Truman* (1885), 11 App. Cas. 45, followed.

Decision of MACDONALD, J. affirmed.

APPEAL by plaintiff from a decision of MACDONALD, J. setting aside the verdict of the jury in his favour, in an action tried at Vancouver on the 15th of December, 1913. The action was brought by the owner of property adjoining the defendant Company's power-house, claiming damages for an

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alleged nuisance owing to the noise and vibration resulting from the operation of the machinery within the power-house, and for an injunction restraining the defendant from continuing to so operate said machinery. The jury had found in favour of the plaintiff for $500 in damages.

Ritchie, K.C. (*Gibson,* with him), for plaintiff.

H. B. Robertson (*G. B. Duncan,* with him), for defendant Company.

26th March, 1914.

MACDONALD, J.: Plaintiff owned and occupied a house and lot on Earl's road in the Municipality of South Vancouver. In the year 1912 defendant erected a power-house on a lot adjoining such property of the plaintiff, and installed therein the usual machinery necessary in carrying on its business. The machinery has, since that time, been operated continuously, and occasioned a great deal of noise and vibration. Plaintiff alleged she had suffered therefrom, and this action is for damages on account of such nuisance and for an injunction.

At the close of the plaintiff's case defendant applied for a dismissal of the action on the ground that in any event there was no legal liability. I reserved my decision upon this application, and left the question to the jury as to whether a nuisance had in fact been created, and they found in favour of the plaintiff and assessed the damages at $500. They did not allow any damages for alleged trespass upon plaintiff's property by defendant during the construction of the power-house. Notwithstanding the finding of the jury, the defendant seeks to avoid liability on the ground that, as a matter of law, even if a nuisance arose through the operation of the machinery in the power-house, still it is protected by statutory authority, and not liable in damages or otherwise.

MACDONALD, J.

Defendant Company has acquired all the property, rights, contracts, privileges and franchises of the Consolidated Railway and Light Company under the provisions of the Consolidated Railway Company's Act, 1896, B.C. Stats. 1896, Cap. 55. The defendant Company is authorized by section 33 of such Act to construct, maintain, complete, and operate a street railway in the

Municipality of South Vancouver, along such road or roads as might be specified by such Municipality, and to "supply electricity for lighting, heating and other purposes, and maintain and construct all necessary buildings, appliances and conveniences connected therewith." The Municipality has passed a by-law to comply with this section. Then, by section 43 of the Act, the Company is given authority to construct, operate and maintain electric works, power-houses, generating plants and such other appliances and conveniences as are necessary and proper for the generating of electricity or electric power. In my opinion, the construction of the power-house and installation of the machinery was a necessary and usual course to be adopted by the defendant Company in carrying on its business. It had power to purchase land and utilize it in any manner authorized by the statute, provided that such utilization was not carried out in a negligent manner. I think the whole question to be determined is whether the principle decided in *London and Brighton Railway Co.* (1885), 11 App. Cas. 45, is to be applied, or whether the defendant Company is liable, following the judgment in *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193. The distinction between a railway company which had a statutory power under an Act to create a nuisance, and other bodies which had no such statutory power, is shewn by these two decisions.

The plaintiff contends that the judgment in *Demerara Electric Company* v. *White* (1907), A.C. 330, is applicable to the facts of this case, so as to render the defendant liable. It appears to me, however, that the facts are so dissimilar to those in the present case that the judgment does not assist the plaintiff. The Demerara Electric Company was operating under two authorities, one being a "lighting order" conferring the exclusive right to supply power, subject to the condition that nothing in such order should exonerate the company from any action for nuisance. The other authority obtained by the company at the same time was a licence to operate tramways in the City of Georgetown, but the condition imposed by the lighting order was not repeated in such licence. The company sought through this omission to escape liability for a nuisance to a neigh-

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bouring owner, created by the operation of the machinery in its power-house. This was somewhat similar to the present case, but the Privy Council held that the company was controlled by the terms of the lighting order. Lord Macnaghten, in delivering the judgment of the Court, at p. 335 said:

"It appears to their Lordships, however, impossible to infer from this circumstance that in connection with one of the two main purposes for which electricity was required by the appellants they are by implication relieved from an obligation imposed by a contemporaneous instrument, and accepted by them as applying to the production of electricity for every purpose, motive power as well as lighting and heating."

It is to be borne in mind that *Hammersmith, &c., Railway Co.* v. *Brand* (1869), L.R. 4 H.L. 171, had been decided prior to the passage of the Consolidated Railway Company's Act, 1896. The Legislature, in granting powers and privileges to this Railway Company, is assumed to have taken into consideration the effect of this decision. Cairns, L.J. in that case decided that it would be a repugnant and absurd piece of legislation to authorize, by statute, a thing to be done, and at the same time leave it to be restrained by injunction. Authority thus having been given to the Company by the Legislature, which is supreme, I do not consider that any actionable wrong has been committed by the defendant Company. The principle upon which no right exists is referred to by Lord Hatherley in *Geddis* v. *Proprietors of Bann Reservoir* (1878), 3 App. Cas. 430 at p. 438.

MACDONALD, J.

I am of opinion that the only ground upon which the defendant could be held liable would be that the power-house was constructed in a negligent manner, or that the machinery therein was operated so negligently as to do damage to the plaintiff.

It is admitted on the part of the plaintiff that there was no negligence in the installation of the machinery in the power-house or in its operation. It was, however, contended that the power-house was unnecessarily located in too close proximity to the plaintiff's residence. But the statute not having placed any restriction on the defendant Company as to its location of the power-house, it was entitled to exercise its own discretion in selecting a suitable site for that purpose. If a lot had been

chosen with no house adjoining, then the owner of the adjoining lot would, according to the contention of the plaintiff in this action, be entitled to complain on account of the depreciation in the value of the property, through the construction and operation of a power-house. The statute not having afforded any remedy, as defendant acted within its legal rights, plaintiff cannot succeed.

The action is dismissed with costs.

The appeal was argued at Vancouver on the 2nd of May, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Ritchie, K.C., for appellant: The question is, does the statute authorize the Company to locate its power-house so as to create a nuisance? We do not allege negligence, but say they must have regard to the rights of parties. He referred to *Hornby* v. *New Westminster Southern Railway Company* (1899), 6 B.C. 588; *Canadian Pacific Railway* v. *Parke* (1897), *ib.* 6; (1899), A.C. 535; *London and Brighton Railway Co* v. *Truman* (1885), 11 App. Cas. 45; *Hammersmith, &c., Railway Co.* v. *Brand* (1869), L.R. 4 H.L. 171. A building used which will result in a nuisance must be expressly allowed by statute: see *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193 at p. 212; *Gas Light and Coke Co.* v. *Vestry of St. Mary Abbott's, Kensington* (1885), 15 Q.B.D. 1; Halsbury's Laws of England, Vol. 21, p. 516, par. 870; *Jordeson* v. *Sutton, Southcoates and Drypool Gas Company* (1898), 2 Ch. 614 at p. 623; *Canadian Pacific Railway* v. *Roy* (1902), A.C. 220 at p. 229; *Demerara Electric Company v. White* (1907), A.C. 330; *Hopkin* v. *Hamilton Electric Light and Cataract Power Co.* (1901), 2 O.L.R. 240; (1902), 4 O.L.R. 258; *Gareau* v. *The Montreal Street Railway Company* (1901), 31 S.C.R. 463; *Francklyn* v. *People's Heat and Light Co.* (1899), 32 N.S. 44 at p. 57; *Barrett* v. *C.P.R. Co.* (1906), 16 Man. L.R. 549 at p. 554; *Guelph Worsted Spinning Co.* v. *City of Guelph* (1914), 30 O.L.R. 466; *Chadwick* v. *Toronto* (1914), 26 O.W.R. 155; 6 O.W.N. 167. The trial judge was

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wrong in applying the *Truman* case, as the statutory right does not carry with it the power to do an unnecessary injury.

McPhillips, K.C., for respondent: The *Truman* case is against the plaintiff, as there is no finding of negligence: see also *The King* v. *Pease* (1832), 4 B. & Ad. 30; *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193 at p. 212. We have proved that it was necessary to put the building where we did: see *Rapier* v. *London Tramways Company* (1892), W.N. 165; *National Telephone Company* v. *Baker* (1893), 2 Ch. 186 at p. 203; *Geddis* v. *Proprietors of Bann Reservoir* (1878), 3 App. Cas. 430. The onus is not on us to prove that we have selected a proper place: see *Bennett* v. *Grand Trunk R.W. Co.* (1901), 2 O.L.R. 425. On the general principle of a railway company given power by statute to do acts which would otherwise amount to an interference with the rights of the public, see Halsbury's Laws of England, Vol. 23, p. 724; Vol. 21, pp. 530-32; Vol. 12, p. 563; Will's Electric Lighting, 4th Ed., 203-5; Knowles on Electricity (1911), Part 1, pp. 153-7.

Argument

Ritchie, in reply: The lot on which the power-house was built was selected and purchased by the Company: see *Shelfer* v. *City of London Electric Lighting Company* (1895), 1 Ch. 309.

Cur. adv. vult.

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MACDONALD, C.J.A.

MACDONALD, C.J.A.: After a consideration of this case and all the authorities cited, I remain of the view which I held at the close of the argument that the appeal should be dismissed.

IRVING, J.A.

IRVING, J.A.: There are certain general principles established in dealing with cases of this nature. They fall within the cases of *Hammersmith, &c., Railway Co.* v. *Brand* (1869), L.R. 4 H.L. 171; 38 L.J., Q.B. 265; or *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193 at p. 212. The latter was a case founded on permissive legislation. The Act authorized the erection and carrying on of a lunatic asylum if it could be done without creating a nuisance, but there is not

to be found any element of compulsion or any indication to interfere with private rights. It was there held that unless compensation is provided in the Act, the presumption is that Parliament did not intend that a public body empowered by statute to do certain things should create a nuisance or otherwise affect private rights: *Hopkin* v. *Hamilton Electric Light and Cataract Power Co.* (1901), 2 O.L.R. 240; (1902), 4 O.L.R. 258; *Guelph Worsted Spinning Co.* v. *City of Guelph* (1914), 30 O.L.R. 467; *Canadian Pacific Railway* v. *Parke* (1899), A.C. 535; *Chadwick* v. *Toronto* (1914), 26 O.W.R. 155; 6 O.W.N. 167, seem to me to fall within that principle.

In *Hammersmith, &c., Railway Co.* v. *Brand, supra,* it was declared that the railway Acts authorized the construction and user of the railways whether a nuisance was created thereby or not, as the language of those statutes clearly authorized the nuisance, notwithstanding the omission of Parliament to provide for compensation. *London and Brighton Railway Co.* v. *Truman* (1885), 11 App. Cas. 45; *Bennett* v. *Grand Trunk R.W. Co.* (1901), 2 O.L.R. 425, fall within this last principle.

The *Truman* case is the most instructive for the purpose of the present appeal. The particular nuisance was a cattle yard near the line of the railway. Bowen, L.J. thought that as the company was not confined to a particular area, and could erect its cattle pens where it pleased, was therefore liable for the nuisance. That, I think, is Mr. *Ritchie's* contention in the present case. In the House of Lords this opinion was not accepted. The decision of their Lordships turned on the true construction of the railway charter. Section 82 conferred on the company power "to purchase lands, not exceeding fifty acres . . . . in such places as the company should deem eligible [so that the choice was left to the company] for the purpose of making and providing, *inter alia,* . . . . loading and unloading places and conveniences for keeping cattle . . . . intended to be conveyed by the railway . . . . which the company shall judge requisite." On this statute it was held that although the company had an option to select land so that no adjoining landowner should suffer detriment from the subsequent use of it, the company was not bound to do so.

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Now, turning to the defendant's Act, we find, by section 33, the Company is empowered to "construct . . . . . a street railway . . . . and to transport and carry passengers . . . . by . . . . electricity, or such other motive power as the Company from time to time may deem expedient . . . . and to supply electricity for lighting, heating, or other purposes, and to maintain and construct all necessary buildings, appliances, and conveniences connected therewith." By section 43 the Company is authorized "to erect . . . . power-houses . . . . necessary and proper for the generating of electricity or electric power, and for transmitting the same to be used by the Company as a motive power for the operation . . . . [I paraphrase] of their own motors" or other people's motors.

IRVING, J.A.

These sections seem to me to give the Company power to do what they are doing and to deprive the plaintiff of any remedy for the nuisance occasioned to her.

I would dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: After a careful consideration of the authorities cited, and others, I am unable to distinguish this case in principle from the decision of the House of Lords in *London and Brighton Railway Co.* v. *Truman* (1885), 11 App. Cas. 45. The powers given the defendant Company by the Consolidated Railway and Light Company's Act of 1896, Cap. 55, have been exercised in a fashion admittedly free from negligence, and that is sufficient to uphold its action, without going into the really irrelevant question of the choice of the present site being justified by the reasonable necessity of the case, because, as Lord Halsbury puts it, p. 51, the company, under the statute, has the "absolute discretion of selecting the site," section 43 giving it authority to act "in such manner as the Company shall think necessary or proper for the purpose of carrying out the operations of the Company in respect of and incidental to the making, generating or supplying of electricity" as "authorized and empowered" by the earlier part of the section.

The appeal, therefore, should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A. concurred in dismissing the appeal.

McPHILLIPS, J.A.: The action was one brought to restrain the defendant from continuing to use a certain building built upon its land, being an electrical power-house (a sub-station) equipped with modern machinery, switch-boards, transformers, and the usual electrical machinery for the transmission of power in the operation of the defendant's railways; and a further claim for trespass upon the land of the plaintiff against the defendant at the time of the erection of the power-house in 1912, grass, trees, shrubs and fences having been damaged.

The plaintiff's land immediately adjoins the land of the defendant, upon which is a dwelling-house within seventeen feet of the power-house, and it was claimed that the operation of the sub-station constituted a nuisance.

The defendant constructed the power-house in 1912, and on or about the 20th of December, 1912, the machinery therein was put into operation, and has been in operation ever since that date during the whole of the day and part of the night, and is accompanied by a great deal of noise, vibration, and flashes of light.

The evidence may be said to disclose no negligence in construction or operation, in fact, such was not alleged, but that in the ordinary user of the power-house and the operation of the machinery therein, it is alleged the plaintiff is disturbed in the occupation of her dwelling-house, it being rendered unhealthy and unfit for habitation.

The action was tried by MACDONALD, J. with a jury, and a general verdict was found. In the words of the foreman, the finding was:

"We find that there is a nuisance and we assess the damages for that at $500, and costs. There is no damage for trespass."

The learned judge reserved judgment, and later, in a written judgment with which I entirely agree, dismissed the action, holding that the defendant had statutory authority to construct, maintain and operate the power-house, and as the statute authorized the nuisance and consequent damage without making provision therefor, the plaintiff was without remedy.

In passing, the case of *Crompton* v. *B.C. Electric Ry. Co.* [(1909), 14 B.C. 224]; (1910), 43 S.C.R. 1, may be referred to, where the exercise of the powers of the defendant were under

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review, and where it was held that the defendant was entitled to the benefit of the limitation of action provided by section 60 of the Consolidated Railway Company's Act, 1896, B.C. Stats. 1896, Cap. 55. In the present case sections 33 and 43 are held by the learned judge to authorize the defendant Company in the construction, maintenance and operation of the power-house, the requisite by-law under section 33 having been passed by the Municipality of South Vancouver, being in the district adjacent to the City of Vancouver: see *British Columbia Electric Railway Company, Limited* v. *Stewart* (1913), A.C. 816. In my opinion it is impossible to distinguish the present case from what may be said to be the determining case of *Hammersmith, &c., Railway Co.* v. *Brand* (1869), L.R. 4 H.L. 171; 38 L.J., Q.B. 265. That was also a case of vibration and noise, and when the Consolidated Railway Company's Act, 1896, is considered, and the fact that provisions of the British Columbia Railway Act are made to apply which deal with compensation in a similar way to the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 18), and the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 20), the application of *Hammersmith, &c., Railway Co.* v. *Brand, supra,* to the present case is at once apparent.

MCPHILLIPS, J.A.

Hammersmith, &c., Railway Co. v. *Brand* was considered and distinguished in *Fletcher* v. *Birkenhead Corporation* (1906), 76 L.J., K.B. 218. There, by the authorized pumping operations, after the completion of the works, a bed of wet-running silt, which lay directly under and formed the support of the plaintiff's land, was drawn away, and its abstraction caused a subsidence of the plaintiff's house, and it was held that the plaintiff was entitled to compensation by sections 6 and 12 of the Waterworks Clauses Act, 1847 (10 & 11 Vict., c. 17), as being a person injuriously affected by the supplying and the maintenance, if not also by the construction of the waterworks. It is instructive to well consider the judgment of Collins, M.R. in *Fletcher* v. *Birkenhead Corporation, supra,* at pp. 221-3, in which it will be noted that great stress is laid on the words "construction and maintenance." Later I will point out the line of distinction from the present case.

[The learned judge here set out sections 5 and 35 of the Consolidated Railway Company's Act, 1896, and sections 5, 6 and 7 of the British Columbia Railway Act, and proceeded].

When these statutory provisions are read, it will be seen that the position of the defendant is identical with that under consideration in *Hammersmith, &c., Railway Co.* v. *Brand, supra,* and we have not the additional provisions so remarked upon in *Fletcher* v. *Birkenhead Corporation, supra,* and, as Collins, M.R. pointed out, the statute law reviewed in *Hammersmith, &c., Railway Co.* v. *Brand, supra,* at p. 222, "was interpreted as being limited exclusively to matters of construction." Likewise, section 35 of the Consolidated Railway Company's Act, 1896, and section 7 of the British Columbia Railway Act are limited exclusively to matters of construction; and see the language of Collins, M.R. in *Fletcher* v. *Birkenhead Corporation, supra,* at pp. 222-3.

The plaintiff has not had any of her land compulsorily, or otherwise, taken in connection with the undertaking of the defendant, but claims damages nevertheless upon the ground of nuisance. In view of this contention, *Horton* v. *Colwyn Bay Urban Council* (1907), 77 L.J., K.B. 215, is a case very much in point to displace any such possible contention. There a local authority, under statutory powers, laid sewers through land belonging to the claimant. The sewers were connected with a pumping-station and reservoir constructed by the local authority on adjoining land which had never belonged to the claimant. The claimant's land was depreciated in value by reason of the contemplated user by the local authority of the pumping-station and reservoir—a situation somewhat analogous to the present case, save that none of the land of the plaintiff is passed over or used by the defendant in the carrying on of its undertaking. It was held that the claimant was not entitled to compensation in respect of such depreciation, notwithstanding that the pumping-station and reservoir and the sewers laid under his land together formed one system of sewerage. See the judgment of Lord Alverstone at pp. 219-21.

Price's Patent Candle Co., Lim. v. *London County Council* (1908), 78 L.J., Ch. 1, was a case of nuisance. It was, how-

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ever, only because of the Metropolis Management Acts of 1855 and 1858, containing an express prohibition against the creation of a nuisance within the Metropolis that the defendant council could not under those statutes justify their action, and it was held that the plaintiff company were entitled to an injunction to restrain the pumping on the ground both of nuisance and trespass. See *per* Cozens-Hardy, M.R. at p. 13.

In the present case there is the express statutory authority authorizing the power-house: see section 43 of the Consolidated Railway Company's Act, 1896. Further, the undertaking is in effect a public utility, and by section 44 of the Act there is the compulsion to "supply electricity to any premises lying within fifty yards of any main supply wire or cable suitable for that purpose on being required by the owner or occupier of such premises."

Green and Haydon v. *Chelsea Waterworks Company* (1894), 10 T.L.R. 259, was a case where the defendants only obtained their powers under the obligation that they would continue to supply water to the district for whose benefit they existed. Damages were sought for injury caused to the plaintiff's property by the bursting of a water main belonging to the defendants. The action was tried by Mathew, J. with a jury. The jury found the defendants were not guilty of negligence. The learned judge then reserved the question whether the defendants were liable notwithstanding the absence of negligence, and later gave judgment for the defendants, holding that if Parliament had intended to impose a liability on the defendants in such cases it would have said so.

Rylands v. *Fletcher* (1868), L.R. 3 H.L. 330, cited in the *Green and Haydon* case, *supra,* was recently considered in *Rickards* v. *Lothian* (1913), 82 L.J., P.C. 42, Lord Moulton delivering the judgment of their Lordships; and see the remarks of Lord Hatherley in *Geddis* v. *Proprietors of the Bann Reservoir* (1878), 3 App. Cas. 430 at p. 448.

Then, perhaps the most forceful and decisive case of all may be said to be *London & Brighton Railway Co.* v. *Truman* (1855), 55 L.J., Ch. 354, in which it was held that where land was occupied by a railway company for specified purposes con-

nected with the undertaking, and used without negligence for one of the purposes authorized, namely, as a dock or yard for the reception of cattle; that notwithstanding a nuisance was thereby caused to adjoining occupiers, the nuisance being a necessary consequence of the use of the lands for a purpose expressly authorized by Parliament could not be restrained by injunction. In my opinion the *Demerara Electric Co.* v. *White* (1907), 76 L.J., P.C. 54, is in no way helpful to the plaintiff.

In the present case we have an undertaking authorized by statute and a system of street railway authorized to be electrically propelled, and the power-house is a necessity in the operation of the system; and it was constructed and is being operated without negligence. It is plain that if it be that a nuisance is thereby created, the statute authorizes it. Nor do I think that *Canadian Pacific Railway* v. *Parke* (1899), 68 L.J., P.C. 89, in any way assists the plaintiff, as the land authorized to be acquired by the defendant is (see section 9 of the British Columbia Railway Act, B.C. Stats. 1890, Cap. 39) "land or other property necessary for the construction of the railway," and under section 35 of the Consolidated Railway Company's Act, 1896, "lands . . . . as it may require for the said works," and under section 44 of the Act there is the statutory compulsion to supply electricity as previously remarked upon.

The facts are that the undertaking authorized by statute has been constructed and is in operation, and is one of public utility; the power-house is of absolute necessity in the operation of the railways, and it is imperative, as provided by section 44, to supply electricity to the public, and compensation is provided for by Parliament, but not compensation for the nuisance the plaintiff complains of, and not being provided for, none can be exacted. In my opinion, it cannot be successfully argued that *Canadian Pacific Railway* v. *Parke, supra,* is conclusive as against the defendant, or establishes any right in the plaintiff to damages, or an injunction, in view of the particular facts of the present case. The distinction which I think can be readily seen is to observe the language of Lord Watson at p. 95. It is seen that the water was to be used on the land, but passing off

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the land the injury ensues. But here we have a power-house which in its operation—which is of necessity in the carrying on of the undertaking—causes the nuisance, but nothing escapes from off the land which gives rise to the nuisance unless it can be said that vibration and noise escape; it cannot be said that any physical injury to the land of the plaintiff has occurred. Therefore, in my opinion, and it is said with the greatest respect, *Canadian Pacific Railway* v. *Parke, supra,* has no bearing upon the present case. Were it otherwise, and could it be said that *Canadian Pacific Railway* v. *Parke, supra,* was conclusive in the present case, rather than that it is a case decided upon the peculiar facts there present, it would, in my opinion, be an absolute reversal of what has been for long years deemed to be the law of England and the law of this country. See also Pollock on Torts, 9th Ed., 132-3, and the authorities there cited.

It is contended that the defendant need not necesarily have placed its power-house so close to the plaintiff's dwelling-house; but wherever placed, unless it could be successfully contended (which I think is an untenable contention) that some large area be acquired and the power-house there placed, remote from all dwellings, there still would be the noise, vibration and flashes of electricity complained of, and if not a nuisance to the plaintiff, a nuisance to others. And see Pollock on Torts at p. 135.

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The facts in the present case would not appear to be such as establish that the defendant has done other than it reasonably is by statute entitled to do, and if the construction and operation of the power-house in the carrying on of its undertaking can be said to be an actionable wrong, it amounts to a deprivation of right essential to the maintenance of the undertaking. It would seem to me that notwithstanding the apparent variance of authority, the true principle of law, and the controlling principle (save where liability for any nuisance has been expressly preserved by statute—*Jordeson* v. *Sutton, Southcoates and Drypool Gas Company* (1899), 2 Ch. 217; 68 L.J., Ch. 457) is laid down in *London and Brighton Railway Co.* v. *Truman* (1885), 11 App. Cas. 45; 55 L.J., Ch. 354, reversing the decision of the Court of Appeal, 29 Ch. D. 89. This view

of the law is pointedly brought out at pp. 136 and 137 of Pollock on Torts, and in reference to *Rex* v. *Pease* (1832), 4 B. & Ad. 30, cited at p. 137, it is well to not overlook note (*o*) on p. 134; and see the preface to 38 R.R. *Rex* v. *Pease* was a case of indictment against the company for a nuisance, the railway being parallel and adjacent to an ancient highway, and in some places came within five yards of it, it not appearing whether or no the line could have been made in these instances to pass at a greater distance. The locomotives frightened the horses of persons using the highway, and it was held that this interference must have been contemplated by the Legislature, since the words of the statute authorizing the use of the engines were unqualified, and the public benefit derived from the railway (whether it could have exercised the alleged nuisance at common law or not) shewed at least that there was nothing unreasonable in a clause of an Act of Parliament giving such unqualified authority.

In the present case—see section 43 of the Consolidated Railway Company's Act, 1896—the defendant is in terms "authorized and empowered to erect, construct, operate and maintain electric works, power-houses, generating plant, and such other appliances and conveniences as are necessary and proper for the generating of electricity or electric power . . . .," and under section 35, may compulsorily expropriate lands such as it may require for its works, and apart from compulsory purchase, at liberty to purchase such lands as might be necessary; also see section 9, subsection (2) of the British Columbia Railway Act (B.C. Stats. 1890, Cap. 39). This being the statutory power, and having exercised it without negligence, in what way can it be contended that there is actionable wrong such that the plaintiff is entitled to insist upon, even if the power-house in the operation thereof constitutes a nuisance, the Legislature not having preserved the right of action?

In *London and Brighton Railway Co.* v. *Truman, supra,* Lord Blackburn at pp. 362-4, considered section 82 of 1 & 2 Vict., c. cxix., and it may be said that section 9, subsection (2) of the British Columbia Railway Act is even wider in its terms, as there is no limitation as to acreage, and it cannot be contended

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upon the evidence that the land upon which the power-house has been placed was not "necessary for the construction, maintenance, accommodation and use of the railway": section 9, subsection (2).

If the present case came within the principle of the decision in *West* v. *Bristol Tramways Co.* (1908), 77 L.J., K.B. 684, the right of action might be established, but it is clear that it does not. That case was one of nuisance brought about by the use of creosote in wood paving. The tramway company were authorized to "pave with wood." The plaintiff in the action was a market gardener, and damage ensued to his plants. The evidence disclosed that there was a well-known method of wood paving not involving the use of creosote, and that it was not absolutely necessary to pave with creosoted blocks, and it was held that there was a right of action: see *per* Lord Alverstone at pp. 687-8.

In the present case, as the evidence shews, the power-house is modern in every way, with properly-installed machinery, and the operation of same is without negligence, and being authorized by statute, the statute does avail to protect the defendant. Then again, there might be liability if the present case were like that of *The Attorney-General* v. *Gas Light and Coke Co.* (1877), 47 L.J., Ch. 534, but there, as pointed out by Fry, J. at p. 535:

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> "It is to be borne in mind that that Act contains an express provision that nothing in that Act or the general Act should prevent their being under liability in respect of nuisances. And therefore they could not justify themselves by setting up an incapacity to make gas without creating a nuisance."

Eastern and South African Telegraph Co. v. *Cape Town Tramways Companies* (1902), 71 L.J., P.C. 123, in my opinion is an authority which greatly assists in demonstrating that upon the facts of the present case there is no liability upon the defendant. The case was one of damage by escape of electricity. See the remarks of Lord Robertson at p. 127.

It is beyond all controversy in the present case, that the noise, vibration and flashes of light are the natural incidents of the operations legalized under the Consolidated Railway Company's Act, 1896.

It is difficult to see how the authorized undertaking can be operated without the class of nuisance complained of. In fact, it would appear to be impossible, and when it is found that there is statutory authority for its construction and operation, and the power-house is a necessity, with such provision as the Legislature in its wisdom thought right for compensation, if it be that the compensation provided for does not cover the case as made out by the plaintiff, it would appear to follow that where the undertaking is carried on without negligence, there is no remedy.

Therefore, in my opinion, the appeal should be dismissed, and the judgment of the learned trial judge affirmed.

Appeal dismissed.

Solicitors for appellants: *Bowser, Reid & Wallbridge.*
Solicitors for respondents: *McPhillips & Wood.*

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Vendor and purchaser—Agreement for sale—Assignment by vendor—Existing equities—Action by grantee of vendor for instalment of purchase-money—Right to set up against assignee equitable defence—Pleading—Estoppel—R.S.B.C. 1911, Cap. 133, Sec. 2, Subsec. (25).

The assignee of an agreement for sale, even in the event of the payments under the agreement not having matured at the time of the assignment, is only entitled to recover the moneys due and enforce the agreement subject to any equities existing between the purchaser and vendor.

Where an assignee of an agreement for sale has an acknowledgment of the debt under such agreement and comes to trial with full knowledge of the fact that the purchaser intends to set up by way of equitable defence a claim against the assignee for defective construction of a building on the land comprised in the agreement, but fails to specially plead estoppel, the purchaser is entitled to set up a claim in connection with the construction of the building as against the assignee, in the same manner, and to the same extent, as she could against the original vendor if he were taking proceedings under the agreement.

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ACTION brought by the plaintiff Company as assignee of a vendor of land, to recover from the purchaser a portion of the purchase-money and interest, and, in default of payment for rescission of the agreement of sale or foreclosure of the defendant's interest thereunder, tried by MACDONALD, J. at Vancouver, on the 2nd of June, 1914. The facts were, that one J. E. Atkins agreed to sell land to the defendant and to erect a house thereon for $10,000, the value of the land being estimated at $2,500 and the price of the house at $7,500. The defendant made a payment in cash of $2,500 and agreed to assume a mortgage for $4,500; the balance of the purchase price to be paid by instalments. Atkins afterwards, and before any instalment came due, conveyed the land, subject to the mortgage, and to the agreement, to the plaintiff Company; and the defendant admitted in writing the amount due under the agreement. The conveyance contained a clause assigning to the plaintiff all moneys due or to accrue due under the agreement and the plaintiff gave the defendant notice in writing of the assignment. The defendant subsequently obtained an extension of time for payment of an instalment of purchase-money, and agreed to pay on it an increased rate of interest, but she stated that she intended to look to the vendor to complete the contract or make good any default.

Statement

Alfred Bull, for plaintiff Company.
T. E. Wilson, for defendant.

24th July, 1914.

MACDONALD, J.: Plaintiff seeks to recover from the defendant $775 and interest under an agreement for sale dated the 2nd of January, 1913, and, in default of payment, foreclosure. This agreement is between James E. Atkins as vendor and the defendant as purchaser, and relates to the sale of property in the City of Vancouver for $10,000. It recites the payment of $2,500 upon its execution and the balance purports to be payable by instalments and by the assumption of a mortgage for $4,500, though, presumably through mistake, no specific provision is made for the payment of $800 of the purchase price. By deed dated the 8th of January, 1913, Atkins conveyed to

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the plaintiff the property subject to the mortgage and agreement for sale. The conveyance contained a clause, assigning to the plaintiff all moneys due or to accrue due under the agreement, and a covenant on the part of the assignor as to the moneys due thereunder, and that if the amount were not duly paid by the defendant he would pay the same. Plaintiff was thus in a position upon completion of the payments under the agreement for sale to convey the land to the defendant subject to such mortgage. At the time of the execution of the conveyance the plaintiff gave express notice in writing to the defendant of the assignment of the agreement and that all moneys payable thereunder should, in future, be paid to the plaintiff. Defendant, in writing, acknowledged receipt of a copy of such notice and admitted that there was "unpaid and accruing due from her in respect of said agreement of sale the sum of $3125, and interest." On the 4th of July, 1913, an instalment of $775 became payable and the plaintiff pressed for payment. John K. Baillie, who acted throughout on behalf of his wife, the defendant, and whose actions were admittedly binding upon her, then sought to obtain an extension of the time for payment of this instalment. He agreed to pay an increased rate of interest in consideration of any indulgence that might be granted. He confirmed one of the conversations in relation to this matter in a letter dated the 9th of August, 1913, and in agreeing to pay such increased interest refers specifically to the "payment due on July 4, 1913, for house located at 2485—8th Avenue, West, Vancouver." Plaintiff, while not agreeing to any definite extension of time, on the strength of the application, refrained from taking any legal proceedings to enforce its rights for a considerable period, and it was not until the 9th of December, 1913, that this action was commenced. Then, for the first time, upon the defence being delivered, plaintiff learned that the defendant intended to dispute its right to recover the instalment then past due and a further instalment which had matured in the meantime. The consideration mentioned in the agreement was composed of the land therein referred to and the cost of a residence then being constructed by Atkins for the defendant and nearing comple-

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tion—the value of the land being estimated at $2,500 and the residence at $7,500. Defendant took possession of the building on the 8th of February, 1913, and since that time has had the use and enjoyment thereof, but contends that she is entitled to set up by way of an equitable defence, non-fulfilment of the contract, or defective construction of such building. She claims a proper reduction in the contract price. See *Mondel* v. *Steel* (1841), 8 M. & W. 858.

Section 2, Subsec. (25) of the Laws Declaratory Act, R.S.B.C. 1911, Cap. 133, provides that any absolute assignment of any debt or other legal chose in action of which express notice in writing shall have been given to the debtor shall be effectual in law, "subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed." Dealing with the legal position of the parties, it was contended that I should take judicial notice of the frequency of purchases of agreements for sale and, as it were, assist their negotiability by deciding that the purchaser of the property was debarred from disputing liability for payment as against a *bona-fide* purchaser of an agreement for sale. It was submitted that the same principle should be applied to the assignment of an agreement for sale as in the case of a transfer of a negotiable instrument. I see no reason to depart from what I believe to be the settled law in the matter, and am satisfied that this proviso in the statute is applicable. In my opinion, although the payments under the agreement had not matured at the time of the assignment of the agreement, still plaintiff only became entitled to recover the moneys and enforce the agreement, subject to any equities existing between the defendant and Atkins. Evidence was admitted without objection on the part of the defence shewing the precautions taken by the plaintiff Company in purchasing the agreement. It was claimed on its behalf that the usual course was pursued. I have no reason to doubt that the defendant was fully aware of the effect of her acknowledgment and that the money would not have been paid over by plaintiff to Atkins under the assignment if such acknowledgment had not been obtained. Her husband seemed to be under the impression that he was absent from the city at the time,

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but it was apparent that he was confused as to dates of a visit made to Seattle, and, being mistaken in this respect, it is probable he has forgotten his presence in the city and the conversation, when it was arranged that Macfarlane should take the notice to the defendant for signature. He admitted he knew of the existence of the notice and acknowledgment shortly afterwards. He did not in any way repudiate the acknowledgment or notify the plaintiff that it was not binding or effective according to its purport. He did not even at the time when he was applying for his extension of payment in July in any way dispute the liability. He stated that he intended to look to Atkins to complete the contract or make good the defects, and emphasized this position by his letters of 6th and 25th of September, 1913. Defendant contends, however, that to apply these facts as a bar to the defendant's right to set up her equity would require a plea of estoppel. During the course of the trial plaintiff applied to add such a paragraph to its reply. Defendant's counsel contended that if the application were granted an adjournment should follow, as he was not prepared to meet such defence. I accepted his statement that he would be embarrassed and prejudiced should such a plea be allowed without an adjournment to give him time to consider its effect and any evidence he might desire to adduce. I allowed the amendment subject to an adjournment on the usual terms as to costs, as I felt that the plaintiff should not be deprived of an answer to the defendant's equitable defence. Plaintiff's counsel would not accept the amendment upon the terms imposed. It was solely a question of terms, and if I had refused the amendment it would have been a good ground for a new trial: Pollock, C.B. in *Brennan* v. *Howard* (1856), 1 H. & N. 138 at p. 140. There was no further evidence during the trial directly bearing upon this matter. Estoppel was thus not an issue between the parties according to the pleadings. It was submitted, however, that, as a matter of pleading, estoppel *in pais* did not require to be specially pleaded. Odgers on Pleading, 7th Ed., 223, states that it should be so pleaded; but, in a foot-note, the text writer qualifies this statement by pointing out that by the former practice it was held that estoppel by

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record or deed must be specially pleaded, but that an estoppel *in pais* might be given in evidence without being specially pleaded, citing *Freeman* v. *Cooke* (1848), 2 Ex. 654, and *Phillips* v. *Im Thurn* (1865), 18 C.B.N.S. 400, the writer adds, however, that

"Now it is, I think, clear that the facts which are said to amount to an estoppel of any kind are material facts, and should be specially pleaded."

If the facts disclosed in evidence had been specially pleaded, in my opinion, they would have clearly operated by way of estoppel and prevented the defendant from setting up the equities suggested or contending that moneys payable under the agreement for sale should not be paid to the plaintiff. Defendant could not even have set up fraud as against the plaintiff.

"If a person before taking an assignment of a bond actually inquires from the obligor whether it is a good bond, and the money secured by it is due, and is told that the bond is good and the money is due, the obligor can never set up against the assignee that the bond was obtained by fraud":

Malins, V.C. in *In re Hercules Insurance Co., Brunton's Claim* (1874), L.R. 19 Eq. 302 at p. 310.

It would appear, according to the evidence adduced at the trial, that the defendant and her husband, by words and writing, caused the plaintiff to believe that the moneys accruing due under the agreement would be paid in due course, and, on the faith of such representations, the defendant was induced to purchase such agreement. The question then is whether the defendant, without a formal plea of estoppel on the part of the plaintiff, is prevented from setting up her equitable defence as against the plaintiff.

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"While, under our practice, the written pleadings and other proceedings have lost much of their importance, they are not always wholly to be disregarded":

Riddell, J. in *Steinacker* v. *Squire* (1913), 30 O.L.R. 149 at p. 157. Then, to the contrary effect, one should consider the *dictum* of Bowen, L.J. in *Hewlett* v. *Allen & Sons* (1892), 2 Q.B. 622 at p. 670:

"We should not allow justice to be defeated upon a mere defect of pleading, and the matter in the Court of Appeal must be treated as if all facts had properly been pleaded which are undisputed in the case."

Defendant is not only seeking an equitable relief, but is

bound as well by rules of equity. Would it be a total disregard of pleading for me to hold, without a plea to that effect, that she has by her actions and those of her husband debarred herself from any equitable relief, especially in view of the fact that the husband stated he looked to Atkins to make repairs and satisfactorily complete the building? Would it, under these circumstances, be equitable for the defendant now to look to the plaintiff for redress or ask for reduction of the amount that the plaintiff would otherwise be entitled to recover under the agreement? Subsection (4) of section 2 of the Laws Declaratory Act provides that—

"The Court, and every judge thereof, shall recognize and take notice of all equitable estates, titles, and rights and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner in which the Court sitting in equity would have recognized and taken notice of the same in any suit or proceeding duly instituted therein before the said 29th day of April, 1879."

The Annual Practice, in referring to a similar provision in the English Act, states that the word "recognize" in the statute is imperative and is equivalent to "give effect to." Reference is then made to the meaning to be attached to the words "appearing incidentally." The case of *Williams* v. *Snowden* (1880), W.N. 124, decides that without pleading a counterclaim, where an equitable right thereto appears incidentally in the course of an action, the Court will recognize such right and decree accordingly. Lord Coleridge, C.J. in that case upheld the judgment of the recorder, and after quoting the statute above referred to, adds:

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"This is an equitable right,—a right to have specific performance of an agreement,—'appearing incidentally in the course of the cause.' How can the Court, in the face of that enactment, refuse to recognize it?"

It was argued by counsel for the plaintiff that the "right" should have been claimed by pleading according to the usual forms of procedure, otherwise the plaintiff would be at a disadvantage of not knowing what he had to meet. This was the only case cited to me as a direct authority that the Court was bound to give effect, without pleading, to an equitable right appearing incidentally during the course of the trial. There were a number of other cases cited in which the Courts held that the party seeking to set up an equitable defence had by

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words and actions contracted himself out of any benefit that might be derived from such defence, but in none of such cases did it appear that the ground was not covered by pleading. In the case of *Mackenzie* v. *Monarch Life Assurance Co.* (1911), 45 S.C.R. 232, the judgment of the Court of Appeal of Ontario ((1910), 23 O.L.R. 342) was reversed, and even the dissenting judges had no hesitation in dealing with the question of estoppel, even though it had not been pleaded. The situation was discussed upon the facts and the majority of the Court held that estoppel had been established. On appeal to the Privy Council ((1913), 25 O.W.R. 743) it was decided that as estoppel had not been pleaded or raised at the trial it could not operate as against the defendant company or support the contention of the plaintiff that the shares issued were binding upon such company. The difficulty presents itself that in *Williams* v. *Snowden, supra,* the Court *sua sponte* dealt with the equitable right appearing from the evidence during the trial and plaintiff is desirous that in this action I should pursue a similar course. In *Mackenzie* v. *Monarch Life Assurance Co., supra,* the point was not even raised at the trial, but their Lordships in the Privy Council (p. 749) referred to the desirability of adhering to the issues outlined by the pleadings as follows:

"This illustrates the dangers of travelling out of the case made on the pleadings and at the trial. A defendant cannot be blamed for not meeting a case of which he has had no warning."

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The necessity for pleading estoppel is dealt with as follows (p. 747):

"Their Lordships are of opinion that it was not open to the learned judge to decide against the defendants on any such ground. Estoppel was not raised in the statement of claim nor in the conduct of the trial at *nisi prius*. In such a case as this any question of estoppel must involve a special inquiry into the circumstances and the position and knowledge of the parties, of the necessity for which no warning was given to the defendants, either by the pleadings of the plaintiff or the behaviour of his counsel at the trial until after the evidence was concluded. It would work grave injustice if, in such a state of things, a Court of Appeal were to permit a contention of this nature to be raised by the party in default, who in this instance, has deliberately chosen to base his case on contentions of fact wholly inconsistent with any such contention."

The plaintiff herein came to trial with full knowledge that the defendant intended to set up a claim to equitable relief as

against any amount that might be payable under the agreement for sale. When it became evident during the course of the trial that an amendment alleging estoppel was desirable and such amendment was allowed, subject to terms, the plaintiff did not take advantage of the privilege thus afforded. Were I now to refuse to consider and recognize the claim of the defendant to such equitable relief it would, in effect, be allowing a plea of estoppel though not formally pleaded. This would be adopting the course which is referred to by their Lordships in *Mackenzie* v. *Monarch Life Assurance Co., supra,* at p. 750, as being beyond the power of a trial judge:

"It would not be within the power of a judge after judgment to make any order which would substantially affect the rights of the parties on appeal, as would be done by such an order if it were to have the effect of making estoppel appear to have been an issue between the parties during the taking of the evidence when in fact it was not so."

I consider that as estoppel has not been pleaded, the defendant is entitled to set up a claim in connection with the construction of the building as against the plaintiff in the same manner and to the same extent as she could against Atkins if he were taking proceedings under the agreement. The defendant adduced evidence that the value of the defects and insufficient construction of the building amounted to $2,500. This would be one-third of the estimated cost of the building, and I think it is unreasonable to suppose that the husband of the defendant with the assistance of Mr. Julian, the architect, would have taken possession of the building if it fell short of the plans and specifications to this extent. In a letter dated the 20th of January, 1913, addressed to Atkins and Macfarlane, Mr. Baillie pointed out to them specifically wherein the contract had not been completed, and desired that they should have such defects remedied not later than the 31st of January. Atkins states he complied with this request. As to the mouldings, there is no doubt that they were of a different type to those shewn by detailed plans, but I am satisfied that this non-compliance was overlooked by the defendant. The evidence in this connection is contradictory, but the mouldings now complained of had been placed in position without criticism before the 20th of January, when the letter referred to was written, and no

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objection was made to them. In the final completion of a building there are many matters of minor importance that require attention on the part of a contractor, and some of these may have been overlooked. The roof appears to have leaked, which is not altogether an uncommon occurrence in this Province, but the amount expended by the defendant for repairs is unusual and unwarranted. There is considerable discrepancy in the evidence on the part of the plaintiff and the defendant as to the quality of the work and material and also as to the reasons for the condition of the plaster and woodwork. An architect on behalf of the plaintiff gave it as his opinion that the contractors had conscientiously tried to carry out the contract, but witnesses of the same profession on the part of the defendant took an absolutely contrary view. Mr. Julian, the architect who drew the plans for the defendant, stated that in his opinion the difference in price between the building as constructed and the building as it should have been constructed according to the plans and specifications would be $2,000, but in arriving at this amount he doubtless included a substantial sum for the difference between the woodwork as supplied and the class of work stipulated for under his detailed drawings. It would not serve any useful purpose to consider the evidence more in detail, as it is very contradictory and to a great extent merely a matter of opinion. Defendant stated that he paid out for repairs in cash $315, a large portion of this amount being in connection with the roof. There are other defects, and I allow a total amount of $525, as a reasonable amount to be credited against the sum now due under the agreement for sale. There will be the usual order of reference to take an account with the credit above referred to and, in default of payment, foreclosure. There were two adjournments of this action obtained by the defendant, thus postponing the time for redemption. In view, however, of the amount of $2,500 having been paid on account of the purchase price, I consider the defendant should be entitled to two months from this date for redemption, and the order will so provide. Plaintiff is entitled to costs of action.

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Practice—Order XIV.—Leave to defend—Grounds for—Costs.

Upon a motion by the plaintiff for summary judgment under Order XIV., r. 1 (*a*), the defendant is entitled to unconditional leave to defend when he alleges facts which, however improbable or suspicious, would, if proved, be a good defence in law to the claim.

Order XIV., r. 9, gives the chamber judge a wide discretion as to costs, with which the trial judge cannot interfere.

APPLICATION for judgment under Order XIV., heard by MORRISON, J. at chambers in Vancouver on the 8th of May, 1914. Statement

Head, for plaintiff.
W. C. Brown, for defendant.

MORRISON, J.: The plaintiff applied for judgment under Order XIV., rule 1 (*a*). The defendant shewed cause, and was given unconditional leave to defend. The application extended over several chamber days and was vigorously pressed and even more vigorously opposed. My mind was directed especially as to whether I should let in the defendant unconditionally to defend, and, having been finally satisfied as to that, I simply so stated. Considering the other aspects as of minor importance, I did not delay other numerous applications on the chamber list by specifically dealing with the form of order. Now, upon settlement of the order, the defendant invokes rule 9 (*b*), and I think he is justified in so doing: *Warner* v. *Bowlby* (1892), 9 T.L.R. 13; especially so having regard to the case of *Jacobs* v. *Booth's Distillery Company* (1901), 85 L.T.N.S. 262, according to which the defendant is entitled to unconditional leave to defend whenever he alleges facts which, however improbable or suspicious, would, if proved, be a good defence in law to the claim. Judgment

MORRISON, J.

1914

May 8.

WILSON v. B.C. REFINING CO.

Rule 9 gives the chamber judge, to whom only it applies, a wide discretion as to costs. The trial judge cannot interfere with the exercise of that discretion as to costs. In view of the knowledge of the grounds upon which the defendant based his defence placed before the plaintiff, I am of opinion that this matter is of that class of cases contemplated by the rule, and the defendant should have his costs as asked for.

Order accordingly.

MARTIN, LO. J.A. (At Chambers)

1914

April 21.

MOMSEN v. THE AURORA.

Admiralty law—Practice—Taxation—Mileage—Hire of tug.

No greater sum than ten cents a mile can in any circumstances be allowed for executing a warrant in Admiralty for the arrest of a ship.

MOMSEN v. THE AURORA

APPLICATION to review the registrar's taxation of the marshal's bill of costs in respect of an item of $440 for hire of a tug for eleven days for proceeding from Vancouver to Sea Otter Cove, at the northern end of Vancouver Island, to arrest the ship "Aurora," and thence towing her to Vancouver under arrest. The registrar allowed the sum of $50 only, being at the rate of 10 cents per mile from Vancouver to Sea Otter Cove and returning, following the note to Part 5 of the Table of Fees in the Admiralty Rules of the Exchequer Court of Canada, as follows:

Statement

"If the marshal or his officer is required to go any distance in execution of his duties, a reasonable sum may be allowed for travelling, boat-hire, or other necessary expenses in addition to the preceding fees, but not to exceed 10 cents per mile travelled."

Heard by MARTIN, Lo. J.A. at Vancouver on the 21st of April, 1914.

MARTIN, LO. J.A. (At Chambers)

1914

April 21.

MOMSEN v. THE AURORA

E. A. Lucas, for plaintiff: This was a "payment necessary for the safe custody of the ship," and should be allowed under the proviso in that behalf in the third item of Part 5 of the Table of Fees. The note at the end of the said Part as to 10 cents a mile refers to the marshal's travelling expenses only, and while it is conceded that he could have travelled by mail steamer *via* Victoria to Winter Harbour and hired a launch there to Sea Otter Cove, about 20 miles further on, yet to keep the ship in safe custody it was necessary to lay alongside her and tow her to Vancouver.

Sears, for Nosler, a claimant on the funds in Court: It was not necessary to employ a tug from Vancouver. The marshal's officer could have taken the regular steamer and hired a local launch, and it must be presumed that the Aurora's crew, with the marshal's officer aboard, would have brought her to Vancouver in pursuance of the marshal's orders.

Argument

Price, for the bondsmen of the ship: The note to Part 5 of the Table of Fees expressly mentions travelling and boat-hire, and this is the only provision for such disbursements; parties providing the marshal for more expensive means of travelling must bear the cost over and above 10 cents per mile.

MARTIN, LO. J.A.: The learned registrar's ruling is the only one possible under the Table of Fees, and it is hereby confirmed. No greater sum than 10 cents per mile can in any circumstances be allowed in executing a warrant to arrest. Motion dismissed.

Judgment

Motion dismissed.

MACDONALD, J.

1914

May 18.

SUTTIE v. PELLETIER

SUTTIE v. PELLETIER *ET AL.*

Damages—Set-off—Unlawful seizure under chattel mortgage—Amount due under chattel mortgage—Set-off refused—Remedy by execution.

Where the plaintiff succeeded in an action for damages for the unlawful seizure of his goods by the defendant under a chattel mortgage:—

Held, that such damages should not be set off against the amount due under the chattel mortgage.

Semble, the plaintiff may take steps, by equitable execution or otherwise, to secure the payment out of the assets of the defendants.

Statement

ACTION for damages arising out of the seizure of the plaintiff's goods by the defendants under a chattel mortgage, tried by MACDONALD, J. at Vancouver on the 27th of April, 1914.

Woodworth, for plaintiff.

Henderson, K.C., for defendant.

18th May, 1914.

MACDONALD, J.: This is an action for damages arising out of the seizure of the plaintiff's goods by the defendants under a chattel mortgage. I gave judgment in favour of the plaintiff for $600 damages, and the question as to whether such amount should be offset against the chattel mortgage was reserved.

Judgment

A number of authorities have been submitted in support of the plaintiff's contention that such set-off should be allowed. I do not think they are in point, nor are the facts similar to those in the present case. This action arose out of an unlawful seizure, and, the judgment being for damages, I do not think that, on principle or under authority, it should be a part of such judgment that the amount so recovered is to be set off against the amount due or to accrue due under the chattel mortgage. It was only through the evidence adduced in support of the action that the chattel mortgage came before the Court for consideration. Upon judgment herein being entered, the plaintiff will be at liberty to take such steps, by equitable execution or otherwise, as she may be advised, to secure payment out of the assets of the defendants.

Order accordingly.

ESSEN v. COOK *ET AL.*

MACDONALD, J.

1914

May 26.

ESSEN v. COOK

Foreclosure—Action for—Agreement for sale—Untenable defence—Costs—Personal liability.

In an action for foreclosure of the purchaser's rights under an agreement for sale, where the purchaser raises an untenable defence, he is personally liable to pay the costs occasioned thereby.

Guardian Assurance Co. v. *Lord Avonmore* (1873), 7 Ir. R. Eq. 496, followed.

ACTION by the vendor for a declaration that the defendants, the purchasers, were in default under an agreement for the sale and purchase of land, and for foreclosure of their interests. Tried by MACDONALD, J. at Vancouver on the 26th of May, 1914. Statement

C. F. Campbell, and *Singer,* for plaintiff.
A. S. Johnston, for defendants.

MACDONALD, J.: This is an action brought by the plaintiff for a declaration of default under an agreement for sale. The defendants, other than defendant Cook, delivered defences denying all allegations tending to support the plaintiff's claim. Prior to the action coming on for trial, admissions were made which practically disposed of the issues and left only the question of costs reserved for consideration. Judgment for foreclosure was granted, and the plaintiff now seeks to obtain judgment imposing costs upon the defendants thus defending. Judgment

The general rule is that in an order for foreclosure there is no judgment against the defendants personally for costs, should redemption not take place, but an exception arises where the validity of the security has been unsuccessfully disputed: see Morgan and Wurtzburg on Costs, 222. There is a case not referred to in this text-book—*Guardian Assurance Co.* v. *Lord Avonmore* (1873), 7 Ir. R. Eq. 496—where the only question left for the Vice-Chancellor to decide was the same as now comes

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ESSEN v. COOK

before me for consideration. I think it well to quote the judgment almost at length, as follows:

"The only question I have to decide is as to the costs. The general rule in foreclosure suits is, that the costs should come out of the estate with the demand. But there is an exception to that rule where the mortgagor raises a defence which is untenable, in which case the costs so occasioned may be ordered to be paid by him personally—and that, whether there be fraud or not on his part. In the present case there is no doubt that Lord Avonmore did raise a defence which was untenable, and which caused a great deal of the litigation in the case. I am not of opinion that the suit was rendered necessary by Lord Avonmore, as it was necessary to be instituted to enable the charges on the property to be raised. I do not, therefore, think the entire costs should be given against him, but I am certainly of opinion that the additional costs of the litigation caused by this defence should not be merely added to the plaintiffs' demand, for payment of which there is likely to be an insufficient fund. I think the proper form of the decree should be that suggested by Mr. Gibson, and which was made in the case of *Sharples* v. *Adams* [(1863)], 1 New Rep. 460. The addition to the usual decree should be that, in case the fund proved insufficient for payment of plaintiffs' demand and costs, Lord Avonmore personally should pay so much of the costs as were occasioned by his unsuccessful defence."

Judgment

I follow this judgment, and am supported in this conclusion by the judgment of the Vice-Chancellor in *Tildesley* v. *Lodge* (1857), 3 Jur. N.S. 1000, where the learned judge directs costs should be paid by the defendant through his failure in the litigation, and that "he ought to pay so much of the costs of the suit as have been occasioned by disputing the plaintiff's right to sue upon his equitable mortgage."

In this action all costs should be taxed in the ordinary manner and added to the amount required to be paid for redemption within the stipulated period. Then the judgment should provide for a separate taxation of the additional costs occasioned by the defendants defending the action, and such costs will be paid by such defendants in the event of the redemption not taking place.

Order accordingly.

BRITISH COLUMBIA EXPRESS COMPANY v. GRAND TRUNK PACIFIC RAILWAY COMPANY.

MORRISON, J.

1914

May 26.

B.C. EXPRESS CO. v. GRAND TRUNK PACIFIC RY. CO.

Injunction—Obstruction of waterways—Railway construction—Bridges—Railway Act, R.S.C. 1906, Cap. 37—Sanction of public works department—Injury to business—Remedy.

Upon an application by the plaintiff Company for a mandatory injunction to compel the defendant Company to cease obstructing certain navigable rivers, and to remove a temporary bridge built across one of them, also to make openings in two permanent steel bridges constructed pursuant to statutory authority:—

Held, upon the evidence, that the injunction be refused, as the requirements of the Railway Act of Canada had been complied with, and the public works department of Canada had sanctioned the temporary obstruction of these streams.

Held, further, that the plaintiff was not obstructed in its navigation of the streams, nor was its business jeopardized thereby.

Semble, the plaintiff has a remedy in damages if its business should be injured by the operations of the defendant.

MOTION by the plaintiff Company for an *interim* injunction, heard by MORRISON, J. at chambers in Vancouver on the 26th of May, 1914. Statement

Armour, for the motion.
Tiffin, and *A. Alexander*, *contra*.

MORRISON, J.: This is an application on behalf of the plaintiff Company for an order for a mandatory injunction to compel the defendant Company forthwith to cease obstructing the Fraser River and the Nechaco River, and to remove the temporary bridge built across the Fraser River by the defendant Company just below the confluence of those two streams, and forthwith to make openings in two permanent steel bridges crossing the Fraser River, likewise constructed by the defendant Company pursuant to statutory authority. Those structures have been built across the upper reaches of the Fraser River in the vicinity of Fort George, and are necessary links in the transcontinental chain of railway now nearing completion. Judgment

The plaintiff Company carries on the business of freighters,

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and employs several river steamers in its operations, which are said to navigate the streams thus crossed by the bridges in question during the months navigation is open—variously from April until November.

The orders in council sanctioning the erection of those structures contain a condition that, if at any time it is found that a passage-way for steamboats is required, the defendant Company shall provide the same upon being directed to do so either by the department of public works for the Dominion of Canada, or by the Board of Railway Commissioners for Canada.

From the material before me, I am satisfied that all the requirements of the Railway Act of Canada have been complied with and that likewise the public works department of Canada, having regard to the exigencies of the case, sanctioned the temporary obstruction of those streams. It is a matter of pointed comment upon an application of this kind that there is every facility afforded parties aggrieved to resort to a great department of State, such as the public works department of Canada, or to the great Federal Railway Court, known as the Board of Railway Commissioners for Canada, and, notwithstanding those facilities, and the fact that they have jurisdiction to deal with the subject-matter of complaint, the plaintiff has passed them by and come to a judge in chambers for an order to interrupt the important public undertaking of completing a transcontinental railway.

Judgment

Doubtless it may be true that a navigable stream is being obstructed, but the point in this application for me to consider is whether the plaintiff Company is being obstructed in its navigation of those streams, as urged by counsel, and that thereby its business is jeopardized. Having regard again to the material before me and, particularly, the correspondence which passed between the plaintiff Company and defendant Company, I do not think it is. Should there be damage to the plaintiff Company's business caused by the operations of the defendant Company, the aid of the Courts, as rendered by means of a trial, may be invoked, if necessary.

I therefore refuse the application, with costs.

Application refused.

REX v. BRADY.

SWANSON, CO. J.

1914

April 19.

REX v. BRADY

Criminal law—Stipendiary magistrate—Conviction by—Appeal—Court of county where offence committed—Summary Convictions Act, R.S.B.C. 1911, Cap. 218, Sec. 72.

An appeal from a conviction under section 72 of the Summary Convictions Act must be brought in the County Court of the county within which the offence is alleged to have been committed.

APPEAL from a conviction by a stipendiary magistrate, at Tete Jaune Cache, in the county of Yale, exercising jurisdiction in both the County of Cariboo and the County of Yale, on a charge of unlawfully selling liquor without a licence, contrary to the provisions of the Liquor Licence Act. The alleged offence was committed in the County of Cariboo, and the accused was convicted and sentenced to six months' imprisonment. The accused appealed from the conviction to the County Court of Yale, at Kamloops. Heard by SWANSON, Co. J. at Kamloops, on the 9th of April, 1914. Statement

Macintyre, for the accused.
R. L. Maitland, for the Crown.

SWANSON, Co. J.: The accused was tried at Tete Jaune Cache, in the County of Yale, before W. A. Jowett, a stipendiary magistrate exercising jurisdiction in both the County of Cariboo and the County of Yale, on the charge of unlawfully selling liquor without a licence, contrary to the provisions of the Liquor Licence Act. The accused was convicted and sentenced to six months' imprisonment. The accused appealed from said conviction to the County Court of Yale at Kamloops. Mr. *Maitland* raised the preliminary objection that there is no jurisdiction in the County Court of Yale to try the said appeal, the proper tribunal being the County Court of the County of Cariboo, being the county wherein the offence is alleged to have been committed. The objection is, I think, fatal to the appeal. Judgment

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The right to an appeal is given by section 72 of the Summary Convictions Act, R.S.B.C. 1911, Cap. 218:

"The defendant may appeal to the County Court, at the sitting thereof which shall be held nearest to the place where the cause of the information or complaint arose."

Section 83 confirms this view:

"Every justice before whom any person is summarily tried shall transmit the conviction or order to the Court to which the appeal is herein given, in and for the district, county, or place wherein the offence is alleged to have been committed," etc.

It is interesting to note by way of analogy only the simliar provisions in the Criminal Code, Secs. 749 and 757. (The appeal is, of course, regulated entirely by the Provincial Act above named and not by the Code.)

Mr. Justice Lamont has dealt with the question of venue relative to trials in a Superior Court on indictment in *Rex* v. *Lynn (No. 1)* (1910), 17 Can. Cr. Cas. 354, dealing with former section 557 of the Code, now section 577. The head-note reads:

"A charge or indictment is not to be preferred against an accused person outside of the judicial district or county in which the offence is alleged to have been committed, unless an order of the Court has been made for a change of venue."

Halsbury's Laws of England, Vol. 9, par. 582:

"The common law rule is that the proper venue for the trial of a crime is the area of jurisdiction in which the place is where the crime was committed. Statutory provision is made for the trial of certain crimes before Courts other than those within the area of whose jurisdiction such crimes were committed, but, in the absence of statutory provision, the common law rule governs the venue."

Judgment

This principle as to the venue of trials of indictable offences is, I think, applicable to cases of trials of other offences triable otherwise than on indictment, unless there is some statutory provision to the contrary. In the case before me, no reference is made to any statutory provision to change the common law principle. See also Archbold's Criminal Pleading, 24th Ed., p. 24, quoting Lord Mansfield in *Rex* v. *Watson* (1770), 4 Burr. 2507 at p. 2511:

"The old jurisdiction of counties was local: they were like different kingdoms. There was no jurisdiction out of the county, no process, out of it."

Denison, J., in *Rex* v. *Harris* (1762), 3 Burr. 1330, said:

"A place of trial ought not to be altered from that which is settled and established by the common law, unless there shall appear a clear and plain reason for it," *viz.*: that there cannot be there a fair and impartial trial. See also Encyclopædia of the Laws of England, Vol. 12, p. 450.

The appeal must, therefore, fail and the conviction stand.

Conviction sustained.

IN RE GLOVER AND SAM KEE.

Municipal law—Power to license and regulate laundries—By-law excluding laundries from specific district—Ultra vires—R.S.B.C. 1897, Cap. 144, Sec. 50, Subsec. (91)—B.C. Stats. 1900, Cap. 23, Sec. 4.

A municipal corporation passed a by-law providing that "no building or structure of any kind shall be constructed and used for a laundry or wash-house" within a specific district. The by-law was passed under R.S.B.C. 1897, Cap. 144, Sec. 50, Subsec. (91), as amended by B.C. Stats. 1900, Cap. 23, Sec. 4, by which power was given to municipalities to make by-laws "for licensing and regulating wash-houses and laundries, and for naming and defining the streets or limits (as in the case of fire limits) on or within which laundries or wash-houses may be established, maintained or operated, and for preventing and regulating the erection or continuance of any laundries or wash-houses which may be found to be nuisances. The defendant was convicted of a breach of the by-law for having constructed and used a building for a laundry or wash-house within the restricted area.

Held, that the conviction should be quashed, as the by-law exceeded the power conferred upon the municipality and was unauthorized.

Semble, that the by-law was not open to attack upon the ground that it was unreasonable and oppressive, and tended to create a monopoly; nor was it prohibitive or in restraint of trade.

CASE STATED for the opinion of the Court by the police magistrate for the City of Kamloops, pursuant to the Summary Convictions Act. Heard by MACDONALD, J. at Vancouver, on the 3rd of February, 1914. Statement

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Harding, for appellant.
Fulton, K.C., for respondent.

3rd February, 1914.

MACDONALD, J.: The appellant was convicted by the police magistrate of the City of Kamloops upon a charge that on the 26th of July, 1913, "he constructed and used a building for a laundry or wash-house within a certain portion of the City of Kamloops, contrary to the City of Kamloops Laundries or Wash-houses By-law, 1903, No. 50." The appellant was granted a case stated for the opinion of this Court, pursuant to the Summary Convictions Act.

It was admitted that the by-law had been duly passed by the Council of the City of Kamloops, that the property upon which the laundry of the appellant was situated was within the portion of the City of Kamloops specifically referred to in such by-law, and that appellant held himself out to the public and solicited business as proprietor of the laundry.

Several questions were submitted arising out of the objections taken to the validity of the by-law under which the conviction was obtained, but I have only deemed it necessary to deal with the more important grounds.

Judgment

The statute in force at the time, and under which the by-law purports to have been passed, was R.S.B.C. 1897, Cap. 144, Sec. 50, Subsec. (91). This subsection gives power to each council of every municipality to make by-laws "for licensing and regulating wash-houses and laundries . . . . for preventing and regulating the erection or continuance of any laundries or wash-houses which may be proved to be nuisances." This subsection was amended by section 4 of the statutes of 1900, Cap. 23, by inserting after the word "laundries," in the first line thereof, the words "and for naming or defining the streets or limits (as in the case of fire limits) on or within which laundries or wash-houses may be established, maintained or operated."

It was contended that the council had misapprehended its powers, as it had not named or defined the streets or limits within which laundries or wash-houses might be "established, maintained or operated," but had created a restricted district

within which buildings or structures for laundry purposes should not be "constructed and used." There is nothing illegal or improper in itself in the establishment, maintenance or operation of a laundry or wash-house. It is a legitimate and necessary business. When any interference by the Legislature is contemplated with such a business or calling, the statutory power conferred upon the municipality must be clearly indicated, and then specifically followed in any by-law passed thereunder. Aside from the unauthorized manner in which the council sought to segregate a district within which laundries or wash-houses might be not constructed and used, I consider the by-law exceeds the statutory power conferred upon the municipality. The Legislature, by the amendment referred to, extended the jurisdiction of the council so that it might define the limits within which laundries or wash-houses might be "established, maintained or operated," but it did not confer power of prevention so that "no building or structure of any kind shall be constructed and used for a laundry or wash-house" within a specific portion of the municipality: see *Regina* v. *On Hing* (1884), 1 B.C. (Pt. 2) 148. BEGBIE, C.J. at p. 149, in referring to *Regina* v. *Howard* (1884), 4 Ont. 377, states:

"In addition to the grounds there adopted by the Court, it is to be considered that a by-law (dealing with matters of this sort) cannot go beyond the words of the statute; and the statute here gives no power whatever to regulate alterations; so that this by-law is quite unauthorized."

Judgment

The contention was made that the by-law was bad, in that it was unreasonable and oppressive and intended to create a monopoly by restraining the trade or calling which it assumed to regulate. I do not think the by-law could have been successfully attacked on this ground. Whatever burden is created or apparent privilege follows from the establishment of an area within the municipality where laundries or wash-houses might only be carried on, it is not a subject for judicial interference. It is a matter purely discretionary with the council of each municipality, and "the Court ought, as far as possible, to support by-laws made by local authorities unless it can be clearly seen that the by-law was made without jurisdiction and was unreasonable."

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IN RE GLOVER AND SAM KEE

Lord Russell of Killowen, C.J., in *Kruse* v. *Johnson* (1898), 2 Q.B. 91 at p. 100, said:

"In matters which directly and mainly concern the people . . . . who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than [some] judges."

In Dillon on Municipal Corporations, 5th Ed., Vol. 1, at p. 458, it says:

"Thus, where the law or charter confers upon the city council, or local legislature, power to determine upon the expediency or necessity of measures relating to the local government, their judgments upon matters thus committed to them, while acting within the scope of their authority, cannot be controlled by the Courts. In such case, the decision of the proper corporate body is, in the absence of fraud, final and conclusive, unless they transcend their powers."

It was contended that the by-law in its wording was prohibitive and not regulative. There is a great difference between prevention and regulation, and even between restraint and regulation, but I do not consider that the by-law, except as to creating a restricted district, bears the construction thus sought to be placed upon it, nor do I think it is a by-law in restraint of trade. It is only subject to strict construction as being an interference or regulation with respect to a lawful calling.

Judgment

It is worthy of mention that the statute in force at the time of the passing of this by-law, and which provided for licensing and regulating of wash-houses or laundries, was amended in R.S.B.C. 1911: see Cap. 170, Sec. 50, Subsec. (117), and now the council of a municipality may pass by-laws for "preventing and regulating the erection and use or continuance of any laundries or wash-houses and for ordering the removal of laundries or wash-houses in a particular locality, when, in the opinion of the council, such laundries are a nuisance or an eyesore to such locality." This amendment greatly extended the powers of the council both as to prevention and regulation.

I consider the by-law bad. The determination of the magistrate was erroneous in point of law and should be reversed, and the conviction of the appellant should be set aside, with costs payable by the respondent.

Conviction quashed.

THOMPSON v. McDONALD AND WILSON.

COURT OF APPEAL

1914

April 23.

Vendor and purchaser—Agreement for sale—Vendor's title—Requirement as to—Land Registry Act, R.S.B.C. 1911, Cap. 127, Sec. 104—Appeal—Costs.

THOMPSON v. McDONALD AND WILSON

Under an agreement for the sale of land in which the place and manner of completion of the contract are not mentioned, the vendor is only called upon to shew that he has a good title. It is the duty of the purchaser to prepare the conveyances (covering the legal and equitable estate with the usual covenants), pay over the purchase price, and have the conveyances executed.

In the absence of an express stipulation that the vendor is to produce a registered title, the purchaser must rely upon the vendor's covenants.

APPEAL by the defendants from an order of MURPHY, J. made at chambers in Vancouver on the 16th of February, 1914, granting the plaintiff liberty to sign final judgment under Order XIV. in an action to recover final instalment in respect of an agreement of purchase dated the 12th of December, 1911, between certain persons as vendors (plaintiff having an assignment of such agreement) and the defendants as purchasers, whereby vendor agreed to sell and convey to the purchasers a good title in fee simple in possession, free from incumbrances, to certain property for $25,000. Upon an application by plaintiff for liberty to sign final judgment, under Order XIV., for $9,500, balance due under said agreement, the defendants opposed the application, and in an affidavit in support exhibited a certificate of incumbrances from the land registry office, whereby it appeared that two undischarged mortgages for $5,000 and $3,000 respectively were registered against the property in question, and also a life interest appeared as a charge. From the correspondence exhibited in defendants' affidavit, it appeared that defendants' solicitors declined to make the final payment until the plaintiff was in possession of a registered title unincumbered, and that the plaintiff's solicitors objected to register plaintiff's title as unincumbered prior to payment by defendants. An order for judgment was made, and

Statement

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final judgment signed thereon. Defendants applied for stay of execution, which was refused. An appeal was taken from the order. Pending the hearing of the appeal plaintiff issued execution against the defendants and realized the amount of the judgment. No change in the registered title was made up to the time of the hearing of the appeal.

The appeal was argued at Vancouver on the 23rd of April, 1914, before MACDONALD, C.J.A., IRVING, MARTIN and MCPHILLIPS, JJ.A.

Argument

Hart-McHarg, for appellants: The judgment was wrongly obtained. Under section 104 of the Land Registry Act, we are not justified in paying for real property until the transfers are actually registered. Plaintiff must give us a registered title before the money is paid. He referred to *Levy* v. *Gleason* (1907), 13 B.C. 357; *Goddard* v. *Slingerland* (1911), 16 B.C. 329; Thom's Canadian Torrens System, 1912, pp. 31, 32 and 127. By the agreement we are entitled to a good title. They cannot do this until they register the conveyances, and it is only upon this being done that they are entitled to payment.

C. B. Macneill, K.C., for respondent: The position now is that the title deeds have been delivered to the purchasers. The purchase price has been paid and distributed. There is therefore nothing before the Court but the question of costs.

Hart-McHarg, in reply.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal. It appears from an affidavit which Mr. *Macneill* asked us to look at, that since this appeal was launched, the disputes between these parties have practically ceased. That is to say, the vendors have performed their contract by shewing a good title and executing and delivering the conveyance, and the purchasers have performed their contract by paying the judgment against them for the balance of the purchase-money. Under circumstances like these, I must confess I cannot understand why this appeal should have been brought to a hearing. It has, however, been brought to a hearing and persisted in by counsel. I think we might very well have struck the case off the list and refused to hear it, as being merely the hearing a case for the purpose of

disposing of the costs. The costs are the only matter left to be disposed of between the parties. We, however, consented to hear the appeal and have heard it on the merits, and after a very able argument, Mr. *Hart-McHarg* has failed to convince me that the appeal ought to succeed.

On the question of costs, I think that they should follow the event. The appellants have been more at fault than the respondent. In fact, I am not sure that the appellants have not been entirely at fault. This appeal is another step in a vendetta. There is, therefore, no reason for departing from the usual rule that costs should follow the event.

IRVING, J.A.: The purchaser insists that, under section 104, the vendor must, before he is entitled to be paid, cause the title to be registered in his own name. I think if he wants that he should have stipulated for it in the agreement for sale. This was an open contract, in which the place and manner of completion of the contract were not mentioned. Under those circumstances, all the vendor had to do was to shew that he had a good title. It was then the purchaser's business to prepare the conveyances, pay over the money, get the conveyances executed, which conveyances should cover the legal and equitable estate and contain the usual covenants. In the absence of an express stipulation that the vendor is to produce a registered title, the purchaser must rely upon the vendor's covenants.

IRVING, J.A.

MARTIN, J.A.: In my opinion of the facts in this case, when the vendors produced the registered title to themselves, it released all of the subsequent incumbrances, and that was all that was necessary to be done on their part. The appeal should be dismissed.

MARTIN, J.A.

MCPHILLIPS, J.A.: In my opinion, the appeal should be dismissed. If parties making agreements for sale want to import all the controlling provisions of the Land Registry Act into them, there is an easy way of doing it, and that is to incorporate those provisions into the agreements. The Land Registry Act never was intended to sweep away all real property law. In my opinion, we should find these things insisted upon,

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and we do not so find them. This is an action for money due and payable under an agreement for sale, and I see nothing in the agreement for sale which calls for a registered title. The money was to be paid into the Bank of Commerce, and it could be paid out on the conveyance being handed over, and the conveyance was forthcoming. I do not see anything before this Court at all to indicate that any other procedure was to have been adopted. Further, it is now shewn that title has been perfected, and the moneys payable under the judgment have been paid, yet the appellants wish to insist upon the disposition of a point which is one of no materiality whatever as the facts now are, but apart from that consideration, the appeal lacks merit.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellants: *Eberts & Taylor.*
Solicitors for respondent: *Crease & Crease.*

HOWARD v. MILLER AND NICHOLSON.

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HOWARD v. MILLER AND NICHOLSON

Statute, construction of—Land Registry Act, B.C. Stats. 1906, Cap. 23, Secs. 3, 15, 16, 24, 25, 29, 74, 75, 81, 92, 116—Cross-deeds between husband and wife—Wife, administratrix of estate of husband, registers the deed from him to herself—Non-registration of the other—Sale by wife to third party—Interest of infant in estate of father—Effect of registration of father's deed to wife upon such interest—Order for rectification of register, establishing infant's interest—Direction for refund of moneys received by administratrix.

Plaintiffs brought action for specific performance of an agreement, dated 1st of June, 1908, made between defendant S. and plaintiff M., whereby S. agreed to sell and M. to purchase 4.14 acres of land. Defendant H. was joined as co-defendant on the ground that she claimed an interest in the property adversely to her co-defendant S. Defendant H., besides resisting the claim for specific performance against her, set up her own title to the property as heiress-at-law of her father, the deceased, former husband of her mother S. In order to prove her title as against the plaintiffs, who disputed it, H. put in three indentures: An indenture dated 23rd August, 1893, whereby a certain block of land, of which the 4.14 acres in question formed part, was conveyed to H.'s father and S., her mother, in fee simple, as joint tenants; an indenture dated the 14th of June, 1905, whereby H.'s father conveyed to S., his wife, an undivided moiety of the whole block in fee simple, thus vesting the whole block in her; an indenture also dated the 14th of June, 1905, whereby S. conveyed to her husband the entirety of the 4.14 acres in question. On the 30th of July, 1907, S. took both of the deeds of the 14th of July, 1905, to the land registry office, for registration, and owing to some misconception on the part of the registrar obtained registration in her name, the second deed, of the 14th of July, 1905, being apparently ignored. M. registered his agreement under section 74 on the day after it was signed, but in his application for registration he did not state the nature of the interest in respect of which he claimed registration, as required by Form D. in the First Schedule to the Act. S. inferentially admitted the title of H. MURPHY, J., at the trial, decreed specific performance of the agreement, but directed that the money should be paid into Court, to remain there until some order was made disposing of the interests of the various parties concerned.

Held, on appeal to the Court of Appeal, that it would be inequitable in all the circumstances, not to grant specific performance, sustaining the decision of MURPHY, J.

[See, however, note appended hereto.]

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Statement

APPEAL from a decision of MURPHY, J. at Vancouver, on the 10th of April, 1912, in an action for specific performance of an agreement for the sale of land, in circumstances set out in the head-note. At the trial, in giving judgment, MURPHY, J. said:

I regret very much, under the facts of this case, the decision I have to come to, but in view of the wording of the Act I cannot see any defence to this action, and consequently, I will have to decree specific performance. But I will order that the money be paid into Court to remain there until some order is made in disposing of it—until all the parties interested in it are heard. But I also order that the costs must be paid in the outcome by Mary Jane Sheard.

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

Argument

L. G. McPhillips, K.C., and *C. W. Craig,* for appellants, referred, for the genesis of this appeal, to *In re Harry Howard* (1911), 16 B.C. 48. As to discretion in granting specific performance, see Fry, 5th Ed., pp. 19, 195 and 204. See also Land Registry Act, section 74. There is no provision for priority of registration prevailing. By our unregistered deed back to the husband, there was created in him a right to registration; *ergo,* he is not ousted from his right to demand registration.

Davis, K.C., for respondent: Section 75 of the Land Registry Act is the one which applies here, and that wipes out the conveyance to Harry Howard. The infant stands in exactly the same position as the father. We question the submission that the title stood really and honestly in the infant. The deed cannot be considered, and the appellants have no right to go behind it.

McPhillips, in reply: They should have cross-appealed on that point, the judge having found in our favour upon it.

The judgment of the Court was delivered by

Judgment

MACDONALD, C.J.A.: I think the appeal must be dismissed. There is no question that the legal title (I am speaking of the

legal title as it appears on the records of the registry office) passed from Mrs. Sheard to Miller, and from Miller to Nicholson. The only question is: Are there any equities, or any circumstances, perhaps I should say, which would make it inequitable to enforce specifically the contract between Mrs. Sheard and Miller and the other plaintiff? I cannot see any such circumstances. I think in the circumstances in this case it would be most inequitable, if we should decline to permit the law to take its course, to permit the enforcement of this agreement in accordance with the terms of the respective agreements.

Appeal dismissed.

[NOTE: An appeal to the Supreme Court of Canada from this judgment was dismissed, but on appeal to the Judicial Committee of the Privy Council, it was—

Held, (1) that H. was misjoined as a co-defendant, on the ground that since there was no equitable principle by virtue of which land could be taken away from her as the true owner under colour of specific performance of a contract to which she was not a party and which she did not authorize to be made on her behalf;

(2), that the general principle of equity that under a contract for the sale of an interest in land, the vendor becomes the trustee for the purchaser of the interest contracted to be sold, subject to a lien for the purchase-money, is only true if and so far as a Court of Equity would grant specific performance of the contract and that, therefore, the plaintiff M., by the registration of his agreement, became the registered owner of an interest commensurate with the interest which equity would decree by way of specific performance;

(3), that the admission by S. of the title of H. was sufficient to rebut the *prima-facie* title conferred upon S. by registration under the Act;

(4), that the second deed of the 14th of June, 1905, was not, under section 75 of the Act, admissible in disproof of the registered title of plaintiff M., but since the latter was registered only in respect of an interest commensurate with the relief which equity would decree by way of specific performance of the agreement of the 1st of July, 1908, the defendant H. was not under the necessity of in any way disputing the title in question, and that, therefore, the said deed was admissible not as disproving the title of the plaintiff M., but as a material circumstance which the Court must take into account in deciding the extent to which specific performance ought to be granted;

(5), that under section 92 of the Land Registry Act, the Court had power to make such order as might meet the justice of the case, including an order rectifying the register, where no application was made to

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stay the action and no objection made on the ground that no security had been given and no issue filed as provided by the said section; (6), that the effect of section 75 is merely to impose a penalty upon non-registration of an instrument by rendering such instrument inadmissible in evidence in certain cases, but has no further operation.

On the 6th of November, 1914, their Lordships' judgment was delivered by

LORD PARKER OF WADDINGTON: In this case the plaintiffs claim specific performance of an agreement dated the 1st of June, 1908, and made between the defendant, Mary Jane Sheard, of the one part, and the plaintiff, Miller, of the other part, whereby the defendant, Mary Jane Sheard, contracted to sell, and the plaintiff, Miller, to purchase, some 4.14 acres of land in the Vancouver District in British Columbia. The plaintiff, Nicholson, is made a co-plaintiff as sub-purchaser of the property from the plaintiff, Miller. The defendant Mildred Howard is joined as co-defendant on the ground that she claims an interest in the property adversely to her co-defendant. In their Lordships' opinion this joinder is misconceived and the judgment given at the trial, and confirmed on appeal for specific performance against the defendant, Mildred Howard, and the vesting of her interest in a trustee for the plaintiffs is erroneous and cannot be sustained. There is no equitable principle by virtue of which land can be taken away from the true owner under colour of specific performance of a contract to which he was not a party and which he did not authorize to be made on his behalf. The action should have been dismissed with costs so far as the defendant, Mildred Howard, was concerned.

So far the case presents little difficulty, but there is a more important question which must be decided before this appeal is finally disposed of. Besides resisting the claim for specific performance as against her, the defendant, Mildred Howard, set up her own title to the property. She was, she said, entitled to it as heiress-at-law of the late Harry Howard, the former husband of the defendant, Mary Jane Sheard, subject, nevertheless to the dower interest of her mother, the last-named defendant, and she counterclaimed against the plaintiffs and her co-defendant for a declaration to that effect with certain consequential relief. The defendant, Mary Jane Sheard, did not defend the counterclaim, which against her must be taken as admitted. As against the plaintiffs, however, who did defend the counterclaim, the defendant, Mildred Howard, was put to the proof of her title. In order to prove it she put in three indentures. First, she put in an indenture dated the 23rd August, 1893, whereby a certain block of land, of which the 4.14 acres in question formed part, was conveyed to Harry Howard and his wife, the defendant, Mary Jane Sheard, in fee simple, as joint tenants. Secondly, she put in an indenture dated the 14th of June, 1905, whereby Harry Howard conveyed to his wife, the defendant, Mary Jane Sheard, an undivided moiety of the whole block in fee simple, thus vesting the whole block in her. Thirdly, she put in an indenture, also dated the 14th of June, 1905, whereby the defendant, Mary Jane Sheard, conveyed to Harry Howard the entirety of the 4.14 acres in

question. The two deeds of the 14th of June, 1905, in fact operated as a partition of the block between husband and wife.

The indentures above referred to, if admissible in evidence, are, in their Lordships' opinion, sufficient proof of the title set up by the defendant, Mildred Howard, but the plaintiffs contend that the second indenture of the 14th day of June, 1905, is not admissible in evidence against them, because of the provisions of section 75 of the Land Registry Act (chapter 23 of the statutes of the Province of British Columbia, 1906), being an Act consolidating the existing statutes as to the registration of titles to land.

On reference to this statute it will be found that it contemplates and provides for four registers. First, there is a Register of Indefeasible Fees. A certificate of title to an estate so registered is, as long as it remains uncancelled, conclusive evidence against all the world that the holder is entitled to all the estate mentioned in the certificate (sections 15, 16 and 81). Secondly, there is a Register of Absolute Fees. The registered owner of an absolute fee is to be deemed to be the *prima-facie* owner of the land referred to in the register for such an estate as he legally possesses therein, subject only to such registered charges as appear existing thereon, and to the rights of the Crown (sections 15 and 24). The certificate of title is not conclusive, but only *prima-facie* evidence of the title of the registered owner. It is to be observed that nothing less than a legal fee simple can be registered as an absolute fee. Thirdly, there is a Register of Charges (section 25), that is, according to the definition clause (section 3), any less estate than an absolute fee, and any equitable interest in land, and any incumbrance, Crown debt, judgment, mortgage, or claim to or upon any real estate.

The registered owner of a charge is to be deemed to be *prima facie* entitled to the estate or interest in respect of which he is registered, subject only to such registered charges as appear existing thereon and to the rights of the Crown (section 29). The certificate of title is not conclusive, but only *prima-facie* evidence of the title of the owner of a registered charge.

It is to be observed that an applicant for the registration of a charge has in his application to state the nature of the charge in respect of which he requires registration (Form D in 1st Schedule to the Act), and the register has also to state the nature of the registered charge (Form E. same Schedule).

Lastly, there is, under section 116, a register in which are entered copies of all instruments affecting land. The 74th section of the Act provides that no instrument executed after and taking effect after the 30th June, 1905, and no instrument executed before the 1st July, 1905, and taking effect after the 30th June, 1905, purporting to transfer, charge, deal with or affect land or any estate or interest therein (with an immaterial exception) shall pass any estate or interest, either at law or in equity, in such land, until the same shall have been registered in compliance with the provision of the Act; and the 75th section provides that instruments executed before and taking effect before the 1st July, 1905, transferring, charging, dealing with, or affecting land or any estate or interest therein, unless registered before the said date (with an immaterial exception) shall

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not be receivable by the court or any court of law or any registrar or examiner of titles as evidence or proof of the title of any person to such land as against the title of any person to the same land registered on or after the 1st July, 1905, except in an action before the court questioning the registered title to such land on the ground of fraud wherein the registered owner has participated or colluded. This section, in their Lordships' opinion, imposes a penalty on non-registration of an instrument by rendering such instrument inadmissible in evidence in certain cases, but has no further operation.

Returning to the facts of this case it appears that, after Harry Howard's death, the second deed of 14th June, 1905, came into possession of the defendant, Mary Jane Sheard, and that on the 30th July, 1907, she took both the deeds of the 14th June, 1905, to the Land Registry Office in Vancouver for registration. What happened in the office is obscure, but owing possibly to some misconception on the part of the registrar, the defendant, Mary Jane Sheard, ultimately signed an application prepared by him declaring she was owner of the land in question, and claiming to have it registered in her name in the Register of Absolute Fees, and obtained such registration; the second deed of the 14th June, 1905, being absolutely ignored, though the registrar had possession of it and ought to have been aware of its effect. In this, if there was no fraud, there was evidently a serious miscarriage, and the plaintiff, Miller, in entering into the agreement of the 1st June, 1908, to purchase the land in question was, undoubtedly, misled by the register and the certificate of title obtained by the defendant, Mary Jane Sheard.

The agreement of the 1st June, 1908, was, in their Lordships' opinion, an instrument purporting to affect land, and, therefore, required registration under the 74th section of the Act. When so registered (but not before) it would confer on the plaintiff, Miller, an equitable interest, his title to which would be registrable in the Register of Charges. On the day after the agreement was signed the plaintiff, Miller, lodged an application for the registration of his title to a charge by virtue of the agreement, but in such application he did not, as he ought to have done, state the nature of the interest in respect of which he claimed registration. It is material to consider what this interest really was. It is sometimes said that under a contract for the sale of an interest in land the vendor becomes a trustee for the purchaser of the interest contracted to be sold subject to a lien for the purchase money; but however useful such a statement may be as illustrating a general principle of equity, it is only true if and so far as a court of equity would under all the circumstances of the case grant specific performance of the contract.

The interest conferred by the agreement in question was an interest commensurate with the relief which equity would give by way of specific performance, and if the plaintiff, Miller, had in his application attempted to define the nature of his interest, he could only so define it. Further, if the registrar had, as in their Lordships' opinion he ought to have done, specified on the register the nature of the interest which he registered as a charge, he could only have so specified it. Had he attempted further to define the interest, had he, for example, stated it as an equitable fee sub-

ject to the payment of the purchase money, he would have been usurping the function of the court, and affecting to decide how far the contract ought to be specifically performed. As a matter of fact the registrar did not, any more than the plaintiff, Miller, attempt to define the interest in respect of which registration was granted. He granted registration, having (their Lordships will assume) first entered a copy of the agreement in the register of instruments under section 116, but the register merely shews that the plaintiff, Miller, is entitled to a charge under the agreement on the land in question, and leaves the nature of the charge to be inferred. At most, therefore, the plaintiff, Miller, became the registered owner of an interest commensurate with the interest which, under all the circumstances, equity would decree by way of specific performance of the agreement.

Their Lordships are now in a position to deal with the question as to whether the second deed of the 14th June, 1905, was admissible in evidence. First, as regards the defendant, Mary Jane Sheard, it was not (having regard to the 75th section of the Act) admissible to disprove the *prima-facie* title conferred on her by her entry on the register as owner of the absolute fee, unless such entry had been obtained by fraud in which she had participated or colluded. But as a matter of fact it was quite unnecessary to adduce the deed as evidence against her at all. She did not defend the counterclaim, thereby admitting the title of the defendant, Mildred Howard, as alleged in the counterclaim, and, further, she had on two several occasions admitted this title before the commencement of the litigation, first in her affidavit for the purpose of obtaining letters of administration to Harry Howard's estate, and, secondly, in proceedings which she took (apparently at the instigation of the plaintiff, Miller) to have the agreement of the 1st June, 1908, adopted by the court on behalf of the defendant, Mildred Howard. These admissions, unless satisfactorily explained, would, in their Lordships' opinion, be sufficient to rebut the *prima-facie* title conferred by registration.

Again, as regards the plaintiff, Miller, it is quite true that by reason of the 75th section, the second deed of the 14th June, 1905, is not admissible in disproof of his registered title, but if, as their Lordships have pointed out, he is registered only in respect of an interest commensurate with the relief which equity would decree by way of specific performance of the agreement of the 1st June, 1908, the defendant, Mildred Howard, is not under the necessity of in any way disputing the title in question. She adduces the deed of the 14th June, 1905, not as disproving the plaintiffs' title, but as a material circumstance which the court must take into account in deciding the extent to which specific performance ought to be granted. In their Lordships' opinion, therefore, the objection to the admissibility in evidence of the second deed of the 14th June, 1905, cannot be sustained, and the defendant, Mildred Howard, is therefore entitled to the declaration of her title as alleged in her counterclaim.

The defendant, Mildred Howard, asks also for certain consequential relief by way of rectification of the register and cancellation of existing certificates of title. The court under section 92 of the Act has jurisdiction in an action contesting a registered title to make such order as may be

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just and appropriate under the circumstances. According to this section, before such an action can be brought, the proposed plaintiff should file an issue and give security to the satisfaction of the registrar, and it is possible that the plaintiffs might have obtained a stay of the counterclaim till this had been done. They did not, however, apply for such a stay, nor did they make any objection before their Lordships' board on the ground that no security had been given and no issue filed. In their Lordships' opinion, therefore, it was open to the courts below to make and is open to their Lordships to advise His Majesty to make such order under the 92nd section as may meet the justice of the case.

With regard to the relief to which the plaintiffs are entitled in this action, it would be contrary to all principle to order the defendant, Mary Jane Sheard, to convey an interest which she has not got and which she cannot convey. The plaintiffs are, however, entitled to repayment of all moneys paid to her under the agreement of the 1st June, 1908, with interest at 4 per cent. per annum, and their costs of action (except in so far as increased by the joinder of her co-defendant), and a lien for such moneys, interest, and costs on her dower interest in the land in question.

Taking all the circumstances into consideration, their Lordships are of opinion and will humbly advise His Majesty (1) that the orders appealed from should be discharged; (2) that the action should be dismissed with costs throughout as against the defendant, Mildred Howard; (3) that on the counterclaim of the last-named defendant there should be a declaration that notwithstanding the entry on the register she is absolutely entitled to the land in question subject to the dower interest therein of the defendant, Mary Jane Sheard, and that the register should be rectified by striking out the entry of the defendant, Mary Jane Sheard, as owner of the absolute fee in the land in question and entering the defendant, Mildred Howard, as owner of such absolute fee subject to the dower interest of the defendant, Mary Jane Sheard, which dower interest should be entered in the Register of Charges, and that the certificate of title granted to the defendant, Mary Jane Sheard, should be delivered to the registrar for cancellation, and that the plaintiffs should pay the costs of the counterclaim; (4) that the defendant, Mary Jane Sheard, should be ordered to repay to the plaintiffs the moneys already paid by the plaintiff, Miller, under the agreement, with interest at 4 per cent. per annum, and the costs of the action (except so far as increased by the joinder of the defendant, Mildred Howard), and that it should be declared that such moneys, interest, and costs, are a lien on the dower interest of the defendant, Mary Jane Sheard, in the land in question, and that the registrar amend the certificates of title issued to the plaintiffs so as to conform with this report; and (5) that plaintiffs should pay the costs of this Appeal.

TOPAY v. CROW'S NEST PASS COAL CO.

GREGORY, J.

1914

Oct. 13.

Alien enemy—Right of action—Orders in council of August 7th and 15th, 1914.

An alien enemy, resident in Canada, may maintain an action for personal injuries sustained while following his avocation by virtue of the orders in council of August 7th and 15th, 1914.

TOPAY v. CROW'S NEST PASS COAL CO.

APPLICATION by the defendant Company for an order to set aside the notice of trial herein, and the notice of appointment for examination for discovery of Thomas Russell, one of the servants of the defendant Company, and the writ of subpœna directed to him, on the ground that the plaintiff had, since the beginning of the action, become an alien enemy, being a subject of the Austrian Empire. Heard by GREGORY, J. at chambers in Victoria on the 9th of October, 1914. Statement

Bodwell, K.C., for the application.
H. A. Maclean, K.C., contra.

13th October, 1914.

GREGORY, J.: Although there is no doubt that at common law an alien enemy was denied the right of appealing to our Courts for the enforcement of his contractual rights, etc., this rule has long been modified when he is resident in this country by licence or under the protection of the Crown: see Halsbury's Laws of England, Vol. 1, pp. 20 and 310; and I do not think that the expression of Lord Lindley in *Janson* v. *Driefontein Consolidated Mines, Limited* (1902), A.C. 484, is, when examined, at all inconsistent with this. He was then dealing with the circumstances of the case before him, and he cited *Le Bret* v. *Papillon* (1804), 4 East 502, as the case which established the rule, but an examination of that case shews that the plaintiff there was resident in the foreign country at the date of his action, and he was suing on a judgment obtained in the Courts of his own country. In the present case the plaintiff Judgment

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has been resident in Canada for a long time and peaceably pursuing his usual occupation.

In *Alcinous* v. *Nigreu* (1854), 4 El. & Bl. 217, the judgment of Lord Campbell, C.J., in giving judgment against the alien enemy, shews clearly that he relied on the fact that the plaintiff, though then in England, was not there with the permission of any one entitled to act for the Sovereign.

In the present case I am unable to read the order in council of the 15th of August, 1914 (appearing in the Gazette of 22nd August, 1914, at p. 617), together with that of the 7th of August, 1914 (appearing in the Gazette of the 15th of August, 1914, at p. 531), as anything but an express permission to Germans and Austrians to reside in Canada so long as they pursue their ordinary avocations in a peaceful and quiet manner, etc. The order of the 15th of August recites that there are many such "persons quietly pursuing their various avocations in various parts of Canada, and it is desirable that such persons should be allowed to continue in such avocations without interruption." It then goes on to proclaim that all such persons, "so long as they quietly pursue their ordinary avocations, be allowed to continue to enjoy the protection of the law and be accorded the respect and consideration due to peaceful and law-abiding citizens; and that they be not arrested," etc.

Judgment

In view of the foregoing, it appears to me that it would be a denial of such protection to permit a coal miner, for example, to work at his usual occupation of coal mining and deny him the right to sue for his wages if they are not paid, or, as in the present case, to deny him the right to maintain an action for personal injuries sustained in his work as a miner, and caused, as he alleges, by the negligence of the defendant, as, during times of peace he has enjoyed this privilege, and the order proclaims that he shall be allowed to continue, etc.

The application will, therefore, be dismissed. Costs to the plaintiff in any event of the cause.

Application dismissed.

TRIMBLE *ET AL.* v. COWAN *ET AL.* (No. 1.)

GREGORY, J. (At Chambers)

1914

Sept. 16.

TRIMBLE v. COWAN

Appeal—Order directing trial without jury—Action to set aside lease—Rule 426—Application to postpone trial for.

An application to postpone the trial of an action to set aside a lease will not be granted to enable the plaintiff to appeal from an order under rule 426, directing that the action be tried without a jury.

S. Pearson & Son, Limited v. *Dublin Corporation* (1907), A.C. 351, inapplicable.

APPLICATION by the plaintiff for an order to postpone the trial of an action to enable him to appeal from an order by GREGORY, J., under rule 426, directing that the trial be heard by a judge without a jury. Heard by GREGORY, J. at chambers in Victoria on the 15th of September, 1914. Statement

Moresby, for the application.
D. S. Tait, contra.

16th September, 1914.

GREGORY, J.: This is an application by the plaintiff to postpone the trial to enable him to appeal from an order made by myself directing that the trial be had by a judge without a jury. I regret exceedingly that I am unable to grant this application, as I am very loath to prevent any decisions of mine coming before the Court of Appeal, but the case seems to me so clear that I have no alternative.

The action is one to set aside a lease (the other relief asked for is merely incidental), and Order XXXVI., rule 3 says that such a case shall be tried by a judge without a jury. Judgment

In support of the plaintiff's application is his affidavit, in which he says counsel has advised an appeal from the above order. I asked him to have this affidavit supplemented by a statement shewing that counsel believed such an appeal would be successful. This supplementary affidavit he admits he is unable to make. It therefore seems to me that the case is so clear, I would be doing wrong in granting any stay to further

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an appeal which would be fruitless except, possibly, for the purpose of securing delay.

I have been referred to the language of Earl Halsbury in *S. Pearson & Son, Limited* v. *Dublin Corporation* (1907), A.C. 351 at p. 356, where he says:

"The action is based on the allegation of fraud, and no subtility of language, no craft or machinery in the form of contract, can estop a person who complains that he has been defrauded from having that question of fact submitted to a jury."

That language does not appear to me to apply to the present case, although the plaintiff makes allegations of fraud against the defendant. That case (*S. Pearson & Son, Limited* v. *Dublin Corporation*) was an action of deceit for damages for fraudulent representations, which is a very different action from the present one; in addition to which, there is no rule in the English practice similar to rule 3, Order XXXVI., B.C. Rules.

Judgment

The application will, therefore, be dismissed, with costs.

Application dismissed.

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TRIMBLE *ET AL.* v. COWAN *ET AL.* (No. 2.)

Practice—Costs—Security for—Plaintiff resident without jurisdiction—Shares in foreign company—Interest in mining claims.

A plaintiff resident outside the jurisdiction cannot avoid giving security for costs by shewing ownership of shares in a registered foreign company owning property within the jurisdiction or of mining claims the value of which are purely speculative and problematic.

APPLICATION by the defendants for an order that the plaintiffs, who are resident without the jurisdiction, put up security for the costs of the action. Heard by GREGORY, J. at chambers in Victoria on the 16th of September, 1914.

Statement

Moresby, for plaintiffs.
D. S. Tait, for defendants.

GREGORY, J.: It is admitted that the plaintiff resides out of the jurisdiction. He seeks to avoid giving security on the ground that he has substantial property within the jurisdiction, and the affidavits disclose: (a) that the property consists of shares in a foreign corporation owning mining property within the jurisdiction, and which corporation is registered under the Companies Act. Such registration does not, it appears to me, go any further than authorize corporations to do business within the Province, and the attorney-in-fact who represents the company has no authority to transfer shares, unless such shares are issued within the Province, and so, it seems to me that the shares in this company are not in any way available for execution, and if not, they are not substantial property within the Province; (b) that he is the registered owner of a group of mining claims within the Province; that said claims are being developed, and that $8,000 was expended on the same last year; and that he is the owner of a three-eighths interest in the said group, which he says in his affidavit: "I value at $50,000." Mr. W. P. Pemberton makes an affidavit in which he states that he is one of the owners of said group of mining claims, and that he verily believes that the same "are worth over and above the sum of $8,000."

Judgment

It is clear from the defendants' affidavits that these claims are simply prospects; that a certain amount of development work has been done thereon; no ore has yet been shipped, and their value is purely speculative and problematic, and it does not appear to me at all clear that in case the plaintiff fails his interest therein would be available to answer the costs, or any part thereof, which the defendant was entitled to recover against him.

The plaintiff will, therefore, have to give security for costs, but as to the amount I will hear further argument, as Mr. *Moresby* did not discuss that feature of the case.

Order accordingly.

GREGORY, J. 1914

STEBBINGS, SPINNING AND WALKER v. WILLIAMS AND SEARS.

Sept. 11.

STEBBINGS v. WILLIAMS

Garnishee—Sheriff—Execution—Money realized by—Paid to trust account—Private creditor of sheriff—Right to garnishee trust account—Interpleader.

A private creditor of a sheriff will not be permitted to garnishee moneys of judgment creditors placed to the credit of the sheriff's official trust account in a bank.

INTERPLEADER issue tried by GREGORY, J. at Victoria on the 11th of September, 1914. Messrs. Williams and Sears, who held a judgment of some years' standing against F. G. Richards, the sheriff of the County of Victoria, garnisheed all the moneys standing to the credit of the sheriff in the Victoria branch of the Merchants' Bank of Canada. The sheriff's account in this bank was his official trust account, in which he paid all moneys received by him in his office as sheriff, and included moneys realized from the sale of goods seized by him in execution for the plaintiffs in this proceeding.

Statement

Maclean, K.C., for plaintiffs.
Griffin, for defendants.

GREGORY, J.: This is an interpleader issue in which Messrs. Stebbings, Spinning & Walker are plaintiffs, and the judgment creditors defendants. The judgment debtor, the sheriff for the County of Victoria, has realized moneys from the sale of goods seized by him in execution for the plaintiffs, and has placed the same in the bank in an account which he calls "Trust Account," and into which he pays all moneys received by him in his office of sheriff, also the moneys received by him for the sale of marriage licences. No other moneys were paid into this account except moneys received by him as bailiff, when acting as such in distress proceedings. The moneys to which he was personally entitled as costs, etc., in all these matters were also

Judgment

paid into this account, but in no other way was the account a personal one.

The judgment creditors, Williams and Sears, having obtained a judgment some years ago, have garnisheed all moneys now standing to the credit of the sheriff in the bank, and claim they are entitled to do so, as the relation between the sheriff and a judgment creditor is that of debtor and creditor only after the execution of the process.

Many authorities have been cited to support the view that the sheriff may be sued in debt, or for money had and received for moneys realized by him in execution. This, however, does not, in my opinion, dispose of the case. While the relation of debtor and creditor exists, there is also a fiduciary relation existing between the sheriff and judgment creditor, and in such case the judgment creditor can follow the moneys so received by the sheriff, at least where, as here, the actual cheques received by the sheriff were paid by him into the bank to the credit of this trust account. It would be inequitable to permit a private creditor of the sheriff to seize these moneys, and so force the person who is really entitled thereto to have recourse to the sheriff's bondsmen, as has been suggested is their remedy.

Judgment

It appears to me that the cases referred to by plaintiffs' counsel support this view—*Lovely* v. *White* (1883), 12 L.R. Ir. 381; *In re Hallett's Estate* (1879), 13 Ch. D. 696; and *Stobart* v. *Axford* (1893), 9 Man. L.R. 18—and certainly, before I can depart from a principle so equitable and just, I will have to have the direct authority of some higher Court.

There will, therefore, be judgment for the plaintiffs in the interpleader issue, with costs.

Judgment for plaintiffs.

MURPHY, J.

1914

Sept. 16.

ROYAL BANK OF CANADA v. BALL *ET AL.*

Banks and Banking—Purchase of banking business—Chattel mortgage included in assets—The Bank Act, Can. Stats. 1913, Cap. 9, Sec. 76.

ROYAL BANK OF CANADA v. BALL

The mere fact that a chattel mortgage, given to secure a past debt, is taken over amongst the securities, in pursuance of an agreement for the purchase of a banking business, is not a contravention of section 76 of The Bank Act.

ACTION tried by MURPHY, J. at Vancouver on the 8th of September, 1914, for the recovery of the amount due under a chattel mortgage held by the plaintiff Bank on goods sold by the defendant.

Statement

Sir C. H. Tupper, K.C. (*O'Neill,* with him), for plaintiff.
MacInnes, for defendant.

16th September, 1914.

MURPHY, J.: I am unable to hold valid the contention that the plaintiff has no title. In my opinion, the agreement of the 13th of January, 1913, gave it a good equitable, if not legal, title to the chattel mortgage, subject to its right to divest itself thereof by electing to reject same within six months. Even if the legal title is outstanding—as to which I express no opinion—it is, if this view be correct, vested in a bare trustee, who, on demand, must transfer it to plaintiff. That condition of things—assuming it to exist—cannot, I think, constitute a defence by Ball.

Judgment

Neither do I think said agreement contravenes section 76 of The Bank Act. The agreement was for the purchase of a banking business. The fact that amongst the securities taken over was a chattel mortgage, taken to secure a past due debt, cannot, in my opinion, embarrass plaintiff in carrying on this action.

As to the objections to the chattel mortgage, the only one that has caused me hesitation is the question of the identity of the goods. Taking defendant's examination for discovery in

conjunction with exhibits 12 and 13, however, I have come to the conclusion that the goods covered by the mortgage are *prima facie,* at any rate, identified with the goods sold by Ball. No evidence to the contrary was given. Although no argument was made on plaintiff's behalf that defendant is not a *bona-fide* purchaser for value under the agreement, exhibit 13, it may well be, on the true construction of that document, that he is merely an agent for the mortgagor to hold a sale, but it is unnecessary, in the view I take of the case, to express an opinion.

Judgment

There will be judgment for plaintiff for the amount claimed.

Judgment for plaintiff.

RE MUNSHI SINGH.

Constitutional law—B.N.A. Act—Immigration—Statutes—Delegation of legislative power—Orders in council—Validity of—Courts—Power of superior to review lower—Statute curtailing.

The Canadian Parliament, as incident to its control of immigration, has power to authorize deportation from Canada of any rejected immigrant. There is no distinction in favour of immigrants being British subjects.

The authority delegated by section 37 of the Immigration Act to the Governor in Council to make regulations providing "as a condition to land in Canada that immigrants and tourists shall possess money to a prescribed minimum amount which amount may vary according to race" is validly exercised by a regulation imposing the condition upon immigrants of any Asiatic race not otherwise dealt with by treaty or regulation. Objection that there was no authority to exempt tourists, or immigrants who were not of Asiatic race, or to discriminate between Asiatics who were or were not subject to existing treaties or regulations, overruled.

The authority, by section 38 of the Act, to the Governor in Council to make regulations or proclamations "to prohibit the landing in Canada

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of any immigrant who has come to Canada otherwise than by continuous journey from the country of which he is a native" is not conditional, or predicated upon any such immigrant having actually come to Canada at the time of the making of the regulation, but is validly exercised by a regulation following the words of the Act, and is applicable to any such immigrant as may thereafter come to Canada.

The order of a board of inquiry rejected an immigrant as being an "unskilled labourer" within the meaning of an admittedly valid regulation, and ordered his detention and deportation. The order of the Board and the evidence and proceedings were removed into the Supreme Court under application for *certiorari* and *habeas corpus*, and, the application being dismissed without argument so as to admit a speedy appeal, an appeal was taken to the Court of Appeal. The evidence shewed that the immigrant testified before the Board that he was not a labourer, but a farmer. The only evidence *contra* was that of an official of the Board, who testified that he did not believe the immigrant, and the fact that he had only $20 in his possession.

Held, by the Court of Appeal, overruling a contention that there was no evidence before the Board sufficient to found its jurisdiction to find that the immigrant was an "unskilled labourer," that in view of section 16 of the Act, authorizing the Board to "base its decision on any evidence considered credible or trustworthy," and section 23, providing "that no Court shall have jurisdiction to review or reverse any decision of any Board of Inquiry, (1) there was sufficient evidence; (2) the decision of the Board of Inquiry was not open to review.

APPEAL from the refusal by MURPHY, J. of an order for a writ of *habeas corpus* to bring up the body of Munshi Singh, together with the cause of his detention, in order to test the validity of an order of the Board of Inquiry sitting at Vancouver under The Immigration Act (9 & 10 Edw. VII., Cap. 27), refusing him admission to Canada as an immigrant, and for his detention and deportation to the place from which he came to Canada, as being an immigrant of a class within the prohibition created by certain orders of the Governor in Council, expressed to be made under the authority of the Act, being number 24, subsection (a).

Statement

The respective orders in council, and the sections of the Act are as follow:

"P.C. 24.

"AT THE GOVERNMENT HOUSE AT OTTAWA,

"Wednesday, the 7th day of January, 1914.

"PRESENT:

"HIS ROYAL HIGHNESS THE GOVERNOR GENERAL IN COUNCIL.

"The Governor General in Council, under the authority of section 37 of The Immigration Act, 9-10 Edward VII., chapter 27, is pleased to order as follows:

"The regulation made by order in council, dated 9th May, 1910, (P.C. No. 926) under the authority cited above is hereby rescinded and revoked.

"The following regulation is hereby made and established:—

"'From and after the date hereof no immigrant of any Asiatic race shall be permitted to land in Canada unless such immigrant possess in his own right money to the amount of at least two hundred dollars. Provided that this regulation shall not apply to any person who is a native or subject of an Asiatic country as to which special statutory regulations inconsistent with this regulation are in force, or with which there is in operation a special treaty, agreement or convention binding the Government of Canada if the provisions of this regulation be inconsistent with the stipulations of such treaty, agreement or convention.'

"(Sgd.) Rodolphe Boudreau,
Clerk of the Privy Council.

"The Honourable
"The Minister of the Interior."

"37. Regulations made by the Governor in Council under this Act may provide as a condition to permission to land in Canada that immigrants and tourists shall possess in their own right money to a prescribed minimum amount, which amount may vary according to the race, occupation or destination of such immigrant or tourist, and otherwise according to the circumstances; and may also provide that all persons coming to Canada directly or indirectly from countries which issue passports or penal certificates to persons leaving such countries, shall produce such passports or penal certificates on demand of the immigration officer in charge before being allowed to land in Canada."

"P.C. 23.

"AT THE GOVERNMENT HOUSE AT OTTAWA,
"Wednesday, the 7th day of January, 1914.
"PRESENT:
"HIS ROYAL HIGHNESS THE GOVERNOR GENERAL IN COUNCIL.

Statement

"The Governor General in Council is hereby pleased to rescind and revoke the order in council, dated 9th May, 1910, (P.C. No. 920) and the regulation thereby made and established.

"The Governor-General in Council, under the authority of section 38 of The Immigration Act, 9-10 Edward VII., chapter 27, is pleased to order as follows:—

"From and after the date hereof the landing in Canada shall be and the same is hereby prohibited of any immigrant who has come to Canada otherwise than by continuous journey from the country of which he is a native or naturalized citizen and upon a through ticket purchased in that country or prepaid in Canada.

"(Sgd.) Rodolphe Boudreau,
Clerk of the Privy Council.

"The Honourable
"The Minister of the Interior."

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"38. The Governor in Council may, by proclamation or order whenever he deems it necessary or expedient,—

"(*a*) prohibit the landing in Canada or at any specified port of entry in Canada of any immigrant who has come to Canada otherwise than by continuous journey from the country of which he is a native or naturalized citizen, and upon a through ticket purchased in that country, or prepaid in Canada."

"P.C. 897.

"AT THE GOVERNMENT HOUSE AT OTTAWA,

"Tuesday, the 31st day of March, 1914.

"PRESENT:

"HIS ROYAL HIGHNESS THE GOVERNOR GENERAL IN COUNCIL.

"His Royal Highness the Governor General in Council under and in virtue of the provisions of subsection 3 of section thirty-eight of The Immigration Act, 9-10 Edward VII., and in view of the present overcrowded condition of the labour market in the Province of British Columbia, is pleased to make the following order:—

"From and after the date hereof, and until after the thirtieth day of September, 1914, the landing at any port of entry in British Columbia, hereinafter specified of any immigrant of any of the following classes or occupation, *viz.*:

"Artisans,

"Labourers, skilled or unskilled,

shall be, and the same is hereby prohibited.

"The following ports of entry in British Columbia, are hereby designated as the ports of entry at which this order shall apply: [Here follows a list of the ports].

"(Sgd.) Rodolphe Boudreau,

Clerk of the Privy Council.

Statement

"38. The Governor in Council may, by proclamation or order whenever he deems it necessary or expedient,—

"(*c*) prohibit for a stated period, or permanently, the landing in Canada, or the landing at any specified port of entry in Canada, of immigrants belonging to any race deemed unsuited to the climate or requirements of Canada, or of immigrants of any specified class, occupation or character."

"3. No immigrant, passenger, or other person, unless he is a Canadian citizen, or has Canadian domicile, shall be permitted to land in Canada, or in case of having landed in or entered Canada shall be permitted to remain therein, who belongs to any of the following classes, hereinafter called 'prohibited classes':—

"(*i*) Persons who do not fulfil, meet or comply with the conditions and requirements of any regulations which for the time being are in force and applicable to such persons under sections 37 or 38 of this Act."

The order of the Board of Inquiry was directed to the owners of the S.S. Komagata Maru, and to the master of said ship, and to the charterers of the ship, and to the assignees of the charter-party, and to Munshi Singh (son of Wazair Singh), of

Gulupore, Hoshiarpur District, Punjab, India, Asia (person rejected), referred to as rejected person. The order recited the above orders in council as in full force, and sections of the Immigration Act, and that the rejected person had been examined by the Board of Inquiry and has been rejected for the following reasons, namely, that he is an immigrant within the meaning of the Immigration Act and said regulations, and is not a Canadian citizen, and has not Canadian domicil, and has not been landed in Canada within the meaning of the said Act, and belongs to one of the prohibited classes enumerated in section 3 of the said Act, namely:

"(a) Such rejected person is a native of India and an immigrant, within the meaning of The Immigration Act and said regulations, of an Asiatic race, and does not possess in his own right money to the amount of at least two hundred dollars as required by regulation made under the authority of section 37 of The Immigation Act by the Governor General of Canada, in Council, on the recommendation of the Minister of the Interior, by order in council dated the 7th day of January, 1914, (P.C. No. 24) and such rejected person is not a native or subject of an Asiatic country as to which special statutory regulations inconsistent with said regulations are in force or with which there is in operation any special treaty, agreement or convention binding the government of Canada and such rejected person does not fulfil, meet or comply with the conditions and requirements of said regulation made by said order in council on 7th day of January, 1914 (P.C. 24), and by reason thereof belongs to the prohibited class (*i*) enumerated in section 3 of said Act.

"(b) Such rejected person is an immigrant within the meaning of The Immigration Act and said regulations who has come to Canada otherwise than by continuous journey from the country of which he is a native or naturalized citizen and upon a through ticket purchased in that country or prepaid in Canada and does not fulfil, meet or comply with the conditions and requirements of regulation made under the authority of section 38 of The Immigration Act by the Governor General of Canada in Council on the recommendation of the Minister of the Interior by order in council dated the 7th day of January, 1914 (P.C. No. 23); and by reason thereof belongs to the prohibited class (*i*) enumerated in section 3 of said Act.

Statement

"(c) Such rejected person is an immigrant within the meaning of The Immigration Act and said regulations of the following class or occupation, namely, unskilled labourer, and by reason of his belonging to such class or occupation is prohibited from and after the 31st day of March, 1914, and until after the 30th of September, 1914, from landing at this port of entry of Vancouver, B.C., by regulation made under the authority of section 38 of The Immigration Act by the Governor General of Canada in Council, on the recommendation of the Minister of the Interior, by order in council dated the 31st day of March, 1914 (P.C. No. 897); and by reason

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thereof such deported person belongs to the prohibited class (*i*) enumerated in section 3 of said Act.

"And said rejected person above named is hereby ordered to be deported to the place from whence he came to Canada. Such conveyance shall be by the said steamship Komagata Maru, being the first available ship of the transportation Company which brought the said rejected person to Canada."

The evidence before the Board of Inquiry in support of the allegation that Munshi Singh did not "possess in his own right money to the amount of at least $200" was that he had only the sum of $20 with him at the time of his detention. It was not suggested that he was a native or subject of a country having special regulations or treaty with Canada, or that he had come to Canada by continuous journey, etc., or upon a through ticket. The evidence before the board upon the allegation that he was an "unskilled labourer" was as follows (the language is that of the interpreter interpreting to the Board the answers of Munshi Singh):

"He says that he is a farmer.

"What farming work has he done? Work on his farm producing grain, etc.

"Had he a farm in India? Yes.

"How long had he lived on that farm? When he became a young man he began to work on his farm; since he became able to work.

"Does he still own a farm in India? Yes.

"What is the value of the farm? Twenty-five thousand rupees.

"How big is that farm? He says he cannot describe. He has separate land, some here, some there, divided into small measurements.

Statement

"Several parcels divided into small holdings? Yes.

"Where did he leave his wife and child? At his home.

"Has he got any money in India? Yes.

"Why did he not bring more money with him? He says: I am not educated and may not transfer money to banks, and I have not brought much money so that I may not be looted on the way, as I have to pass from the different countries.

"Would he be able to wire to his people and have his money sent on? Yes.

"Would he be able to have as much as $200 of our money sent on here? Yes, 600 rupees.

"How much has he got now on his person? Six pounds.

"Can he produce it? Yes. (Produces six gold sovereigns.)

"Why did he come to British Columbia? To do work on farms, to purchase some land and do work as a farmer.

"How is he to get farming work here when he does not own any farm

here? He says he will search out here any tract of land, but when he finds one suitable to him he will wire to his home and purchase it.

"Has he ever done any other work besides working his own farm? No, he has done no other work."

Inspector Hopkinson, an officer under The Immigration Act, testified as follows:

"I see that you referred the matter to a Board of Inquiry, as in your opinion his [Munshi Singh's] landing would be contrary to the provisions of The Immigration Act. What was the basis of that? Although he has been declared on the manifest as a person who intends to be a farmer in this country, and he has reiterated that statement, yet I believe that the man has no more intention of being a farmer than I have, and my reasons for this are, that the man, for a start, has not sufficient money to make a living for a month, much less to buy a farm in this country. Of the 2,500 East Indians resident in this country, to my personal knowledge 90 per cent. are employed as labourers, and the remaining 10 per cent. are divided between farmers and real-estate operators.

"Cross-examined: Did you examine this man for the purpose of ascertaining what resources he had in India? No, sir."

Statement

The ship's manifest, and also the affidavit in support of the application for the writ of *habeas corpus*, stated that the subject Singh intended to make his permanent residence in Canada.

The application for the writ was refused by MURPHY, J. without argument or reasons for judgment, in order to facilitate an appeal to the Court of Appeal.

The appeal was argued at Victoria on the 26th and 30th of June, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Cassidy, K.C. (*Bird*, with him), for the appellant: We object to the constitutionality of the Immigration Act in so far as it authorizes deportation from Canada of rejected immigrants who are British subjects. It has been held that the Dominion Parliament has power to authorize the deportation of aliens: *Attorney-General for Canada* v. *Cain* (1906), A.C. 542. We contend that Parliament has not power to authorize the detention and deportation of a British subject who presents himself at a port in Canada claiming the right to enter Canada as an immigrant. The distinction arises from the circumstance that the British North America Act attributes the legislative topic of aliens to the exclusive authority of the Dominion Parliament. In regard to aliens, it exercises that power in addition to its

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legislative control over the subject of "immigration." When dealing with the question of immigration of aliens, the Dominion Parliament can, therefore, deal absolutely with the civil rights of those aliens, and can authorize their detention and deportation in addition to rejecting them as immigrants. In regard to British subjects, the limit of the Dominion authority is derived from its control over "immigration," and this power is exhausted by making laws for the admission or rejection of the immigrant. A law for the detention and deportation of a person rejected as an immigrant is certainly an interference with "civil rights within the Province" which all immigrants possess from the moment they enter the Province, *i.e.*, Provincial waters. These civil rights, in so far as immigrant British subjects are concerned, are in the exclusive control of the Provincial Legislature. One of them is the right of personal freedom, in the absence of the commission of any offence known to the common law or created by a competent Legislature. It is not a common-law or statutory crime or offence to be rejected as an immigrant. This man is convicted—of what? Of having failed to convince the Board of Inquiry that he should be accepted as an immigrant into Canada. He is not only rejected as an immigrant, but ordered to be deprived of his liberty; to be imprisoned on a ship and carried over seas against his will. This is authorized by the words of the Act.

Argument

We submit that such authorization is in excess of the Dominion legislative power in relation to "immigration," and an unwarranted trenching on the appellant's "civil rights within the Province." That the distinction derived from the fact of the person affected by the legislation in the particular instance being an "alien" or not is a substantial one is sufficiently indicated by *Union Colliery Company of British Columbia* v. *Bryden* (1899), A.C. 580. There the Provincial Legislature was dealing with a purely Provincial subject—the regulation of Provincial coal mines—and could, admittedly, have made any provisions it pleased in regard to the class of persons to be employed in the mines so long as it did not, while so legislating, prejudice the rights of some class of persons whose civil rights were withdrawn from its control. It provided that "no Chinaman

should be employed below ground in a coal mine." It was proved that the Chinamen were "aliens." The legislation was held unconstitutional, as interfering with the ordinary civil rights of aliens to be employed, and that only the Dominion Parliament, as having exclusive authority over aliens, could so provide, and that the interference with the personal rights of the aliens was not rendered constitutional by the fact that the general subject was within the competence of the Provincial Legislature. The Dominion Parliament has power to imprison and deport rejected immigrants being aliens, because it has control over their civil rights, but we submit it has no such power over rejected immigrants being British subjects.

We further object that the orders of the Governor-General in council proposed to be passed under the authority of sections 37 and 38 of The Immigration Act are bad, as being contrary to, and in excess of, the power delegated by the statute. There is no inference whatever in favour of orders in council made upon statutory authority. They must be narrowly scrutinized and compared with the statute to see whether they exceed or contradict the legislative mandate. The mandate by section 38 is carefully restricted. The Governor in Council is not given the power to pick out a particular class of immigrants and by order in council require that they, and they alone, should possess money to a required minimum amount as a condition of permission to land in Canada. The authority is to make regulations providing the condition that "immigrants and tourists" shall possess in their own right money, etc. It clearly means in the first place that, if the condition is provided by regulation, it must be directed against all immigrants without discrimination, and further, that it must also be directed against all tourists. It is not necessary to assist the argument by appealing to the known high international and political considerations which must have affected the mind of Parliament in subjecting all "immigrants" to the same conditions. Nothing has occasioned so much international jealousy, friction, and ill-feeling, as laws discriminating against a particular race or nation in the matter of immigration. The necessity to include tourists along with immigrants in the condition as to possession

Argument

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of money is quite plain and also understandable. There could be little international objection to a proviso against immigrants which also included tourists. It is true that section 38 goes on: "which amount may vary according to the race, occupation or destination of such immigrant or tourist." A discrimination could, therefore, be effectively made in regard to amount. That does not, however, authorize the total exemption from the condition of all immigrants except those of "Asiatic race." Still less does the Act authorize a discrimination by the Governor in Council between Asiatics of different nationalities such as is made by the words of the regulation (P.C. 24): "provided that this regulation shall not apply to any person who is a native or subject of an Asiatic country as to which special statutory regulations inconsistent with this regulation are in force, or with which there is in operation a special treaty," etc. This has reference to existing political arrangements with China and Japan. There may be political propriety in such an exemption, but it is plain that the order in council could not establish it without express statutory authority. The discriminations referred to are not trifling, but of great and far-reaching consequence, and unless it is held that under the aegis of the very limited power given by the Act to the Governor in council that body had general authority to readjust the law at discretion, the regulation is bad.

Argument

Under the supposed authority of section 38, reading, "The Governor in Council may by proclamation or order whenever he deems it necessary or expedient prohibit the landing in Canada of any immigrant who has come to Canada otherwise than by continuous journey from the country of which he is a native, and upon a through ticket," the following order in council (P.C. 23) was passed: "from and after the date hereof the landing in Canada shall be and the same is hereby prohibited of any immigrant who has come to Canada otherwise than by continuous journey," etc. We contend that section 38 establishes a condition precedent to the making of a proclamation or order, *viz.*: the presentation for admission of some immigrant "who has come to Canada otherwise than," etc. There is no power to make precautionary or general regulations

on this topic. Who may the Governor-General prohibit? "Any immigrant who has come to Canada." It would have been easy to give the Governor in Council power to make a general regulation, but it was not done. In so far as appellant is held in custody under P.C. 23, 24, he must be discharged. But he is also prohibited from landing and held in custody for deportation on the ground, found as a fact in the order of the immigration Board of Inquiry, that he is an unskilled labourer. We cannot urge anything against the order in prohibiting the landing in Canada within the named period of "labourers, skilled and unskilled." It is well authorized by section 38 (*c*). It is found as a fact, and recited in the order of the Board of Inquiry that the appellant is an "unskilled labourer." Our objection is that the Board had no power so to find, as there was no evidence upon which the judicial function to make the finding could be called into action. If there is no evidence, there is no jurisdiction to make the finding. It is true that section 16 of the Act says "such Board of Inquiry may at the hearing receive and base its decision upon any evidence considered credible and trustworthy, and, the burden of proof shall rest on the immigrant." In this case the only direct evidence was that of the immigrant, who denied that he was a labourer. The sworn opinion of the immigration officer to the contrary goes for nothing. Section 16 does not alter the common law that a man shall not be convicted without proof such as would satisfy natural justice. It should be taken as similar in effect to the rules of evidence affecting arbitrators, namely, the strict rules of evidence are not to apply. Section 23 does not take away the right of this Court to review the decision of the Board of Inquiry on any question affecting its jurisdiction to make the order complained of. Laws attempting to take away the right of superior Courts to review decisions of inferior tribunals have been uniformly held not to apply to cases in which there was lack of jurisdiction on the part of the lower tribunal.

Argument

Ritchie, K.C. (*W. H. D. Ladner,* with him), for the Crown: The Immigration Act as passed is within the province of the Dominion Parliament, under section 95 of the B.N.A. Act. In the case of *In re Narain Singh* (1908), 13 B.C. 477, referred

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to in Lefroy's Constitutional Law, 1913, at p. 667, the British Columbia Immigration Act was held to be *ultra vires* because the Dominion Act provided a complete code dealing with immigration. The residuary clause in section 91 of the British North America Act also gives the Dominion Parliament power to pass this Act: see Lefroy at pp. 143, 199 and 492; *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348 at p. 361; *Hodge* v. *The Queen* (1883), 9 App. Cas. 117 at p. 133; *Russell* v. *The Queen* (1882), 7 App. Cas. 829. *Cotton* v. *The King* (1913), 83 L.J., P.C. 105, was decided on the ground that the succession duty imposed, not being "direct taxation within the Province," was *ultra vires* of the Legislature. On the question of whether the Dominion has the right to exclude British subjects, see *Hodge* v. *The Queen, supra; Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575 at p. 588; *Attorney-General for Canada* v. *Cain* (1906), A.C. 542 at p. 547; *Cunningham* v. *Tomey Homma* (1903), A.C. 151. The term "immigration" should receive a large and liberal construction: see Interpretation Act, R.S.C. 1906, Cap. 1, Sec. 15; see also The Immigration Act, Can. Stats. 1910, Cap. 27, Sec. 2.

Argument

There is sovereign power in the Dominion Parliament. His Majesty takes part in the Dominion Legislature as much as in the Imperial: see *Regina* v. *Brierly* (1887), 14 Ont. 525 at pp. 532-3. As to the action of the Board of Inquiry in enquiring into this man's standing, and making an order for his deportation, they say the board is in the position of a jury, but we contend that if the board has jurisdiction over the subject-matter, its finding cannot be interfered with by any Court: see section 23 of The Immigration Act; see also Paley on Convictions, 8th Ed., p. 556; *Bird* v. *Gunston* (1785), 2 Chit. 459; *The Queen* v. *The Justices of Rippon* (1837), 7 A. & E. 417; *In re Lee Him* (1910), 15 B.C. 163; *Nishimura Ekiu* v. *United States* (1892), 142 U.S. 651. The Court is confined to the question of the Board's jurisdiction and cannot review the evidence upon which it has concluded that a deportation order should be made: see *Regina* v. *Bennett* (1882), 1 Ont. 445; *The Queen* v. *The Sailing Ship "Troop" Company*

(1889), 29 S.C.R. 662 at p. 673; *Reg.* v. *Walsh* (1897), 29 N.S. 521 at p. 541. The board has the power to question the credibility of the appellant's evidence: see *Baldocchi* v. *Spada* (1907), 38 S.C.R. 577 at p. 583; *The Odin* (1799), 1 C. Rob. 248 at p. 252; Maxwell on Statutes, 5th Ed., 386; Craies's Statute Law, 2nd Ed., 315. The argument of discrimination cannot be applied here, as under section 37 of the Interpretation Act discrimination is extended to orders in council; it applies to regulations as well as to Acts. This man comes here to compete as a labourer; these are the people against whom the legislation was intended to extend.

Argument

Cassidy, in reply.

Cur. adv. vult.

6th July, 1914.

MACDONALD, C.J.A.: The appellant Munshi Singh, who seeks to enter Canada as an immigrant, is a native of India and a British subject. He is one of a large number of immigrants who have come to the port of Vancouver in the Komagata Maru. He was denied permission to land, and after formal proceedings were had before a Board of Inquiry, he was rejected and on order was made by the Board for his deportation. He then applied to a judge for a writ of *habeas corpus* to test the legality of his detention, and from the refusal of the writ he now appeals to this Court.

On the threshold of the case is the question of the constitutionality of The Immigration Act. That the King, with the advice and consent of the Imperial Parliament, had the power to make laws for the exclusion from British possessions of immigrants, whether British subjects or not, has not been questioned, as, indeed, it could not be doubted. By the terms of the British North America Act the Parliament of Canada is clothed with sovereign power in matters relating to immigration into any part of the Dominion, subject only to disallowance of its Acts by His Majesty in Council, and hence, subject to that power, which has not been exercised, Canada's authority to admit immigrants of any or every race or nationality, on any terms she pleases, is complete "authority as plenary and as

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ample . . . . as the Imperial Parliament in the plentitude of its power possesses and could bestow."

The next question is as to whether or not the three orders in council under which the immigration authorities have acted in rejecting the appellant conform to the authority given by The Immigration Act to the Governor in Council to make such orders. Section 3 of the Act specifies certain prohibited classes, and then provides that other restrictions may be effected by orders in council pursuant to sections 37 and 38. So much of section 37 as is relevant to this case reads: [already set out in statement.]

In pursuance of this authority the Governor in Council made a regulation known as P.C. 24, which reads: [already set out in statement.]

Much ingenious argument was directed to this section and order, the principal contention being that the order goes beyond the authority given by the section, and discriminates against a particular race. The section is not well drawn, but the manifest intention of its framers was to enable the Governor in Council to make regulations which would empower immigration officers to exclude from Canada an immigrant or a tourist not possessed of a specified sum of money, and that in making such regulation he might have regard to the race, occupation and destination of the immigrant or tourist. It contemplates that discrimination with respect to race which the order in council makes when it subjects the person of Asiatic race to the monetary test. The contention is that because the Asiatic race was singled out and the test not applied to other races, there was an unjust discrimination not authorized by that section. The proviso in P.C. 24 which excepts from the monetary test natives of Asiatic countries with whom we have treaties or conventions affecting immigration, or whose subjects are admitted under other statutory laws or regulations, was referred to as further supporting this contention, but, in my opinion, the conditions which made such a proviso necessary are important as shewing that section 37 could not be, and was not, intended to have been made operative without discrimination in favour of some races

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whose legal *status* to be admitted to Canada was already fixed by statute or treaty.

The Board of Inquiry acted also under another order in council passed on the 7th of January, 1914, and known as P.C. 23, the authority for which is derived from subsection (*a*) of section 38 of The Immigration Act. That subsection enables the Governor in Council, by proclamation or order, to

"prohibit the landing in Canada or at any specified port of entry in Canada of any immigrant who has come to Canada otherwise than by continuous journey from the country of which he is a native or naturalized citizen, and upon a through ticket purchased in that country, or prepaid in Canada."

The order in council is identical in language with the subsection, and hence no doubt arises as to its conforming to the Act. The fact is conceded that the appellant did not and could not comply with this regulation. His passage was taken from Hong Kong, and though that is a British possession, he cannot, even in a technical sense, be said to be a native citizen of Hong Kong, while, in the popular sense in which I am convinced the term "native citizen" is used in section 38, it would be absurd to call him such. The appellant's suggestion is that a British subject born in one part of the King's possessions is a native citizen of every other part. This, I am confident, was not the meaning attached to the term "native citizen" by Parliament.

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Counsel also contended that the powers conferred on the Governor in Council under this subsection could be exercised by him only and in respect of each immigrant claiming admission—in other words, that the Governor in Council should adjudicate upon each and every claim to admission. Such a construction of the section is repugnant to the whole Act and to the language of the section itself.

Then, again, subsection (*c*) of section 38 authorizes the Governor in Council to

"prohibit for a stated period, or permanently, the landing in Canada, or the landing at any specified port of entry in Canada, of immigrants belonging to any race deemed unsuited to the climate or requirements of Canada, or of immigrants of any specified class, occupation or character."

In pursuance of this authority the order in council P.C. 897 was passed on the 31st of March, 1914. It provides that from and after its date, and until after the 30th of September, 1914,

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the landing at any specified port of entry in British Columbia of any immigrant who is an artizan or a labourer is prohibited. Among the specified ports of entry is the port of Vancouver. It is not contended that this order does not conform to the section. The complaint is that the Board of Inquiry erroneously held that the appellant was a labourer and not a farmer, as he claimed to be. The onus of proof is by the Act cast upon the immigrant to shew that he does not belong to a prohibited class. He failed to convince the board that he was not a labourer, and one of the questions involved in this appeal is as to whether this Court can review the decision of the Board on that question. Section 23 reads:

"No Court, and no judge or officer thereof, shall have jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or order of the Minister or of any Board of Inquiry, or officer in charge, had, made or given under the authority and in accordance with the provisions of this Act relating to the detention or deportation of any rejected immigrant, passenger or other person, upon any ground whatsoever, unless such person is a Canadian citizen or has Canadian domicile."

Had the Board of Inquiry acted without jurisdiction, or upon orders in council made without authority, or upon a statute which was unconstitutional, no doubt the Court could and would interfere to prevent what in that case would be an illegal detention.

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As, in my opinion, The Immigration Act is not unconstitutional, and the order in council P.C. 897 is not *ultra vires,* and as the Board was legally seized of the subject of the inquiry, I think the Court cannot review a decision upon a question which the board was authorized to decide. The appellant, if he have just cause of complaint, is not without redress, as an appeal to the Minister of the Interior is given by this Act.

The result is that, in my opinion, the British North America Act vested in the Parliament of Canada sovereign power over immigration into Canada; that that power includes the right to exclude British subjects, not even excepting those born in the United Kingdom that each of the orders in council in question here was authorized by the Immigration Act; that each one of them would bar the appellant; that the Board of Inquiry acted within its jurisdiction and in accordance with

the provisions of the Act; and that its decision, which is not impeached on the ground of fraud, that the appellant is a labourer, is not open to review except by the Minister of the Interior.

It follows that the appeal must be dismissed.

IRVING, J.A.: By section 95 of the British North America Act, passed by the Imperial Parliament, the legislative and executive powers of the Crown were delegated to the Parliament of Canada in "relation to immigration into all or any of the Provinces of Canada," and by section 91, subsection (25), in the distribution of the legislative powers, the Parliament of Canada was authorized to deal with all matters coming within the class of subjects embraced within the words "naturalization and aliens." In respect of the matters so delegated to Canada the Dominion has an authority as plenary and as ample as the Imperial Parliament in the plentitude of its power possessed and could bestow: *Hodge* v. *The Queen* (1883), 9 App. Cas. 117 at p. 130.

Under the authority so conferred, Canada has a right to make laws for the exclusion or expulsion of aliens; that was so held in the case of aliens in the *Attorney-General for Canada* v. *Cain* (1906), A.C. 542, and it seems to me plain beyond question that Canada has a right also to make laws for the exclusion and expulsion from Canada of British subjects whether of Asiatic race or of European race, irrespective of whether they come from Calcutta or London. It is with reference to a British subject of Asiatic race, coming from Hong Kong, that we are now dealing, but what has been done by Parliament with reference to one of an Asiatic race can be done with reference to any European race (should Parliament think proper). In the statute, The Immigration Act, passed in 1910 and amended in 1911, we find a list of prohibited classes of persons who, irrespective of nationality or race, are not permitted to land in Canada. This list includes persons mentally and physically defective; diseased persons, criminals, beggars and vagrants; charity immigrants, and also "persons who do not fulfil, meet or comply with the conditions and

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requirements of any regulations which for the time being are in force and applicable to such persons under section 37 or section 38 of this Act." Under these sections (which I need not set out), three orders in council have been passed, *viz.*: P.C. 23, which prohibits the landing in Canada of any immigrant (*i.e.*, irrespective of race or nationality) who has come to Canada (*i.e.*, any part of Canada) otherwise than by continuous journey from the country of which he is a native or naturalized citizen, and upon a through ticket purchased in that country or prepaid in Canada. P.C. No. 24 decrees that no immigrant of an Asiatic race shall be permitted to land in Canada unless such immigrant possesses in his own right, money to the amount of at least $200. There is a proviso to this regulation which need not be set out. The third, No. 297, prohibits, from and after the 31st of March, 1914, until after the 30th of September, 1914, the landing at any port (*i.e.*, of the ports of entry therein named) in British Columbia, of any (*i.e.*, irrespective of race) artizan, or labourer, skilled or unskilled. Vancouver, B.C., is one of the ports named.

For non-compliance with the conditions in each of these three orders in council, Munshi Singh, a Punjabi, who came to Canada in the S.S. Komagata Maru on the 22nd of May, 1914, was refused permission to land and ordered to be deported in the said vessel, and in the meantime is being detained against his will a prisoner on board the said ship. At least, I presume so, as an application for a writ of *habeas corpus* has been made on his behalf. The affidavit is silent on the point of illegal restraint: *Canadian Prisoners' Case* (1839), 5 M. & W. 32; and in *Ex parte Child* (1854), 15 C.B. 238, it was laid down that the application for *habeas corpus* should be supported by an affidavit by the person applying, shewing that he is illegally restrained. This omission, I think, shews that the true point for our determination has not been appreciated. Our duty is to determine on this appeal whether the applicant is illegally restrained, and although we have in that connection to consider the provisions of the Immigration Act, nevertheless, our duty is not to determine whether or not Munshi Singh ought to be admitted. We are not a Court of Appeal from the decision of the Board of Inquiry.

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Assuming, then, that he complains that he is illegally restrained under the warrant of deportation of the Board of Inquiry, I am of opinion that his appeal is hopeless. There is a complete chain of authority from the Sovereign, with the assent of the Imperial Parliament, down to the Board of Inquiry, and the proceedings are, on their face, regular in every respect.

Many and varied were the attacks made on the three orders in council by counsel for the applicant. It was said that under section 37 the Governor-General in Council could not enact absolute prohibitions under the guise of regulations. The three orders are not absolute prohibitions. No. 23 shews how an immigrant may come into Canada by coming direct or prepaying his passage in Canada; No. 24 permits an Asiatic having more than $200 to come in; and No. 897 is a temporary measure in force for a limited period, and applicable only to the coast of British Columbia and confined to a certain class of persons. These orders in council are truly regulations, and because they do prohibit the landing of this particular applicant at a port on the Pacific Coast, they do not lose their character of regulation. With the policy of the statute we are not concerned. That is for Parliament. The question for us is as to the applicant's illegal restraint. But even if the orders in council were positive prohibitions, I am of opinion that such orders in council would be sanctioned by the statute.

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Exception was taken to the form of the order in council No. 24. It was said quite gravely that the Governor-General in Council, under section 37, could only deal with individual cases as they occurred from time to time; that making an anticipatory order was not contemplated by Parliament, and that in any event the Governor in Council should have fixed a sum of money as a pre-requisite for all immigrants, and then, if he chose to do so, he might deal with different races. These arguments seem to me to have no weight, and do not require any answer.

As to No. 897, made under the authority of section 38, Mr. *Cassidy* contended that there was no legal or sufficient evidence before the Board to sustain the findings of fact, and that there

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was no evidence that Munshi Singh was an unskilled labourer and, therefore, there was a want of jurisdiction on the part of the Board to deal with his case. Mr. *Ritchie* interposed an objection to our dealing with these grounds, and called our attention to section 23 of the Act. That section can be dealt with later.

I will assume for the present that the point is open for our consideration. Mr. *Cassidy's* argument was founded on the fact that Munshi Singh stated on oath that he had been a farmer in India, and that the Board could not, in the face of his sworn statement, find that he was a labourer. By section 16, where the question of the right to enter Canada is raised, the burden of proof rests upon the person claiming such right. Courts of justice frequently refuse to accept as trustworthy the sworn statement of a man so as to satisfy the onus of proof: *e.g., Rowley* v. *Rowley* (1854), 23 L.J., Ch. 275, where the judge declined to accept the evidence of the solicitor who prepared the deed in question that it was not delivered as a deed, but as an escrow only.

Again, *Berney* v. *Bishop of Norwich* (1867), 36 L.J., Ecc. 10 at p. 12, where Sir William Erle said:

> "A tribunal trying questions of fact, ill performs its duty if it adopts as true every statement on oath not contradicted by counter-testimony."

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The point is not what he was in India, but what he will be here. On the evidence adduced, I think the Board was right in coming to the conclusion that in this country he would be an unskilled labourer.

As to Mr. *Bird's* argument that The Immigration Act was *ultra vires* because it amounted to an interference with civil rights—a subject committed by the 92nd section of the British North America Act to the Province—I would say that where power to prevent a prohibited immigrant from landing in Canada, or if landed, to expel him, is given to a legislative body such as the Dominion Parliament, that power carried with it power to impose all things necessary to carry out the prohibition or expulsion. That is well illustrated in the *Attorney-General for Canada* v. *Cain, supra.* We must remember that where the Dominion Parliament enters a field of legis-

lation committed to it, that body occupies that field fully, and to the exclusion of the Province. It was intended that their legislation should be effective.

Section 23, to which our attention was particularly invited, deals with two classes of persons, namely, Canadian citizens or persons having a Canadian domicil—that is one class; the other class is "any rejected immigrant, passenger or other person, not being a Canadian citizen or having a Canadian domicil. With respect to the first class, in my opinion, the rights of the civil Courts to intervene has not been taken away. In such cases the Courts have a right to interfere by *certiorari*. With reference to the second class, the jurisdiction of the Court to review, quash, reverse, restrain or otherwise interfere, I shall not say has been taken away, but does not exist. The right to *certiorari* in the second class is limited to want of jurisdiction, or excess of jurisdiction, or fraud. In cases where the right to *certiorari* is taken away by statute, the Courts can, nevertheless, inquire as to the facts which go to the jurisdiction—that is, facts collateral to the matters they are to determine; but as to the merits of the case, the tribunal appointed is the sole judge. A person may apply to a civil Court to determine whether he falls within one class or other, but once it is established that he is a rejected immigrant or passenger, under the authority and in accordance with the Act, and is not a Canadian citizen or has not a Canadian domicil, then the civil Court has no jurisdiction to investigate the correctness of the decision. In *Regina* v. *Bennett* (1882), 1 Ont. 445, relied upon by Mr. *Cassidy*, the right to *certiorari* had not been taken away therefore it was open to the Court there to consider whether there was "any" evidence. The Courts, in dealing with a Canadian citizen under this Act, would have that right, but it is otherwise as to persons in the other class. That Parliament has distinguished between the right of those who are citizens of Canada and those who are not, gives point to the argument that the Act itself, subject-matter and language together, contemplates all matters relating to the detention and deportation of any rejected immigrant, etc., under this statute being dealt with by the executive, and not with the judicial department of

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the Government. Provision is made for an appeal to the Minister.

I would dismiss the appeal.

MARTIN, J.A.: This is an appeal by one Munshi Singh (who describes himself in his affidavit as "a native of India and a British subject," coming from the Punjab in that country "to Canada for the purpose of making this my permanent home") from the order of Mr. Justice MURPHY, dismissing his application for a writ of *habeas corpus,* by means of which he seeks to be discharged from his present detention by immigration officers on board the Komagata Maru, under an order by the Immigration Board of Inquiry at the Port of Vancouver, dated the 25th of June, 1914, whereby he has been rejected as an immigrant, prohibited from landing in Canada, and ordered to be deported from Canada by said ship, which brought him to Vancouver on the 22nd of May last.

Many questions were raised before us, some not legal, but directed to the policy which led up to the statutes and orders in council under review, with respect to which I repeat an extract I gave in *Re Coal Mines Regulation Act* (1904), 10 B.C. 408 at p. 419 (a case on the employment of Chinese in coal mines), from the decision of their Lordships of the Privy Council in *Cunningham* v. *Tomey Homma* (1903), A.C. 151 at p. 155, as follows:

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"The policy of such an enactment as that which excludes a particular race from the franchise is not a topic which their Lordships are entitled to consider."

And quite recently in *Attorney-General for Province of Ontario* v. *Attorney-General for Dominion of Canada* (1912), 81 L.J., P.C. 210, in delivering an illuminating judgment (if I may be permitted so to refer to it) on some aspects of the constitution of Canada, and the relation of the Courts thereto, the then Lord Chancellor (Earl Loreburn) said, at pp. 212 and 213, with respect to the powers conferred upon Canada by the Imperial Parliament:

"In 1867, the desire of Canada for a definite Constitution embracing the entire Dominion was embodied in the British North America Act. Now there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the Provinces on the

other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada . . . . For whatever belongs to self-government in Canada belongs either to the Dominion or to the Provinces, within the limits of the British North America Act."

And again, at p. 213, he speaks of

". . . . The interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act."

The power and duty of the Courts under the Constitution he thus defines, at pp. 213 and 216:

"A Court of law has nothing to do with a Canadian Act of Parliament, lawfully passed, except to give it effect according to its tenor . . . . It cannot be too strongly put that with the wisdom or expediency or policy of an Act, lawfully passed, no Court has a word to say."

"The policy of the Canadian Parliament . . . . is exclusively the business of the Canadian people, and is no concern of this Board."

With respect to the legal questions, they have been reduced in number and scope because it was conceded at the end of the argument (as it ought to have been at the beginning) that since the Federal Parliament has already occupied the common field of legislation conferred upon both Federal and Provincial Parliaments by section 95 of the British North America Act, therefore the authority of the former must prevail: *cf. In re Narain Singh* (1908), 13 B.C. 477. But while this is conceded, and also that in the primary exercise of such authority the Federal jurisdiction may incidentally, yet substantially, trench upon one or more of the classes of subjects exclusively assigned to Provincial jurisdiction by section 92, *e.g.*, "property and civil rights in the Province," so long as such intrenchment does not exceed what may be necessary to effectuate such Federal jurisdiction, yet it is submitted that in the case at bar this line of intrenchment should be drawn so as to declare that though a British subject may not, by the exercise of due Federal jurisdiction, be permitted to land as an immigrant in Canada, yet the said jurisdiction is exhausted by this prevention and he cannot be detained or deported because, once he comes within the territorial waters of Canada, the exercise of such control over his person comes within the said class of "property and civil rights in the Province." Many observations may be made

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on the premise of this submission as regards territorial waters and civil rights, but, assuming the premise is correct, there is one complete and final answer to the whole contention, and it is that as a matter of fact, and of reasonable necessity in the carrying out, completely and effectively, of "laws in relation to immigration into all or any of the Provinces" (section 95), an immigrant is not immediately divested of that character and freed from the operation of laws relating to the subject-matter of immigration merely because he happens to come within the three-mile limit. Whatever else may be said of him, that character, and the Federal jurisdiction which controls it, continues in general to attach to him at least till after he is permitted to land in conformity with the Act. Indeed, it cannot be doubted that he may be subject to such jurisdiction for an indefinite time and may be deported, *e.g.*, as at present provided by section 40 of the Act, "within three years after landing" for the causes therein specified. It can hardly be seriously contended that an immigrant who on a dark night swims ashore from a ship, eludes the preventive officers, and hides in the woods, or, to quote section 33 (7), "who enters Canada by force or misrepresentations or stealth, or otherwise contrary to any provision of this Act," thereby acquires such civil rights in the Province he elects to enter that he threw off the Federal jurisdiction with that portion of his clothing which he presumably left behind him when taking to the water. The truth is, of course, that the exercise of Federal jurisdiction necessarily often affects civil rights, including, primarily, personal liberty, the most striking illustration of which occurs in connection with quarantine (subsection 11), wherein whole shiploads of people, traders, merchants, tourists, immigrants and others, have been frequently detained for weeks at a time in quarantine stations on shore. Some of the cases are to be found conveniently collected in Lefroy on Canada's Federal System, 1912, at p. 488 *et seq.*, and the Lord Chancellor (Earl Loreburn) adverts to the subjects in the *Attorney-General's* case above cited. The best illustration of the domination of Federal jurisdiction over even Provincial public property is to be found in *Attorney-General* v. *C.P.R.* (1905), 11 B.C. 289, wherein the view I

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ventured to express, that the Parliament of Canada had the power to appropriate Provincial public lands for the purposes of a railway connecting two or more Provinces, received the approval of their Lordships of the Privy Council: (1906), 75 L.J., P.C. 38.

Such being the powers of the Federal Government, I turn then, first, to section 38 (*a*) of The Immigration Act and the order in council of the 7th of January, 1914, No. 23, relating to a continuous journey and through ticket, which are relied upon as a justification of the said deportation order. The appellant first contends that the said order in council is invalid because no express power is given to the Governor-General in Council to alter or rescind any "proclamation or order," and, therefore, the powers of the Governor in Council have in this respect been exhausted by his order in council on the same subject dated the 9th of May, 1910, P.C. 920, which has been held to be invalid: *In re Narain Singh* (1913), 18 B.C. 506. The point is, however, clearly covered by section 31 (*g*) of the Interpretation Act relating to "rules, regulations or by-laws," and conferring the right to "rescind, revoke, amend, or vary" the same, which language covers the proclamation or order "authorized by section 38," because, whatever they may be termed, these proclamations and orders are in fact "regulations," and indeed, are so styled in the heading of the fasciculus of sections numbered 37 to 39 inclusive, *viz.*: "Regulations as to monetary and other requirements," etc. Then, second, it is contended that as the applicant came direct from Hong Kong, and is a British subject, he, as a citizen of the Empire and therefore a native of the whole of it, is a native of Hong Kong, which is a part of it, and so his journey from that place to this was "a continuous journey from the country of which he is a native," and his ticket "a through ticket" therefrom. But it is obvious from the context, and the whole Act, that the expression "country of which he is a native," is used in a geographical and not racial or national sense, and, therefore, does not assist the applicant.

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In the third place, it is said that the Governor in Council has power to deal only with the case of each individual immigrant as he arrives ("an immigrant who has come to Canada,"

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as the section puts it), and therefore, an omnibus order, dealing in advance with immigrants in general, is invalid. But the expression "any immigrant" includes all immigrants, and I confess I cannot see the force of this contention, which would be a very impractical one to work out as a general rule, leading, as it would inevitably, to great delay and confusion in a vast country like Canada, where a constant stream of immigrants is arriving at many ports. The fact that this order is a general prohibition does not prevent the Governor in Council from making a special one to meet a particular case "whenever he deems it necessary or expedient." Up to the present time he has only deemed it "expedient" to make a general order dealing with all immigrants alike, and it is somewhat strange that this should be objected to when we have heard so much of the undesirability of any discrimination in these regulations. This order, in carrying out the Governor in Council's conception of expediency as it exists at present, only follows, as has been pointed out, the exact words of the section, but I am unable to see how that can detract from its efficacy.

I next turn to the order in council of the 31st of March, 1914, No. 897, prohibiting until after the 30th of September next the landing in British Columbia of all "labourers, skilled or unskilled." This is made under subsection (*c*) of section 38, and is objected to on the ground that there was no evidence before the Board of Inquiry on which it could reasonably found its finding that Munshi Singh was an "unskilled labourer," or a labourer of any kind, and therefore it lacked jurisdiction to make such order. It was, however, objected on behalf of the Board that, under section 23—

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> "No Court, and no judge or officer thereof, [has] jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or order of the Minister or of any Board of Inquiry, or officer in charge, had, made or given under the authority and in accordance with the provisions of this Act relating to the detention or deportation of any rejected immigrant, passenger or other person, upon any ground whatsoever, unless such person is a Canadian citizen or has Canadian domicile."

This is a very sweeping and unusual enactment, both as regards its object and wording, going direct to the question of our jurisdiction, and it is not really similar, with one exception

to be noted, to those sections which have been dealt with in the cases cited to us or which I have examined. In my opinion it stands by itself, and having regard to the subject-matter and the exceptional circumstances which often will necessarily surround cases arising out of it, I think Parliament intended that it should be taken to mean just what it says and be given full effect to, which can and ought to be done, as applied to the present case, by holding that once the Board has duly entered upon an inquiry over which it has been given jurisdiction by the statutes and its orders or regulations, there can be no interference "upon any ground whatsoever" with its subsequent proceedings, or with the decision or order it decides to make, so long as said decision or order is one that the Board is empowered to make; it could not, for example, make an order for fine and imprisonment instead of deportation, which often involves detention: *The Colonial Bank of Australasia* v. *Willan* (1874), L.R. 5 P.C. 417; *Rex* v. *Woodhouse* (1906), 2 K.B. 501 at pp. 515-6. This is what I understand the expression "under the authority and in accordance with the provisions of this Act" to mean. It cannot mean that it is a condition precedent to the right of the Board to take any action that its proceedings must be in all respects regular, because that would require and insure complete and absolute compliance, from beginning to end, and consequently there would be no cause or reason for "reviewing" or "interfering" with something that was already perfect in itself. This is, in truth, exemplified by the present case because in one sense, clearly the inquiry as a matter of fact was held "under the authority of the Act and in accordance with" its provisions, as the Board was properly constituted when it entered upon its duties, and finally made an order within the statute on the face of it, and no objection is taken to the regularity of its proceedings but simply to the fact that it did not properly weigh the evidence before it and hold it to be insufficient. That there was some evidence before it cannot be denied, because section 16 says that "where the question of the right to enter Canada under this Act is raised the burden of proof shall rest upon the immigrant, passenger, or other person claiming such right." This reversal of the usual course of a trial in

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effect means that he must meet what is equivalent to a *prima-facie* case having been made out against him, because if he gives no evidence his application fails, and in attempting to do so he gave evidence which I need only say was of such an inadequate character, and fell so far short of what might reasonably have been expected in the circumstances, that I am not surprised it failed to convince the Board of his veracity. This is one of the very things that the statute, I think, intends should not be reviewed, and it is for that reason that the hand of the Court is arrested and it is directed not to "interfere with any proceedings" which the Board is engaged in, either at the time they are pending or after, by restraining order or otherwise "upon any ground whatsoever." I am fortified in this opinion by two other things, *viz.*: (1) that by the same section the Court is allowed to interfere in two specified cases, *viz.*: where such person is a Canadian citizen or has Canadian domicil," which emphasizes the intention to arrest the ordinary powers of the Court in all other cases; and (2) that Parliament has not left the applicant without a remedy, for he has a special one provided in lieu of the ordinary one taken away, *viz.*: in the appeal to the Minister against the decision of the board given him by section 19. The excepted case above referred to is *In re Lee Him* (1910), 15 B.C. 163, 390, which is somewhat similar in principle, being a decision that there was no appeal, except to the minister of customs, from the decision of the controller of customs, that a Chinese immigrant applying to enter Canada was not a merchant under section 7 (*c*) of the Chinese Immigration Act, Cap. 95, R.S.C. 1906. That case, being a decision of this Court, must be taken to be correctly decided, and support is given to this view by something not mentioned in the judgment, *viz.*: that by the next section 8 a right is given to His Majesty, and not to the immigrant, to contest the validity of any certificate, "and such contestation shall be heard and determined in a summary manner by any judge of a superior Court of any Province of Canada where such certificate is produced." All this goes to shew that there is nothing strange or unusual in holding the view that in these immigration matters it was the intention of Parliament

that certain questions, at least, relating to immigrants should be speedily and summarily decided, on the spot, so to speak, by the specified officers of the Crown.

This being the view I take of section 23, I therefore have no power to consider the objection of the applicant to the evidence, and I have only "reviewed" as briefly as possible the "proceedings" of the Board relating to the evidence before it in order to make my meaning clear. This is not one of those cases where an antecedent fact has to be found so as to confer jurisdiction to enter upon a hearing or inquiry; that is quite a distinct question. But in case I should be wrong on this legal point, then, alternatively, I am satisfied that there was evidence before the Board to give it jurisdiction and support its finding, because of the defects I have already noted in the evidence. Demeanour is often all-important in such cases, and as their Lordships of the Privy Council said in *Khoo Sit Hoh* v. *Lim Thean Tong* (1912), A.C. 323 at p. 325,

> "The trial judge sees the demeanour of the witnesses, and can estimate their intelligence, position, and character in a way not open to the Courts who deal with later stages of the case."

These remarks apply more strongly to this Board of Inquiry of three members dealing with matters of which they have special knowledge and experience.

A final objection to this order 897 was taken, that though Canada had the power under section 95 of the British North America Act to legislate with respect "to immigration into all or any of the Provinces," yet as it had not done so as to British Columbia in particular therefore the Governor in Council had no power to do so by making this order, which relates only to this Province. But this ignores the wording of subsection (*c*) which says that he may prohibit "the landing at any specified port of entry in Canada," and that is all the order has done, and though all the ports specified in the order happen to be in this Province, their geographical situation does not destroy the power to close them for the purposes of the Act.

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Such being my views on the effect of subsections (*a*) and (*c*) of section 38, it follows that the order of deportation may and should be supported under orders in council Nos. 23 and 897.

But, if necessary, it may also be supported under order in

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council No. 24, dated the 7th of January, 1914, made in pursuance of section 37, requiring an "immigrant of any Asiatic race" to "possess in his own right money to the amount of at least two hundred dollars." It is contended at the outset, and assuming the order to be otherwise valid, that the expression "Asiatic race" is ethnologically incorrect and too indefinite to be capable of application. The expression must be construed "according to the common understanding of the words," as Duff, J. said in the very recent case in the Supreme Court of Canada of *Quong-Wing* v. *The King* (1914), 49 S.C.R. 440 at p. 463, in referring to the Japanese, Chinese and other Oriental races (a subject which I discussed at length as regards the Chinese race in this Province in the case he there refers to) and if so, there is no uncertainty about its meaning and application. We speak constantly about European, Asiatic and even Latin-American races, and no one doubts what the people at large understand thereby. But "Asiatic race" is, moreover, a proper expression ethnologically, as may be conveniently seen by reference to the Encyclopædia Britannica (11th Ed.) under the article Asia in Vol. 2, p. 749, Col. 1, where the exact expression "Asiatic races" occurs in an account of the ethnology of that continent; and *cf.* also the articles on the ethnology and races of Europe, Vol. 9, p. 919; Africa, Vol. 1. pp. 325-6; America, Vol. 1, pp. 810-1; Australia, Vol. 2, pp. 954-5; and Polynesia, Vol. 22, p. 33.

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I am unable to take the view that the order goes beyond the section. No difficulty occurs in reading the word "and" as "or" in the expression "immigrants and tourists" so as to give the obvious meaning according to a well-known canon of construction, and the very word "or" is to be found in the expression "immigrants *or* tourists" in the 6th line of the same section. The language, therefore, being disjunctive, the order may properly deal with immigrants alone as it has done. But it is further objected that even so, it must first deal with all races as a whole by prescribing a minimum amount in general and may then make variations for particular races, and because it has only dealt with "any Asiatic race" it is bad. I am unable to construe the statute in such a narrow and too technical man-

ner. The objection would be satisfied if the orders said first that immigrants of all races should be allowed to land if they had only one cent in their possession, but those of "any Asiatic race" must have $500. That would be a general order with a particular variation. But it would also be a ridiculous and empty formality (as well as an offensive emphasis of race discrimination which diplomatically it would be desirable to avoid) and this statute and order deal with matters of substance. In spirit and effect the order means that as to the races of the world in general the minimum, if prescribed, would be so small as to be infinitesimal and therefore negligible (according to the maxim *de minimis non curat lex*), but as to Asiatic races it is a matter of substance and is correspondingly "prescribed." I do not doubt that, reading the whole section as applied to the subject-matter, the order essentially and substantially conforms with the section on which it is founded.

On this topic especially, the decision of HUNTER, C.J.B.C. *In re Narain Singh* (1913), 18 B.C. 506, was referred to and its soundness challenged, particularly in connection with order in council No. 924, of the 9th of May, 1910, which has never been rescinded and is put forward as a valid order, despite the ruling of HUNTER, C.J.B.C. in answer to the said demand for a general "prescription" of an amount for immigrants (if that should be held necessary) as it first deals with all immigrants, prescribing a minimum of $25, with the exception at the end in favour of "any Asiatic race," and the present order 24 would therefore be regarded as a still later variation requiring Asiatic races to pay $200. This Court is not bound by that decision, and after a careful review of it, I do not, with all respect, agree with it, at least as to the $200 clause, which is all I am now concerned with, and I note that the writ of *habeas corpus* therein had been refused by MURPHY, J. before it had been granted by Chief Justice HUNTER. The order there in question, No. 926, provided that the immigrant should not be allowed to enter Canada "unless in actual and personal possession in his or her own right of two hundred dollars." I cannot agree that in effect this language goes beyond the reasonable intendement and scope of section 37, which says that "immigrants and tour-

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ists shall possess in their own right money to a prescribed minimum amount" (*i.e.*, the said sum of $200). The learned judge, at p. 509, gives as his reason for taking the contrary view that

> "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."

I venture to hold the contrary view, however, that the statute, having regard to the circumstances and necessities of the subject-matter clearly intended by the words "possess in (his) own right money" that he should have and possess it when and where he would, under that section, be called upon to produce it, *viz.*: on the ship's deck, before he was allowed to land. "In his own right" here means nothing more nor less than his own money, not that of an employer, or the shipowner, exhibited as his own to deceive the immigration officer, and it is therefore inevitable that the possession must be his own actual one and not that of "a Victoria bank," or a Prince Rupert merchant, or a Nanaimo mill-hand, or an Ottawa cousin, or a Singapore money-lender, or a Delhi father, because if once the idea of personal possession, then and there when demanded to comply with the Act, can be eliminated then the money may be in possession of anyone in any place; as well in Siam as Victoria, because no line of demarcation in place or person can on any principle be drawn, and "a Victoria bank," or any British Columbia or other bank or business house is not nominated or given preference by the statute, as a place of deposit, over any other place or person. And what, for example, is to become of the immigrant while the case of a disputed and long-delayed question of fact as to whether or no he really has $200 "in his own right" in, say, a bank in Siam, is being laboriously determined by the immigration authorities here, and how is it going to be determined, and by what machinery, unless by the production of the money itself? It is not safe, even, to accept here a banker's pass book from India as evidence of the possession of money there, because the bank may have received the money and closed its doors the next day, which very recently happened, unfortunately, to certain banks in India, in Bombay. And even banks in Great Britain as well as in Canada have been known to fail. Therefore, I think that the *Narain Singh* case

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should be overruled on this point at least, and I hold that order 924, like 926, is not invalid because it requires the money to be "in actual possession at the time of arrival" of the immigrant. Mr. Justice MURPHY must have been of the same opinion as to 926, because otherwise it would have been his duty to grant the writ, and therefore I agree with him in this respect.

Then, as to the argument that was addressed to us on Sovereignty, and the Royal Prerogative, and the powers of His Majesty's judges, it is sufficient to say that the statute in question has received His Majesty's assent, and to refer to the cases already cited on the British North America Act, and in addition to quote the following extract from the recent decision of their Lordships of the Privy Council in *Attorney-General for British Columbia* v. *Attorney-General for Canada* (1914), A.C. 153 at p. 162:

> "The business of the Supreme Court of Canada is to do what is laid down as its duty by the Dominion Parliament, and the duty of the Judicial Committee, although not bound by any Canadian statute, is to give to it as a Court of review such assistance as is within its power."

I confess I do not comprehend the references to Magna Charta, Sec. xxix., or the Habeas Corpus Act. The applicant has been heard and dealt with according to the "law of the land," and neither the learned judge below nor the Board of Inquiry did "deny or defer to" him "either justice or right." His case simply failed below and fails here because there was no legal foundation for it.

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Much was said about discrimination between the citizens and races of the Empire, and it was suggested that Canada had not the right to exclude British subjects coming from other parts of the Empire. As to the latter, the cases above cited shew Canada has the right beyond question, and as to the former, there are two answers, first, discrimination is not a ground of attack upon an Act of Parliament within its jurisdiction, the course of legislation constantly and necessarily involving the different treatment of various classes even of the Crown's own subjects; and second, as a matter of fact there is no discrimination, at least as regards the order in council No. 897, excluding "all labourers, skilled or unskilled," from this Province, which alone is sufficient to support the deportation order complained of.

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That prohibition covers not only British subjects residing in other parts of the Empire, but in Canada itself, to the extent that Canadian citizens of the prohibited class residing in other Provinces of Canada cannot enter this Province, and no one has ventured to suggest any reason why a native East Indian British subject and labourer from the Punjab should be allowed the special privilege of entering the Province of British Columbia when even a native Canadian Indian, a British subject and labourer from, say, the adjoining sister Province of Alberta, who attempted to cross the boundary into this Province and work in a salmon cannery or a logging camp would be turned back. That would, indeed, be a strange conception and perversion of British citizenship which would give to others greater rights and privileges in Canada than are therein possessed and enjoyed by Canadians themselves. Though, in view of the legislative power which exists, this element of discrimination is immaterial, yet I think it desirable to make these observations owing to the evident misapprehension existing in certain quarters.

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The result is that the deportation order is a valid one, and, therefore, the order of MURPHY, J., dismissing the application for a writ of *habeas corpus,* should be affirmed.

GALLIHER, J.A.: In my opinion, the applicant Munshi Singh was properly ordered deported under order in council (P.C. 23) referred to in the deportation order under sub-heading (b).

In that view it becomes unnecessary to consider sub-headings (a) and (c) of said order. Privy Council Order 23 is founded upon section 38, subsection (*a*) of The Immigration Act of Canada, 1910. It was contended that under the wording of section 38 (*a*) the Governor in Council could not pass a general order such as P.C. 23, but that each case must be dealt with separately, and a separate proclamation made in each individual case as it arises. I cannot agree with that contention, and if there was any doubt, I think it is removed when one refers to subsection (*i*) of section 3 of the Act, which reads as follows:

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"Persons who do not fulfil, meet or comply with the conditions and requirements of any regulations which for the time being are in force and applicable to such persons under sections 37 or 38 of this Act."

The immigrant in question, who is a British subject, came by steamer from Hong Kong (a British possession) direct to the Port of Vancouver, British Columbia, and it was urged upon us that Hong Kong being a British possession, although situated in a country known geographically as China, and the immigrant being a British subject, that he, coming from Hong Kong, a British possession, came by direct route from the country of which he was a native citizen within the meaning of the Act. That, to my mind, is a fallacy. Hong Kong is in the country geographically designated China, and there is no pretence that Munshi Singh is a native or naturalized citizen of China. The word "country" is used in its geographical sense in the Act.

Mr. *Bird* further urged that the Act, in so far as it purported to deal with the exclusion of British subjects, was *ultra vires* of the Parliament of Canada.

I think that is fully answered by a reference to the cases decided in the Privy Council: see *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348 at p. 361; *Hodge* v. *The Queen* (1883), 9 App. Cas. 130; *Russell* v. *The Queen* (1882), 7 App. Cas. 829; *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575 at p. 588; *Attorney-General for Canada* v. *Cain* (1906), A.C. 542 at p. 547.

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We were asked to express an opinion as to the effect of section 23 of the Act, which reads as follows: [already set out].

I think I cannot do better than cite certain passages from the judgment of their Lordships of the Privy Council in the case of *The Colonial Bank of Australasia* v. *Willan* (1874), L.R. 5 P.C. 417.

Sir James W. Colvile, who pronounced the judgment of their Lordships, in dealing with the question where the power to remove proceedings into a higher Court had been (as here) taken away by statute, says at p. 442:

"It is, however, scarcely necessary to observe that the effect of this is not absolutely to deprive the Supreme Court of its power to issue a writ of *certiorari* to bring up the proceedings of the inferior Court, but to con-

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trol and limit its action on such writ. There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a *certiorari;* but some of those authorities establish, and none are inconsistent with, the proposition that in any such case that Court will not quash the order removed, except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it."

And in dealing with the want of jurisdiction in the tribunal below, at pp. 442 and 443:

"In order to determine the first it is necessary to have a clear apprehension of what is meant by the term 'want of jurisdiction.' There must, of course, be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends. But those conditions may be founded either on the character and constitution of the tribunal, or upon the nature of the subject-matter of the inquiry, or upon certain proceedings which have been made essential preliminaries to the inquiry, or upon facts or a fact to be adjudicated upon in the course of the inquiry. It is obvious that conditions of the last differ materially from those of the three other classes. Objections founded on the personal incompetency of the judge, or on the nature of the subject-matter, or on the absence of some essential preliminary, must obviously, in most cases, depend upon matters which, whether apparent on the face of the proceedings, or brought before the superior Court by affidavit, are extrinsic to the adjudication impeached. But an objection that the judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject-matter, he properly entered upon the inquiry, but miscarried in the course of it. The superior Court cannot quash an adjudication upon such an objection without assuming the functions of a Court of appeal, and the power to re-try a question which the judge was competent to decide."

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See also *Reg.* v. *Bolton* (1841), 1 Q.B. 66.

There is nothing in the proceedings before the Board of Inquiry in the case at bar which gives this Court power to review their findings.

There is no defect of jurisdiction and no fraud.

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MCPHILLIPS, J.A.: This is an appeal by Munshi Singh—the applicant for a writ of *habeas corpus*—and for his discharge from detention for deportation by the immigration authorities of Canada, Mr. Justice MURPHY, to whom the application was made, having dismissed the same.

The appellant, Munshi Singh (son of Wazair Singh), of Gulupore, India, Asia, has been ordered to be deported by the Board

of Inquiry at the Port of Vancouver, B.C., the order being of date the 25th of June, 1914.

The deportation order is made in the alleged pursuance of the provisions of The Immigration Act, Cap. 27, 9 & 10 Edw. VII., 1910, and amending Act, Cap. 12, 1 & 2 Geo. V., 1911, and in further pursuance of three orders of the Governor in Council respectively, and dated as follows: P.C. No. 24, 7th January, 1914; P.C. No. 23, 7th January, 1914; and P.C. No. 897, 31st March, 1914. The first-named order in council (P.C. No. 24) was passed in pursuance of section 37 of the Act, and is aimed at immigrants of any Asiatic race—not permitting any immigrant of the Asiatic race landing in Canada unless he possess in his own right money to the amount of $200. The second-named order in council (P.C. No. 23) was passed in pursuance of section 38 of the Act, and is directed against all immigrants who have come to Canada otherwise than by continuous journey from the country of which he is a native or naturalized citizen, and upon a through ticket purchased in that country or prepaid in Canada, and prohibiting all immigrants not so coming from landing in Canada. The last above-named order in council (P.C. 897) was passed prohibiting, until after the 30th of September, 1914, the landing at any port of entry in British Columbia of any immigrant of any of the following classes of occupation, *viz.*: artizans, labourers, skilled or unskilled.

The appellant has been held by the Board of Inquiry to be an immigrant entitled to be deported under the provisions of all of the three in part-recited orders in council. The appellant is specifically held to be entitled to be deported and is ordered to be deported for the following reasons: that his last place of residence was Gulupore, Hoshiarpur District, Punjab, India, Asia, seeking to enter Canada at the Port of Vancouver, B.C., *ex* Steamship Komagata Maru, from China, Asia, arriving at the Port of Vancouver on the 22nd of May, 1914; that he is an immigrant within the meaning of The Immigration Act and the regulations (*i.e.*, orders in council), and is not a Canadian citizen and has not Canadian domicil, and has not been landed in Canada within the meaning of the said Act, and belongs to

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one of the prohibited classes enumerated in section 3 of the Act and the orders in council, P.C. No. 24, P.C. No. 23, and P.C. No. 897; that he is of the Asiatic race and does not possess $200; has not come by continuous journey and is an unskilled labourer and specifically is not entitled, in pursuance of the orders in council, to land in Canada, and is a person entitled to be deported as determined by the Board of Inquiry after due and proper inquiry, and has been so ordered to be deported.

Upon the facts as adduced, it is plain that the decision of the Board of Inquiry has been arrived at in accordance with law, and upon good and sufficient evidence, and the decision of the Board of Inquiry, even if subject to review, has been rightly arrived at and in no way offends against any rule of evidence, nor can it be said that it is a decision which in any way offends against natural justice.

In my opinion, though, this Court is under the most complete inhibition from in any way canvassing, considering or reviewing, by appeal or otherwise, the decision of the Board of Inquiry. This is well demonstrated when section 23 of the Act is looked at, which reads as follows: [already set out].

Parliament has not left the appellant without an appeal, and, acting under a well-understood principle—that in the Crown resides infallible justice—we see that an appeal is given to the Minister of the Interior against the decision of the Board of Inquiry, and the Minister may allow or disallow the appeal, or there may be a rehearing by the Board of Inquiry. This procedure is all set forth and defined by section 19 of the Act.

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This Court—one of His Majesty's Courts of Justice—is without jurisdiction to hear this appeal, but this in no way indicates that there is any refusal of justice. The Courts of law cannot attract to themselves jurisdiction. Jurisdiction must be conferred. It is true that at times the inherent jurisdiction of the Court is invoked, but that jurisdiction can never avail when there is paramount legislation by the law-making authority positively withdrawing all jurisdiction.

This Court has been greatly assisted by able arguments addressed to it by the learned counsel from the bar, and par-

ticularly have we had addressed to us by counsel for the appellant cogent and strenuous reasoning that, notwithstanding the Act of Parliament, there still resides in this Court authority and jurisdiction to review the finding of the Board of Inquiry, and further that the deporation order has not been made "under the authority and in accordance with the provisions of the Act" (section 23), and that, therefore, there is no statutory inhibition in the way.

In my opinion, as already indicated, there has been a proper exercise of authority by the Board of Inquiry, and apart from that, it is further my opinion that the Court is absolutely without jurisdiction in the matter. Parliament has in no uncertain terms withdrawn all jurisdiction from the Courts. Parliament, in its wisdom, has given an appeal, but not to this Court, and the appellant is at liberty to prosecute an appeal should he be so advised. It cannot be said that to oust the jurisdiction of the Court is the denial of justice, and especially upon the facts of the present case there is, as I have already stated, no departure from natural justice, as the facts overwhelmingly prove that the appellant is attempting to land in Canada in plain defiance of the law, a law enacted, in my opinion, by the Parliament of Canda in the exercise of powers conferred by the British North America Act, and, unquestionably, the intention of Parliament is well spread upon the statute book. The legislation being, in my opinion, *intra vires,* is sovereign in its effect, and with all deference to the argument of Mr. *Bird,* junior counsel for the appellant, who relied so strongly on Magna Charta as being an insurmountable obstacle, I would refer to a portion of the argument of counsel for the defendant in *Phillips* v. *Eyre* (1870), 40 L.J., Q.B. 28 at p. 31 (effect being given to the argument of counsel for the defendant in the judgment).

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It will be seen that in *Phillips* v. *Eyre, supra,* a similar line of argument was adopted as in the present case. The decision however, was that—

> "A confirmed Act of the local Legislature, lawfully constituted . . . . has, as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the Imperial Parliament."

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It is to be noted, however, that this decision was one arrived at, and possibly to some extent affected by the extent of legislative authority conferred upon or acquired by the Island of Jamaica (without regard at the moment to the extensive powers of self-government extended to Canada), and that the proviso "subject to be controlled by the Imperial Parliament"—if the learned law reporter rightly interpreted the judgment—is too extensive a statement of the true constitutional position. In this connection I would refer to *Reg.* v. *Marais* (1901), 71 L.J., P.C. 32, and the head-note reads as follows:

"The 'repugnancy to the laws of England' which by the Colonial Laws Validity Act, 1865, makes Colonial legislation void, is repugnancy to such Imperial legislation only as by express terms or necessary intendment is made applicable to the Colony, and does not otherwise restrict the powers of a Colonial Legislature."

And see *per* the Lord Chancellor (Earl of Halsbury), who delivered the judgment of their Lordships, at p. 33.

Now, what is the position with regard to Magna Charta and the Habeas Corpus Act? They are undoubtedly statute law in this Province, under section 2 of the English Law Act, R.S.B.C. 1911, Cap. 75.

Magna Charta, and the Habeas Corpus Act, 31 Car. II., c. 2 (A.D. 1679) (having relation to criminal and supposed criminal matters), as well as the Act for more effectually securing the liberty of the subject (56 Geo. III., c. 100, 1st July, 1816), having relation to other than criminal or supposed criminal matters, is the law of British Columbia, but, as we have seen, subject to be modified by all legislation having the force of law in the Province of British Columbia. Irrespective, however, of this provision, the British North America Act intervenes, and there has been committed to Canada and the Provinces thereof, within the ambit of the respective powers Imperially conferred, the sovereign power of legislation. It is true if the Parliament of Canada or the Parliaments of the Provinces transcend these powers, the Courts have the power to declare any such attempted statute law *ultra vires*, and to this extent, and to this extent only, can it be said that His Majesty's Courts of law have any power to review. It may be said to be well-settled law, speaking generally,

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that whether there be concurrent powers conferred or not, the Parliament of Canada is paramount in its legislation in respect of all matters not coming within the classes of subjects by the British North America Act assigned exclusively to the Parliaments of the Provinces. Further, it may also now be stated to be settled law that the Parliament of Canada, acting under the power conferred by section 91 of the British North America Act, in the making of laws for the peace, order and good government of Canada, is paramount in legislating in respect to all matters coming within section 91 of the Act, and the legislation of the Parliament of Canada is to prevail, although it may be that the Dominion Parliament may trench upon matters assigned to the Provincial Legislature. This is the more definitely pointed out when section 95, dealing with agriculture and immigration, is considered, where concurrent powers are conferred. And it is to be observed that this is the only section of the Act where provision against conflict is made. To well indicate the rule for the interpretation of statute law, the language of Viscount Haldane, L.C. in *Vacher & Sons, Limited* v. *London Society of Compositors* (1913), A.C. 107 at p. 113 may be usefully and instructively read:

"In endeavouring to place the proper interpretation on the sections of the statute before this House sitting in its judicial capacity, I propose, therefore, to exclude consideration of everything excepting the state of the law as it was when the statute was passed, and the light to be got by reading it as a whole, before attempting to construe any particular section. Subject to this consideration, I think that the only safe course is to read the language of the statute in what seems to be its natural sense."

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Following the rule so succinctly stated by the Lord Chancellor, can it for a moment be contended that it was not the intention of Parliament to enact a code, complete in itself, governing and controlling the coming to Canada of all persons, irrespective of race or nationality, save those persons defined in the Act as being "non-immigrant classes" (section 2 (*g*))? That being so, it is not to be wondered at that a policy so well indicated would be set out in terms complete in themselves, and that the forum for passing upon all applicants for entry and the tribunal of appeal should be such as would be peculiarly fitted to deal with all possible cases arising, no doubt calling for

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varying terms and conditions of entry, and in other proper cases calling for exclusion (section 3), and where necessary, deportation. It follows that the Court must interpret the statute law in accordance with the intention and spirit of the enactment when such construction does no violence to the language used, or distort its natural and customary meaning.

To now revert to the question of there being no appeal to the Courts. Is this not expressed in apt words? In my opinion, language more comprehensive or effective to, in terms, oust jurisdiction could not have been used, and it is plain that it was the spirit and intention of Parliament to withdraw all appeal or right of review from the Courts. This cannot be gainsaid: section 23. In still further support of my opinion that the object of the Legislature was undoubtedly to exclude all appeal to the Court in the language used, and in what way the language is to be viewed, we find Abbott, C.J. in *The King* v. *Hall* (1822), 1 B. & C. 123 at p. 136 (25 R.R. 321) saying:

> "Now, the meaning of particular words in Acts of Parliament, as well as other instruments, is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion, on which they are used, and the object that is intended to be attained."

And this sentence is cited in the judgment of the Judicial Committee in *The "Lion"* (1869), L.R. 2 P.C. 530 (25 R.R. 332. Also, Lord Atkinson in *Keates* v. *Lewis Merthyr Consolidated Collieries, Lim.* (1911), 80 L.J., K.B. 1318 at p. 1320.

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That it is not novel legislation in providing for finality, and no appeal to the Superior Courts, a number of instances of Imperial legislation may be referred to. The Public Health (London) Act, 1891, was considered in *Westminster Corporation* v. *Gordon Hotels, Lim.* (1908), 77 L.J., K.B. 520, and it was held there was no appeal; and similarly, the Police Act, 1890, was considered in *Kydd* v. *Liverpool Watch Committee, ib.* 947, the Court of Appeal first holding that there was an appeal, but the House of Lords reversed this decision, holding against any appeal: see *per* the Lord Chancellor at p. 949.

It may be said in the present case that Parliament advisedly intended that the Board of Inquiry having acted, or the Minis-

ter of the Interior, upon an appeal to him, having acted (to adopt the words of the Lord Chancellor), it was "to be an end of the business."

It is argued that the order in council, P.C. 24, is invalid, being prohibitive in its nature, while section 37 only admits of an order in council of a permissive nature being passed. In my opinion, the order in council is, in its terms, a full and complete compliance with the section of the Act—37. Parliament clearly committed to the Governor in Council authority to fix the amount of money required to be in the possession of the immigrant, and compliance with the order in council is a condition precedent to the right to land. That orders in council may be passed from time to time, and have relation only to immigrants or tourists—that is, dealing with them separately—is clear. In my opinion, the words "immigrants and tourists," as used in section 37, are to be taken disjunctively, the "and" to be read as "or."

It has been strenuously argued that the order in council P.C. 897, in prohibiting, generally, the landing of immigrants being artizans, labourers, skilled or unskilled, at the defined ports of entry, is invalid, and in excess of the power conferred by section 38 (*a*) of the Act—that what was enacted was power to prohibit in individual cases, after inquiry. I cannot agree with this contention. In my opinion, it is clear what the intention of Parliament was, and that was to act when deemed necessary and expedient, and the order in council is, in my opinion, valid in form, and in plain compliance with the power conferred upon the Governor in Council.

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It has been argued that the appellant being a British subject by birth, cannot be prevented from landing and cannot be deported, that he is now in Canada although still upon the ship —being in Canadian waters within the three-mile limit—and that it is an interference with his civil rights.

Attorney-General for Canada v. *Cain* (1906), 75 L.J., P.C. 81, was cited by way of support to this argument that while aliens might be deported, British subjects could not. It cannot be said that their Lordships in the Judicial Committee determined other than that the Attorney-General for Canada was

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entitled to arrest the alien immigrant and return him to the country from whence he came. It does not follow as a matter of inference that an immigrant being a British subject could not be returned in like manner in a proper case.

The Immigration Act is, as has been previously pointed out, an Act passed in pursuance of the power conferred by the British North America Act, and applies to all persons coming to Canada, irrespective of race and nationality, and, in my opinion, the British subject has no higher right than the alien in coming to the shores of Canada, nor does the Parliament of Canada in its enactment differentiate in any way. The only privileged persons are those who in accordance with natural justice should be allowed free entry—by any nation—being her own Canadian citizens and persons who have Canadian domicil. These are permitted to land in Canada as a matter of right (section 18).

Lord Atkinson, in *Attorney-General for Canada* v. *Cain, supra,* at p. 83, said:

> "In *Hodge* v. *Reg.* (1883), 53 L.J., P.C. 1; 9 App. Cas. 117, it was decided that a Colonial Legislature has within the limits prescribed by the statute which created it 'authority as plenary and as ample . . . . as the Imperial Parliament in the plentitude of its power possessed and could bestow'."

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Proceeding from this proposition of law, as laid down by their Lordships of the Privy Council, can it be at all contended that there is not the power to exclude immigrants whatever be their race or nationality, inclusive of British subjects, save Canadians and those who have acquired Canadian domicil?

Firstly, it may be said, and in my opinion, effectively, that The Immigration Act is within the legislative authority of the Parliament of Canada, it being a specifically defined subject of conferred power of legislation. That being so, it is to be looked at as being of equal potency to an Act of the like nature of the Imperial Parliament. Secondly, in my opinion, The Immigration Act, if need be, could be supported under the sovereign and general authority given to the Canadian Parliament by the introductory enactments of section 91 of the British North America Act—"to make laws for the peace, order and good government of Canada in relation to all matters not

coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

Canada is a sovereign nation within, and of, the British Empire, all legislation being enacted by the respective Parliaments, Federal and Provincial, in His Majesty's name.

Now, what is the extent of the authority that may be exercised by the Federal and Provincial Parliaments? This may be said to be *all authority.* We are not without guidance upon this point. In *Bank of Toronto* v. *Lambe* (1887), 56 L.J., P.C. 87 at p. 92, Lord Hobhouse said:

"Their Lordships have to construe the express words of an Act of Parliament [The British North America Act] which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated Provinces a carefully balanced Constitution, under which no one of the parts can pass laws for itself except under the control of the whole acting through the Governor-General. And the question they have to answer is whether the one body or the other has power to make a given law."

The argument therefore, in effect, is that the Imperial Parliament would be powerless to pass The Immigration Act and implement its provisions to the extent of excluding and deporting from Great Britain and Ireland any British subject, no matter from what part of the Empire he came, and similarly, the Parliament of Canada is also powerless to exclude and deport from Canada. The mere statement carries its own refutation. Were the power not to exist to exclude and even, after entry, the power to deport British subjects from the British Isles, Canada, and all other portions of the Empire, might be invaded by people of the undesirable class as specifically set forth in section 3 of the Act and further referred to in sections 40 and 43 inclusive. It is irresistible that self-government and national status must attach to itself this power. It is a power of preservation of the nation, and no authority has been cited in support of the contention. The contention is one of mere platitude, devoid of reason or rationality. The Immigration Act, therefore, does, in its terms, apply to British subjects, as well as aliens and naturalized subjects and persons of all races without regard to nationality, subject to the exception in favour of Canadian citizens and persons who have Canadian domicil, and the appellant is not singled out in any way other

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than he must pass the requirements of the Immigration Act and the orders in council made in pursuance thereof, without which he cannot land. And as a matter of fact, at the present time there is existent, by reason of order in council P.C. 897, an absolute prohibition against landing which not only applies to the appellant, but to all artizans, labourers, skilled or unskilled, coming to Canada, irrespective of race, nationality or citizenship, save as aforesaid.

In *Quong-Wing* v. *The King* (1914), 49 S.C.R. 440, it was held that:

"The provisions of the statute of the Province of Saskatchewan, 2 Geo. V., c. 17, containing a prohibition against the employment of white female labour in places of business and amusement kept or managed by Chinamen, sanctioned by fine and imprisonment, is *intra vires* of the Provincial Legislature. *Union Colliery Co.* v. *Bryden* (1899), A.C. 580, and *Cunningham* v. *Tomey Homma* (1903), A.C. 151, referred to."

And see *per* Duff, J. at p. 463.

Then it is argued for the appellant that he is entitled to the ordinary civil rights which appertain to all British subjects within Canada, and that he can only be affected in these rights by Provincial legislation, and that he cannot be now deported, being within Canada. In my opinion, it cannot be said, upon the facts, that he is within Canada, not yet being landed—being withheld by immigration authorities and ordered to be deported—and further, he has not acquired a domicil in British Columbia. The appellant's domicil is unquestionably that of India. He left Calcutta for Hong Kong with the intention of going to Vancouver, British Columbia, and cannot be said to have acquired domicil in British Columbia. Upon the question of domicil we have the Lord Chancellor saying, in *Udny* v. *Udny* (1869), L.R. 1 H.L. (Sc.) 441 at p. 449:

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"I shall not add to the many ineffectual attempts to define domicil. But the domicil of origin is a matter wholly irrespective of any animus on the part of its subject. He acquires a certain *status civilis*, as one of your Lordships has designated it, which subjects him and his property to the municipal jurisdiction of a country which he may never even have seen, and in which he may never reside during the whole course of his life, his domicil being simply determined by that of his father. A change of that domicil can only be effected *animo et facto*—that is to say, by the choice of another domicil, evidenced by residence within the territorial limits to which the jurisdiction of the new domicil extends. He, in making this change, does an act which is more nearly designated by the word 'settling'

than by any one word in our language. Thus we speak of a colonist settling in Canada or Australia, or of a Scotsman settling in England, and the word is frequently used as expressive of the act of change of domicil in the various judgments pronounced by our Courts."

It would occur to me that nothing more need be said to indicate that the appellant cannot claim that he has an acquired domicil in British Columbia. It would, therefore, follow that the appellant is not in the position of one entitled to claim any civil rights in the Province of British Columbia. Upon this point, and dealing with political and civil status, see *per* Lord Westbury in *Udny* v. *Udny, supra,* at p. 457.

And it was held in *Abd-ul-Messih* v. *Chukri Farra* (1888), 57 L.J., P.C. 88, that—

"Civil status with its attendant rights and disabilities depends not upon nationality but upon domicil."

Then we have the Lord Chancellor (at that time the Earl of Halsbury) saying, in *Winans* v. *Attorney-General* (1904), 73 L.J., K.B. 613 at p. 615:

"Now, the law is plain, that where a domicil of origin is proved it lies upon the person who asserts a change of domicil to establish it, and it is necessary to prove that the person who is alleged to have changed his domicil has a fixed and determined purpose to make the place of his new domicil his permanent home."

Then it is argued that the appellant is not of the Asiatic race. In my opinion this is in no way crucial, as there is the right to refuse the appellant to land, and the right to deport, under the provisions of The Immigration Act and the orders in council, irrespective of race, and, as I have also said, irrespective of nationality or citizenship. It is somewhat interesting to know that as early as 1784 an association was formed, and named the Asiatic Society, in Calcutta, to extend a knowledge of the Sanskrit language and literature. (Introduction to the Science of Language, A. H. Sayce, Professor of Assyriology, Oxford, Vol. 1, p. 44). And in the History of India (edited by Mr. A. V. Williams, Professor of Indo-Iranian Languages in Columbia University, Vol. 7, by Sir Wm. Hunter, a vice-president of the Royal Asiatic Society), at p. 44, we read of "the Asiatic races," including therein the people of India. And see Encyclopædia Britannica, 11th Ed. (1910), Vol. 2, p. 749.

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It was asserted by counsel for the appellant that the Hindus

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are of the Caucasian race, akin to the English. We have Freeman, in his masterly essay "Our Race and Language," when speaking of the Aryan family, saying:

"One great branch he will see going to the south-east to become the forefathers of the vast yet isolated colony in the Asiatic lands of Persia and India. He watches the remaining mass sending off wave after wave to become the forefathers of the nations of historical Europe. . . . .

"Mr. Sayce says truly that the use of a kindred language does not prove that the Englishman and Hindoo are really akin in race; for, as he adds, many Hindoos are men of non-Aryan race who have simply learned to speak tongues of Sanskrit origin. He might have gone on to say with equal truth that there is no positive certainty that there was any community in blood among the original Aryan group itself, and that if we admit such community of blood in the original Aryan group, it does not follow that there is any further special kindred between Hindoo and Hindoo or between Englishman and Englishman. The original group may not have been a family, but an artificial union. And if it was a family, those of its members who marched together east or west or north or south may have had no tie of kindred beyond the common cousinship of all. . . . . If, then, we are ever to use words like race, or even nation, to denote groups of mankind marked off by any kind of historical, as distinguished from physical, characteristics, we must be content to use those words as we use any other words, without being able to prove that our use of them is accurate as mathematicians judge of accuracy."

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Therefore, it may well be said that when the words "Asiatic race" are used in the order in council, P.C. 24, the words are, in their meaning, comprehensive and precise enough to cover the Hindu race, of which the appellant is one. It is plain that upon study of the question, the Hindu race, as well as the Asiatic race in general, are, in their conception of life and ideas of society, fundamentally different to the Anglo-Saxon and Celtic races, and European races in general.

Further acquaintance with the subject shews that the better classes of the Asiatic races are not given to leave their own countries—they are non-immigrant classes, greatly attached to their homes—and those who become immigrants are, without disparagement to them, undesirables in Canada, where a very different civilization exists. The laws of this country are unsuited to them, and their ways and ideas may well be a menace to the well-being of the Canadian people. I am supported in expressing views which might possibly be deemed as extra-judicial—although I submit not, when passing upon the

constitutionality of statute law—by the language of Duff, J. in *Quong-Wing* v. *The King, supra,* at p. 465.

The Parliament of Canada—the nation's Parliament—may be well said to be safeguarding the people of Canada from an influx which it is no chimera to conjure up might annihilate the nation and change its whole potential complexity, introduce Oriental ways as against European ways, eastern civilization for western civilization, and all the dire results that would naturally flow therefrom, and, adopting the language of Duff, J. in *Quong-Wing* v. *The King, supra,* at p. 465, with the one alteration of "national" for "local," and applying it to the provisions of The Immigration Act and the orders in council passed in pursuance thereof, it may well be said that "there is nothing in the Act itself to indicate that the Legislature is doing anything more than attempting to deal according to its lights (as it is its duty to do) with a strictly [national] situation." And in this it is in no way exceeding its legislative powers, and is, in fact, pursuing what is its bounden duty under section 91 of the British North America Act.

In that our fellow British subjects of the Asiatic race are of different racial instincts to those of the European race—and consistent therewith, their family life, rules of society and laws are of a very different character—in their own interests, their proper place of residence is within the confines of their respective countries in the continent of Asia, not in Canada, where their customs are not in vogue and their adhesion to them here only give rise to disturbances destructive to the well-being of society and against the maintenance of peace, order and good government.

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Lord Watson, in *Abd-ul-Messih* v. *Chukri Farra, supra,* said at p. 91, dealing with the law of India:

> "By the law established in India, the members of certain castes and creeds are, in many important respects, governed by their own peculiar rules and customs, so that an Indian domicil of succession may involve the application of Hindu or Mohommedan law; but these rules and customs are an integral part of the municipal law administered by the territorial tribunals."

It is apparent that it will not conform with national ideals in Canada to introduce any such laws into Canada, or give

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them the effect of law as applied to people domiciled in Canada, and this, probably, would be the germ of discontent that would be brought to this country with any considerable influx of people so different in ideas of family life and social organization. Better that peoples of non-assimilative—and by nature properly non-assimilative—race should not come to Canada, but rather, that they should remain of residence in their country of origin and there do their share, as they have in the past, in the preservation and development of the Empire.

In my opinion, the Immigration Act and the orders in council referred to constitute full and justifiable warrant for the detention of the appellant by the immigration authorities, and for his deportation, the deportation order being good and sufficient in law even were the decision of the Board of Inquiry reviewable, and no grounds are made out for the appellant's discharge. But in so holding, I am not to be understood as holding that there is any power of review, or the right to invoke *habeas corpus* proceedings to effect the discharge of the appellant, as my opinion is that section 23 is an absolute inhibition upon the Court, and there is no jurisdiction in the Court to grant a writ of *habeas corpus* and thereupon discharge the appellant from custody.

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Appeal dismissed.

Solicitors for appellant: *MacNeill, Bird, Macdonald & Darling.*

Solicitors for respondent: *Bowser, Reid & Wallbridge.*

HALL v. CANADIAN PACIFIC RAILWAY COMPANY.

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HALL v. CANADIAN PACIFIC RY. CO.

Master and servant—Negligence—Injury to servant—Common-law liability—Negligence of competent fellow servant—Proper place to work in—Case taken from jury—Employers' Liability Act, R.S.B.C. 1911, Cap 74.

The plaintiff, employed as a switchman, when about to climb to the top of a train in the night time, while being shunted, in order that he might more effectively signal the engineer, stumbled over an unlighted pile of dirt formed by an excavation made by the defendant Company's workmen in construction work, and was severely injured by the train. The defendant Company had delegated to a competent foreman, who was in charge of a construction gang, the duty of "seeing that everything was left safe." He was supplied with sufficient resources for that purpose, including suitable lights for dangerous places, and it was his duty to decide as to where lights should be placed on obstructions. At the trial the learned judge refused to submit to the jury the question of common-law liability.

Held, on appeal (MARTIN and MCPHILLIPS, JJ.A. dissenting), that although the plaintiff could receive compensation under the Employers' Liability Act, as the accident was due to the negligence of a fellow servant in failing to place lights upon the mound over which the plaintiff stumbled, the doctrine of common employment precluded him from recovering damages at common law.

The temporary obstruction of a railway yard by a dirt pile, arising from an excavation preliminary to the erection of a tool-house, which was in charge of a competent foreman, did not alter the nature of the yard from that of reasonable safety to a dangerous place to work in.

Wilson v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326, followed.

Decision of MURPHY, J. affirmed.

APPEAL by plaintiff from a decision of MURPHY, J. in an action tried by him at Vancouver on the 8th of October, 1913, in which the learned judge refused to submit to the jury the question of common-law liability, and entered judgment for the plaintiff for $3,900 under the Employers' Liability Act. Immediately prior to the accident from which the action arose, the plaintiff was engaged as a switchman in the making up of a train in the yards of the defendant Company in Vancouver, the time being about midnight. The engine, with cars attached, was shunting back and forth, and the plaintiff, who was about

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half way between the engine and the rear of the train, was repeating signals from a switchman at the rear, to the engine driver. He was standing to the north of the track upon which the train was shunting, and owing to a curve in the line, he ran towards the train, for the purpose of getting on top of the cars, where he would be in a better position to repeat the signals. In so running, he stumbled over a pile of earth, which he could not see in the darkness, and fell under the train, with the result that he lost his left leg above the knee, his right leg below the knee, and three fingers of his left hand. This pile of earth was about 40 feet long, running east and west close to the track, and at its north side, where the plaintiff stumbled, it was from two to three feet high.

The Company's workmen, who were in charge of a foreman, and who were excavating close to the track on the south side, preliminary to placing a section foreman's tool-house on the spot, had thrown the earth across to the north side, where it had accumulated. Part of it was removed from time to time, but the major portion of it had been there for over a week prior to the accident.

The defendant Company had left to the foreman (whose competency was not questioned in the pleadings) the duty of seeing that the place was kept in a proper condition for the safety of the workmen employed there in the operating of the Company's business. No light was on the dirt pile at the time of the accident, and no contributory negligence was imputed to the plaintiff. The plaintiff appealed against the judgment of the learned trial judge on the grounds that he erred in not allowing the case to go to the jury upon the question of the defendant's liability at common law; that there was evidence of a defective system; that the defendant Company was negligent in leaving to the discretion of the foreman of a gang of labourers in the construction department the deciding as to when lights should be placed upon an obstruction when the safety of workmen in the operating department depended on the same; and upon other grounds.

Statement

The appeal was argued at Vancouver on the 20th of April, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

J. W. de B. Farris, for appellant (plaintiff): Each gang working at the excavation had a foreman, whose duty it was to see that lights were put on the mounds of earth at night, and the evidence shews that lanterns were available. It was the duty of the Company to provide a safe place to work. He referred to *Fralick* v. *Grand Trunk Ry. Co.* (1910), 43 S.C.R. 494 at p. 521; *Fakkema* v. *Brooks, Scanlon, O'Brien Company, Limited* (1910), 15 B.C. 461; (1911), 44 S.C.R. 412; *Liset* v. *The British Canadian Lumber Corporation* (1914), 19 B.C. 480. Where any foreign substance is thrown on the ground where the switchman works, it is dangerous, and lights should be on it: see *Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326. It was a defective system to leave to the discretion of a foreman of a gang of labourers a matter of this nature; it should have been left to some one in connection with the operative part of the road, some one primarily in charge of seeing to the safety of the men: see *Velasky* v. *Western Canada Power Co.* (1913), 18 B.C. 407; (1914), 49 S.C.R. 423; *Canada Woollen Mills* v. *Traplin* (1904), 35 S.C.R. 424.

Argument

Sir C. H. Tupper, K.C., for respondent (defendant): There is no evidence of incompetency of the foreman, and competent men and proper material is all they have to supply: see *Liset* v. *The British Canadian Lumber Corporation* (1914), 19 B.C. 480; *Burr* v. *Theatre Royal, Drury Lane, Limited* (1907), 1 K.B. 544. It was the duty of the fellow servants to put the lights in place. This was all temporary work, and the actual obstruction had only been there a week: see *Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326; *Allen* v. *New Gas Company* (1876), 1 Ex. D. 251; *Wood* v. *Canadian Pacific Railway Company* (1899), 6 B.C. 561; 30 S.C.R. 110.

Farris, in reply: The case of *Wood* v. *Canadian Pacific Railway Company* shews the distinction between temporary and permanent conditions.

Cur. adv. vult.

14th July, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The ridge of earth which caused the plaintiff to stumble and fall under the wheels of the car was taken out by a gang of defendant's workmen from an excava-

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tion made necessary in the work of improvement and maintenance of the defendant's railway. It was work of a class which, in the operation of a great railway system, must of necessity be carried out from day to day by the Company's servants as occasion should arise, and in the performance of which a pretty wide discretion must be left to those immediately in charge of the particular work. The men who placed the earth there were in charge of a foreman whose general instructions were to "see that everything was left safe." The negligence charged consisted of: (1) leaving the pile of earth there in close proximity to the tracks where switching operations were being carried on; or (2) in not placing red lights upon it.

I do not think it can be said that defendant's system of leaving it to its foreman to "see that everything was left safe," and supplying him with resources to that end, such as were supplied in this case, in the way of danger signals, was a defective one. There were several alternative courses open to the foreman. He might remove the earth altogether; he might level it down to safety, or he might put lights on it. The only comprehensive instruction therefore would be to "see that everything was left safe." A competent and careful foreman should, one would think, be the best person to entrust with such a duty, confined, as it would be, to the work upon which he was immediately engaged. I think I am controlled by *Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326.

MACDONALD, C.J.A.

The instruction to be careful is mere surplusage in this case. The fitness of the foreman to discharge the duty imposed upon him has not been questioned, either in the pleadings, the notice of appeal, or in the arguments before us.

With reference to the statement of Davies, J. in *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420, at p. 424, that "the doctrine of common employment cannot be extended to cases arising out of the master's 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," the words "in the first instance" must not be overlooked. This statement of the law does not mean that the employer is bound to see that the place

is safe from day to day or from hour to hour. Changes may have to be made incidental to the work, and to the place the employee is called upon to work in, and if these are made under the direction of persons competent to carry forward the work, and under a system, and with resources which would enable them to carry it out with due regard to the safety of themselves and their fellow servants, the master is not at common law liable for the failure of such persons to exercise due care, skill and diligence in its prosecution. He would be liable if he did not correct their mistakes after actual or implied notice, or where the negligent performance amounts to a breach of a statutory duty imposed on a master.

MACDONALD, C.J.A.

I would, therefore, dismiss the appeal.

IRVING, J.A.: It is objected by the defendant that by reason of the form of the statement of claim no damages can be recovered at common law, but only under the Employers' Liability Act. The departure from an ordinary form cannot possibly deprive a person of his rights. The first three paragraphs shew plainly that the plaintiff is suing at common law; the last three, under the statute. To my mind, the pleading is very neatly drawn, and no amendment is necessary.

The learned trial judge, on a motion for nonsuit, refused to allow the common-law branch of the case to go to the jury, on the ground that the negligence which caused the accident was the negligence of a fellow servant. The defendant thereupon admitted liability under the Employers' Liability Act, and judgment was given for $3,900.

The plaintiff now appeals from the refusal of the judge to permit the common-law action to go to the jury. The operation in which the plaintiff was engaged was connected with the making up of a train in the yards of the defendant in the night time. Cars were being shunted backwards and forwards, and the plaintiff, stationed about half way between the engine and the rear of the train, was expected to repeat the signals from the switchman to the engine driver as required from time to time. For that purpose he was standing well to the north of the railway track, but, as the track was somewhat curved, he

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thought that he could discharge his duty better by getting on top of the cars and repeating the signals from there. With this end in view he ran from where he had been standing on the north side of the track towards the train, and stumbled over a pile of earth which had been placed close to the track by some workmen in the employ of the defendant Company. The workmen had been engaged during the day in excavating for a new track to the south of the track upon which the freight cars were being shunted. This pile of earth was some 30 to 40 feet long from east to west; near the track it was some 15 inches high; but on the northern or outside edge, against which part the plaintiff had stumbled, it must have been between two or three feet high. The men employed in excavating had thrown dirt across the track to the north side, and from time to time, as was convenient, a car would be brought to the pile and the dirt removed. But it had been there, alongside of this track, in more or less substantial form, for a week, and was the result of some weeks' work. At the time of the accident no warning lights were upon the mound, although suitable lights had been provided by the Company for that purpose. No special directions as to placing lights had ever been issued by the Company. The system adopted was to rely on the discretion of the foreman of each gang as to when and where lights should be placed.

IRVING, J.A.

Plaintiff's counsel takes two grounds in support of the contention that the judge should have allowed the case to go to the jury. First, that there was a defective system, and he refers to the language of Duff, J. in *Fralick* v. *Grand Trunk Ry. Co.* (1910), 43 S.C.R. 494 at p. 522, as follows:

> "The desideratum is a system which consistently with reasonable efficiency reduces to as low a degree as possible the risks arising from imperfections of human instruments."

Mr. *Farris* contends it was for the jury to pass upon the sufficiency of the system of leaving the matter to the foreman in this case. The defendant concedes that a light ought to have been placed there. The plaintiff has said had there been a warning light no accident would have occurred. The point for the judge to determine is: Was there any evidence of negligence on the part of the Company to go to the jury? It seems

to me the uncontroverted evidence established that it was the neglect of a fellow servant, just as in *Wood* v. *Canadian Pacific Railway Company,* decided in 1899 (30 S.C.R. 110), where the duty of getting the line of the railway and the side track in proper order was delegated to the defendant's roadman and section foreman, who were shewn to be properly qualified, and if there was any failure to perform a duty which the defendant owed to the appellant, it was the fellow workmen who were guilty of it. As they were for the purpose of the defendant of common employment, fellow servants of the plaintiff, the action failed.

The second ground is founded on the *dictum* of Davies, J., in giving judgment in *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420 at p. 426, where the following language is used:

"Defective places in which to work, defective machinery with which to work, and defective systems of carrying on work, are none of them, I hold, within the exception grafted upon the rule holding an employer liable for the negligence of the men in his employ. That exception, as defined by Lord Cairns in his celebrated *dictum* in *Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326, does not cover the duties owing by the employer to the employed in these respects."

In that case there was evidence from which it might be inferred that the directors did know and direct, or acquiesce in what was being done.

IRVING, J.A.

I am unable to distinguish this case on its facts from *Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326. There, on account of new work being undertaken, a scaffold had been constructed by Neish on Saturday. On Monday the plaintiff, with others, began to work, and on Wednesday, by reason of the accumulation of gas—which accumulation had taken place on account of the scaffold interfering with the system of ventilation—an accident took place. It was there held that because Neish was a fellow servant of the plaintiff, he could not recover. That seems to me this case exactly. I do not see that the other two cases cited by counsel carry the plaintiff's case any further. *Canada Woollen Mills* v. *Traplin* (1904), 35 S.C.R. 424, was a case of an accident resulting from the use of a dilapidated elevator, of which there had been no inspection and for the

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repairs of which there was no competent person employed. That was not mere negligence of a fellow servant, but a gross case of long-continued neglect on the part of the management to provide a safe machine.

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The other case, *Fakkema* v. *Brooks, Scanlon, O'Brien Company, Limited* (1910), 15 B.C. 461; (1911), 44 S.C.R. 412, reaffirms the *dictum* from *Ainslie Mining and Ry. Co.* v. *McDougall, supra.* In the opinion of one of the learned judges, it is doubtful if that case would have been decided against the company if the question of fellow employment had been raised at the trial. That doctrine seems to have been pressed before the Court of Appeal here, but not in the Supreme Court of Canada. The precise ground upon which the *Fakkema* decision rests is that there was either a faulty installation or a defective system being carried on, in either case making the company liable within the rule laid down in *Ainslie Mining and Ry. Co.* v. *McDougall, supra.* I can only say that in the present case there was no evidence to go to the jury that the Company had any knowledge of the existence of this accumulation of dirt, and that the judge was right in refusing to allow the jury to pass upon the question. In *Waugh-Milburn Construction Co.* v. *Slater* (1913), 48 S.C.R. 609, the plaintiff won because it was held that the defence of common employment was not available to defendants, who had been guilty of personal negligence.

IRVING, J.A.

I would dismiss the appeal.

MARTIN, J.A.: It is alleged that the defendant Company is liable to the plaintiff at common law because it did not provide him with (1) a safe place to work, according to the principles lately applied in, *e.g., Waugh-Milburn Construction Co.* v. *Slater* (1913), 48 S.C.R. 609, nor (2) with a proper system of protection in making alterations or additions to that place; in other words, no safe arrangement or a suitable scheme of work. The learned trial judge refused to allow the case to go to the jury on these questions, but, by consent, it was arranged that a verdict should be entered under the Employers' Liability Act for $3,900, and that an appeal should be taken on the common-law question.

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The essential facts are that the plaintiff was employed as a switchman in the defendant's railway yard at Vancouver, and at the time of the accident was engaged, about midnight, in making up a train of cars, taking the train from the freight shed, and switching it on to the main track. In the performance of this duty, part of which required him to give signals to another switchman at the rear end of the train, who passed them on to the engine driver, it is admitted that he had to board the train in motion and get up on top of it owing to a curve, and in attempting to do so he stumbled over the end of a large pile of dirt close to the track, which he had not seen before and did not notice in the dark, and which caused him to fall onto the track and sustain severe injuries from the passing train. There was no red (or any) light on this dirt pile, as is usual and necessary to be put to warn persons of obstructions. No contributory negligence can be imputed to the plaintiff, who was admittedly doing his duty. It is also admitted by the yard master that it was a dangerous thing to leave the pile of dirt at that place, and it had been there for a week at least, though varying in size, as part was removed from time to time. This particular piece of shunting, or switching, was being done under pressure; as the yard master says:

". . . . It was a hurry-up job—that train getting out this stuff—it is a rush job from the start to the finish—so everybody has to be on time."

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The expression "getting out this stuff" refers to the shipment of raw silk, which deteriorates rapidly in certain conditions, and, therefore, "silk trains" have to be made up and sent on with extra dispatch.

All the locality in question was part of the yard, and used entirely for shunting and yarding purposes, though the main-line track comes down into it, and the silk train at the time was being shunted from the side to the main track. We are not told why the yard was not lighted so that obstructions could be seen, but as no complaint has been advanced on that score, here or below, I do not propose to deal with it, because doubtless there is good reason for not complaining, possibly because if the yard were brilliantly lighted, the electric lights might interfere with the signals from the switchmen's lanterns.

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This yard was subject to two concurrent jurisdictions: (1) that of the yardmaster (Ralston) in charge of the shunting work, and the trains and men therein employed, and (2) that of the roadmaster (Vollams) in charge of the track department, looking "after any construction work, or anything else that is going on in connection with the roadbed." The particular work in hand which caused the dirt to be there was construction work, the excavating for and placing of a section foreman's tool-house close to the main track within the yard, and it was the dirt thrown from this excavation that caused the injury to the plaintiff. This construction work was solely in charge of the roadmaster, who had two extra foremen, with their gangs, to do it under his directions, and in the doing of it, except in regard to arrangements for cars in connection with it, the responsibility for taking precautions to protect the Company's servants working in the yard fell upon the roadmaster's department. His evidence as to the system employed for such protection is that red lights were supplied to the foremen, with the instructions that they were to put the lights on any obstructions that they considered unsafe, and that they were not placed on the pile in question "because they considered that the pile was levelled off enough to be safe." For several pages of cross-examination, this question of the rule or system adopted by the Company is gone into, and it is put in varying and sometimes shifting language, but, in my opinion, it is clear that it would have been open to a jury to find that it comes down in practice to this general rule, and this only, as the yardmaster sets it out:

"Then I understand that this general working rule does not define the occasion when a light shall be used, but is simply to this effect, that if the person working himself considers a light should be put there, it is his duty to do it? Yes, it is his duty.

"In other words, it is left to the individual discretion of the particular foreman who is doing the work? It is, if nobody else comes around; yes.

"Taking this particular case—this foreman was not required by the rules of the Company to consult you as to whether a light should be put on this mound? He was entitled to use his own discretion in that matter? You say he was not compelled.

"He was not required by the rules of the Company to consult you as to whether a light should be put on that mound? He works on his own judgment."

The yardmaster explains the reason why the foremen "have

to exercise their own judgment" is that "the territory is so large that I cannot be held (to) account, you see."

And in regard to this particular work he says:

"Now, is this a regular thing that happens from time to time in the business of the Company, in the work of the Company, that earth has to be deposited? No, it is not often that we have anything happen like that around. Of course, in construction work, things are out of the ordinary.

"But you have a good deal of construction work as a matter of fact on the C.P.R.? Oh, yes.

"And where construction work is going on it is necessary to have dirt to place along the track from time to time? We do that right along, yes."

It is clear, I think, that before the erection of this tool-house began, the yard was a reasonably safe place to work in, and I am unable to take the view that the subsequent temporary obstruction of it by the dirt pile under the roadmaster's superintendence altered its nature in this respect and made it different in principle from the temporary obstruction of the ventilation of the mine by the scaffold erected under the superintendence of the mine manager in *Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326, which was held to be the fault of a competent fellow servant to whom the master had properly delegated his duty. Here the presumably competent (as I shall deem him to be for the present, subject to further remark) roadmaster or foreman to whom the duty was delegated was the fellow servant of the plaintiff, so, even though there were separate departments, we have common employment by a common master within *Wilson* v. *Merry, supra,* as defined by, *e.g., Johnson* v. *Lindsay & Co.* (1891), A.C. 371; *Hedley* v. *Pinkney & Sons Steamship Company* (1894), A.C. 222; *Burr* v. *Theatre Royal, Drury Lane, Limited* (1907), 1 K.B. 544; *Cribb* v. *Kynock Limited* (1907), 2 K.B. 548; *Young* v. *Hoffmann Manufacturing Company, Limited, ib.* 646; and *Waldron* v. *J. A. & N. Stores* (1910), 2 I.R. 381.

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I qualified the expression "presumably competent" because it is a matter of some doubt whether on the facts of this case, and having regard to the very grave duty to be discharged in the question of determining the safety of an obstruction under all conditions, as hereinafter more fully noted, an ordinary foreman of an ordinary construction or repair gang of labourers can be said, even *prima facie,* to be a "proper and competent

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person," as Lord Cairns puts it in *Wilson* v. *Merry, supra.* As a rule the onus of proving incompetence is upon the plaintiff, but, as it is said in Beven on Negligence, 3rd Ed., 648:

"It is clear that incompetency may be so gross and palpable that it may raise an irresistible presumption of negligence in the appointment of the incompetent person; it is equally true that incompetency, as undoubted and as harmful, may be so disguised that its existence is quite consistent with a due care on the part of the master. The result seems to be that the question in each case is for the judge, whether the proof given of incompetency is sufficient to raise a presumption of want of due and reasonable care in the selection of the servant; for the jury, whether it does."

The matter is further discussed by the same author on p. 649, and attention is drawn to the case of *Skerritt* v. *Scallan* (1877), Ir. R. 11 C.L. 389 at p. 400, as regards the inference to be drawn from a single act of negligence. But as this interesting aspect of the matter was not argued before us, I shall content myself by drawing attention to the remarks of Lord Shaw in *Butler (or Black)* v. *Fife Coal Company, Limited* (1912), A.C. 149 at pp. 170-1, wherein he found it incredible that the men there in question could have been competent.

This brings me to the second branch of the case, which is that even if the Company is not liable for the said default of its competent servant, yet it is liable for another reason, *viz.*: that it failed to provide a proper and adequate system, or arrangement or scheme of work, to protect those working in the yard from the consequences of works of construction proceeding concurrently with works of operation in such a way as to make it highly dangerous for those engaged in the latter to carry on their ordinary duties. This is something quite distinct from the other antecedent obligation already referred to, and is pointed out by Lord Colonsay in *Wilson* v. *Merry, supra,* at p. 346, where he is defining the limits of that decision, and while restricting it, draws attention to "a defect in the general arrangement or system of ventilation of the pit for which, in certain views, the defenders might be regarded as liable." This liability for defective system has been given effect to so often in this Court, even in the present term, that it would be superfluous to cite many cases, and I shall therefore content myself by referring to the judgment of Lord Watson in *Smith*

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v. *Baker & Sons* (1891), A.C. 325 at p. 353, and to the latest decision of the Supreme Court of Canada on the subject—*Bergklint* v. *Western Canada Power Co.* (1914), 6 W.W.R. 1236, where *Wilson* v. *Merry* and other leading cases are considered, and only add that our judgment in *Liset* v. *The British Canadian Lumber Corporation* (1914), 19 B.C. 480, was based upon a temporary change of conditions and not upon a system.

The submission of the appellant herein, as I understand it, is that a so-called system of protecting workmen which leaves in general and loose directions the question as to whether an obstruction is to be guarded or not to the opinion of the foremen of gangs at all times, and in all places and conditions, without any special directions to meet special cases, and over so large a territory that the roadmaster admits he can have no continuous effective personal supervision over the foremen or their work, nor can they have a like opportunity to consult with him, is, on the face of it, inadequate and deficient. The submission comes to this, that, in general, the directions here are so lacking in precision, and leave so much to the discretion of the individual foreman as to invite slackness and a lack of responsibility, and, in particular, that when an area where operative work of a specially dangerous and exacting nature has often to be carried on (as on the night in question) is invaded by a construction gang whose workings must necessarily and unavoidably, if unguarded, leave traps for the lives of fellow servants employed otherwise, concurrently as aforesaid, in that area, then special precautions should be taken for their safety by the joint action of the masters of the yard and of the road, or otherwise, so that the concurrent work of the two departments could proceed with as little danger to the yardmen and train crews as possible. I find it impossible to say that this submission is wrong. The determination of the question of an adequate system was one of fact for the jury, and they would have had to consider it in the light of, and as applied to, the conditions before them. Those precautions which they might have thought sufficient to safeguard a train crew on a freight train crossing the plains, might well have been deemed insufficient and unsafe to protect a train crew necessarily hurrying to make up a train in a dark yard,

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where agility and a good foothold are essentials; or to protect the crew of a passenger train, or other servants, in a passenger station. Would they be prepared to say that a great transcontinental railway system can be operated with reasonable regard for the protection of its servants by merely providing its road-gang foremen with red lamps and telling them to place them on any obstructions they thought were unsafe? I think they would be abundantly justified if they said "No" to that question, and held, in the language of Lord Cranworth in *Bartonshill Coal Company* v. *Reid* (1858), 3 Macq. H.L. 266 at p. 290, that "[plaintiff's] injury was evidently the result of a defective system not adequately protecting the workmen at the time of the explosions." This question of the sufficiency of directions came up in *Young* v. *Hoffmann Manufacturing Company, Limited* (1907), 2 K.B. 646, a case on the antecedent duty of employers to provide competent persons to give proper instructions to inexperienced workmen, young or old, employed upon dangerous work, and at p. 659, Kennedy, L.J., referring to such delegation of duty by the employer, said:

"Whether in the particular case such delegation, either express or implied, existed; whether the directions of the employer, if expressly given to the delegate, were sufficiently precise and explicit; whether the delegate was or was not competent to understand and to fulfil the delegated duty—all these, just as in a case where the employer gives instruction personally or by written or printed notice the adequacy of such personal direction or of the notice, are matters proper for the consideration of the tribunal which, whether judge or jury, has to decide the issue of fact upon which depends the question of the fulfilment or non-fulfilment of the employer's duty to use reasonable care to avert danger to his servant employed about the machinery, and consequently the question of his liability or non-liability for the injury to the servant."

MARTIN, J.A.

These observations relating to the question of the directions to the delegate being "sufficiently precise and explicit" are specially applicable to the case at bar, and I find it quite impossible to say that there was not abundant evidence which a jury would have been entitled to consider in determining the question of an adequate system for the protection of the plaintiff and his fellow servants working in the defendant's yard.

I therefore think that the learned judge should not have withdrawn the case from the jury on the common-law branch

thereof, and, consequently, this appeal should be allowed and a new trial ordered.

GALLIHER, J.A.: I would not interfere with the judgment below.

There is no suggestion that before the pile of dirt in question was placed there, that the Company had not provided a fit and proper place for its workmen in operating trains to work. It became necessary to excavate a bank of earth close to the track for a site for a tool-house, and the construction gang engaged in this, under a foreman, placed the dirt from the excavation in a pile across the track upon which the accident occurred. The evidence is that this dirt was levelled back some four feet from the track, and then sloped up to a height of about four feet, and about 40 feet in length. No light was placed upon this pile of dirt at night. The plaintiff, in the course of his duties as switchman, not seeing this pile of dirt in the dark, stumbled over it and fell beneath a moving train that was being made up, and suffered very severe injuries, and seeks to make the Company liable at common law.

The learned trial judge withdrew the case from the jury at common law, and the Company admitting that they were liable under the Employers' Liability Act, judgment was signed against them for $3,900. It is against the learned trial judge's refusal to let the case go to the jury at common law that this appeal is taken.

GALLIHER, J.A.

Mr. *Farris,* for plaintiff, relied on *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420; and *Fralick* v. *Grand Trunk Ry. Co.* (1910), 43 S.C.R. 494 at p. 521, but, in my opinion, those cases are not applicable.

The general instructions of the Company to its foremen in the different departments were to leave all work safe and guarded. Their system was established, and what was done here was not a providing of a fit and proper place for men to work in, or the establishing of a system, but a piece of work which arose incidentally in the course of business operations, or changes that take place from time to time, and as there is no suggestion that the men in charge of this work were incom-

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petent, the failure to properly guard or light this pile of dirt was the neglect of the foreman in charge, and for whose neglect the Company, in the circumstances, are not liable at common law.

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MCPHILLIPS, J.A.: The appeal is one from the judgment of MURPHY, J. refusing to submit to the jury the question of common-law liability—and entering judgment for the plaintiff for $3,900, under the Employers' Liability Act, the jury being first discharged, the learned judge entering the same upon the consent of counsel for the defendant Company—but without prejudice to the plaintiff's right of appeal in respect of his claim for damages at common law.

The procedure adopted is somewhat novel, but being consented to, and no argument having been addressed to the point, I assume it to be the determination of this Court that the question of common-law liability should have been submitted to the jury—that in such event the judgment as entered will be set aside and a new trial directed.

The plaintiff was a switchman and met with the injuries—terrible in their nature, being the loss of his left leg above the knee, the right leg below the knee, and three fingers of the left hand—at about 12.15 a.m. on the 5th of August, 1912. The switching-engine was shunting cars and a caboose was attached —the plaintiff, in the discharge of the duties imposed upon switchmen, was, immediately prior to the occurrence of the accident and injury, running from a point near the engine to the caboose so as to ascend to the top of the train near the caboose, so that he could effectively pass signals to the locomotive engineer, it being at a point where there was a curve, and whilst attempting to do this his foot was caught in a pile of dirt which, unknown to him, was thrown up and laid near to the rail on the north side of the track upon which the train was being shunted. No suggestion is made that there was any contributory negligence upon the part of the plaintiff, nor any previous knowledge of the existence of this pile of dirt, and the night was dark and there was no warning light or any watchman placed at the point to warn the train crew of the danger—

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the tracks at the point are known as yard tracks for shunting. It would seem that this pile of dirt was thrown up next to the track, and had been there possibly a week before the occurrence of the accident. The assistant yardmaster at night—one Ralston—said in evidence elicited on discovery, and part of the plaintiff's case—that undoubtedly the pile of dirt was a dangerous thing to have where men were switching, and stated that there should be lights placed on temporary obstructions such as the pile of dirt was—the work of switching being rush work necessitating quick action upon the part of all engaged at it.

The roadmaster (Vollams) said, in evidence also elicited on discovery, and part of the plaintiff's case, that he was in charge of the track department, looking after construction work or anything having connection with the roadbed, but was not aware of the existence of the particular pile of dirt until after the accident. He knew though that excavation work was going on on the opposite side of the track to that upon which the pile of dirt was—the dirt having been thrown over to make way for the erection of a building to be used as a section foreman's toolhouse—and admitted that the men were working under him, but he had never gone to the point where the work was proceeding previous to the accident. The excavation work was being done under two different gang foremen, their names being Perrigo and Kjellsborg. The dirt was thrown at a convenient point to be loaded and taken away on flat cars. When Vollams went to the scene of the accident upon that morning he found that the pile of dirt was about 15 inches above the top of the rail, and it was a distance of four feet and six inches from the rail, in width about ten feet, in length about 40 feet—the track at the point was on a curve. Vollams admitted that where a pile of dirt is left no lights are placed. [The learned judge here quoted from Vollam's evidence, and proceeded]:

MCPHILLIPS, J.A.

Now, the position was this: obstruction was of at least a week's duration, the labouring gang—all labouring men—is permitted to create this dangerous situation without the supervision of the roadmaster, and the roadmaster says there was no violation of duty upon the part of the labouring-gang foreman—and he himself asserts that there was no unsafety of

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conditions. The question at once arises for consideration—Is the defendant Company liable at common law upon these facts, or more properly, perhaps, at this stage of matters, was there evidence fit to go to the jury and upon which they were entitled to pass as to the liability of the defendant Company at common law?

In my opinion, it was incumbent upon the defendant Company to provide (a) a yard in which switching work could be done without unreasonable risks; (b) select competent servants; (c) have a proper system and proper supervision. Even with a proper system, circumstances might occur that would give rise to liability—*i.e.*, where there is negligence in not adhering to the prescribed system and this is known to the employer, or possibly, where it reasonably should have been known.

In view of the evidence, it seems to me that the present case was one which entitled the plaintiff to have all these questions submitted to the jury, that is, (a) whether the switching yard was a reasonably safe place? (b) whether competent servants were selected and employed? (c) whether there was a proper system and proper supervision? (d) that if it were found that there was a proper system and provision for supervision—was the non-observance of the system or absence of supervision known to the defendant Company? (e) if not known, should it have been known?

MCPHILLIPS, J.A.

The Supreme Court of Canada has laid it down in no uncertain terms that if an employee is injured through failure upon the part of the employer to provide a reasonably safe and proper place in which the employee may do his work, liability cannot be escaped by the assertion that that duty was delegated to another, and invoke the doctrine of common employment: *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420. Davies, J. at pp. 426-7 said:

> "Mr. Newcombe relied upon the case of *Hall* v. *Johnson* [(1865)], 3 H. & C. 589, as supporting his proposition that an underlooker, whose duty it was to examine the roof and prop it up if dangerous, is a fellow labourer with a workman in the mine and the latter cannot maintain an action against the owner of the mine for injury occasioned by the neglect of the underlooker to prop up the roof, if the owner has not personally interfered or had any knowledge of the dangerous state of the mine.

"It cannot, I think, be questioned, that an 'underlooker,' with such duties as those mentioned, would be held to be a fellow workman with the ordinary workmen in the mine. In that case it appeared that the mine had been worked in the ordinary course for the previous six years, and the Court of Exchequer Chamber held that under these circumstances, the workmen 'undertook to run all the ordinary risks of the service including negligence on the part of a fellow servant,' and that the case before them was within that undertaking.

"That case does not involve any question as to the primary duty of the master to provide in the first instance places in and materials with which workmen may safely work or systems under which they may so work . . ."

Here we have the defendant Company entering upon work foreign to the operation of the railway, that is, work attendant upon the construction of a tool-house at a point where switching was going on night and day, and it is evident that there was no proper system, it devolving in the end upon two labouring foremen to decide whether lights should be shewn upon this pile of dirt.

The defendant Company gives no evidence—does not call these foremen, but rests the defence at common law upon the case as proved by the plaintiff. In my opinion it was necessary for the defendant Company to be able to successfully insist upon the defence of common employment to shew that it was the duty of some one to be at the pile of dirt to warn other employees, or to at least place lights on the pile of dirt, and that by carelessness and negligence, some fellow servant of the plaintiff had failed to do what it was his duty to do.

MCPHILLIPS, J.A.

Although *McMullin* v. *N.S. Steel & Coal Co.*, C.R. (1906), A.C. 468, was a case of statutory duty, yet it is instructive upon the point, as, although there is no statutory duty here, yet the employer owes some duty, and the question is: Has that duty been satisfactorily discharged? In considering the answer to this question, I would call attention to what Davies, J. said at p. 485:

"If the company desired to raise the defence of common employment, they would be bound, in my judgment, to prove either that the man was stationed there to warn people and by his own carelessness and negligence had failed to do so, or, at least, that it was, by their rules or orders, the duty of some one to have been there to carry out the statutory duty, and that his absence was not in any way owing to their negligence or default, but to the deliberate breach of duty of some workman charged with such duty."

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In *Williams* v. *Birmingham Battery and Metal Co.* (1899), 68 L.J., Q.B. 918, it was clearly laid down that where the employment is of a dangerous nature, a duty lies upon employers to use all reasonable precautions to protect the workman from unnecessary risk: and see Lord Herschell in *Smith* v. *Baker & Sons* (1891), A.C. 325 at p. 363, and Kelly, C.B. in *Indermaur* v. *Dames* (1867), 36 L.J., C.P. 181 at p. 183.

I would also refer to the judgment of Davies, J. in *Grant* v. *Acadia Coal Co.* (1902), 32 S.C.R. 427 at pp. 438-40.

And in *Hosking* v. *Le Roi No. 2* (1903), 34 S.C.R. 245 at p. 249, Taschereau, C.J. said:

"Then under the finding of the jury and the evidence, the respondents have committed a breach of the common law obligation that they impliedly contracted towards the appellant when he entered their service, of providing the adequate materials and a reasonably safe place in which he was to work and a reasonably safe system for the carrying on of the works in which they agreed to employ him. I would not think the operating of a mine of this kind, without a plan, or with a defective and deceiving plan, which is worse, a reasonably safe system of carrying on the operations.

"And it is no defence to his claim for injuries received in the course of his employment, in consequence of their failure to fulfil such a positive duty, that the accident was the result of the negligence of some one else upon whom they relied for the performance of such duties that the law imposes upon them personally, whether they act, or have to act, in the matter through other persons or not."

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The defendant Company was under an obligation to select and employ proper and competent servants. This was determined in *Bartonshill Coal Company* v. *Reid* (1858), 3 Macq. H.L. 266 at pp. 276, 284, 288: see *Potts* v. *The Port Carlisle Dock and Railway Company* (1860), 116 R.R. 935 (8 W.R. 524); *Brown* v. *Accrington Cotton Co.* (1865), 140 R.R. 583 (3 H. & C. 511).

In my opinion, the defendant Company has not discharged the duty which was imposed upon it of meeting the case as presented by the plaintiff. The case as presented established *prima facie* evidence of negligence at common law, and there was evidence fit to be submitted to the jury, and which the plaintiff was entitled to have the findings of the jury upon. In *Skeate* v. *Slaters* (*Limited*) (1914), 30 T.L.R. 290, Lord Reading, C.J. at p. 291, said:

"During the argument before this Court we came to the conclusion that

the judge was right in refusing to enter judgment for the defendants at the end of the plaintiff's case. Although we were of opinion that the evidence was, as the judge said, very weak, we thought that sufficient evidence had been given on the plaintiff's behalf to entitle him to have his case submitted to the jury."

And see Buckley, L.J. at p. 293:

"I agree that the power to give judgment for the defendants ought to be very cautiously exercised, and that, if there is a doubt in the matter, the case should be left to the decision of another jury."

In the case last-above referred to, the jury disagreed, and Lawrence, J. refused to enter judgment for the defendants, and an appeal was taken, which stood dismissed.

In the present case the trial judge refused to submit the question of common-law liability to the jury, and the plaintiff appeals and asks that the judgment in the action, as entered under the Employers' Liability Act, be set aside, and that judgment be entered for the plaintiff at common law, or for a new trial. As already pointed out, the situation is a novel one. The plaintiff has now a judgment in his favour with which he is not satisfied, and asks it to be set aside and judgment entered for damages at common law. But for what amount? No assessment of damages has been made, and the assessment of damages is essentially a matter for a jury. This is not a case of assessing damages where the facts are sufficiently before us under the Employers' Liability Act, or a case for reduction of damages. Further, upon the facts, it is not a case where judgment should be entered for the plaintiff without the intervention of a jury. At most, the plaintiff can only be given a new trial. This will involve the setting aside of the judgment already entered in his favour—that, however, is a responsibility the plaintiff has evidently undertaken.

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In my opinion the appeal should be allowed, the judgment set aside, and a new trial granted, the costs of the first trial to abide the event of the second.

It is, perhaps, idle to speculate upon the ultimate result of the present case if a new trial be had, when the following cases are given consideration—they undoubtedly carry the doctrine of common employment to a very great length: *Coldrick* v.

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Partridge, Jones & Co., Limited (1910), A.C. 77; *Waldron* v. *J. A. & N. Stores* (1910), 2 I.R. 381.

Appeal dismissed,
Martin and McPhillips, JJ.A. dissenting.

Solicitors for appellant: *Farris & Emerson.*
Solicitor for respondent: *J. E. McMullen.*

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DRINKLE v. REGAL SHOE CO., LTD.

DRINKLE v. REGAL SHOE COMPANY, LIMITED, ENDACOTT, AND RAE.

Bulk sales—Sale of stock in trade by mortgagee—Debtor and creditor—Preference—Action by ordinary creditor—Parties—Amendment—Principal and surety—Proceedings to which surety is not privy—Release of surety—Bulk Sales Act, 1913, B.C. Stats. 1913, Cap. 65.

The Bulk Sales Act is not intended to destroy a security in the shape of a chattel mortgage on a stock in trade, and enable the general creditors of a mortgagor to share equally with a secured creditor. A sale, therefore, of a stock in trade by a chattel mortgagee is not within the Act.

The plaintiff in an action to set aside a conveyance as a fraudulent preference, if not a judgment creditor, must bring the action on behalf of himself and all other creditors, but his omission to do so is an informality that may be amended on application during the argument.

Where there is a material variation in the terms of the contract between the creditor and the principal debtor without the privity of the surety, the surety will be discharged.

Statement

ACTION tried by MACDONALD, J. at Vancouver on the 16th of June, 1914, to set aside as fraudulent and void a chattel mortgage given by the defendant Endacott to the defendant the Regal Shoe Company, Limited, on his stock in trade, and to set aside the sale thereunder of the said stock in trade. The defendant Company counterclaimed to recover from the plaintiff

under a guarantee to pay for the goods, up to a certain amount, supplied by the defendant Company to the defendant Endacott. The facts are that the defendant, the Regal Shoe Company, Limited, supplied the defendant Endacott, who was a shoe merchant, with goods on the strength of a guarantee given by the plaintiff Drinkle, who was a creditor of Endacott, to pay for goods advanced up to $4,000. Later, in good faith, Endacott executed a chattel mortgage in favour of the defendant Company to secure his indebtedness, and also assigned to said Company the lease of the premises which he occupied. The business was then practically taken over by the defendant Company, who only allowed Endacott a limited amount as a salary, and took over the balance of the receipts in reduction of the indebtedness to themselves, and Endacott was not allowed to purchase from other wholesale establishments. Later, the defendant Company, with the consent of Endacott, sold, under the mortgage, the said stock in trade to the defendant Rae, the proceeds of which were taken to satisfy Endacott's indebtedness to them. The plaintiff had no knowledge of these transactions.

Statement

E. B. Ross, and *Sears,* for plaintiff.
M. A. Macdonald, and *Hancox,* for defendants.

30th September, 1914.

MACDONALD, J.: Defendant Endacott carried on business in Vancouver, B.C., as a boot and shoe merchant. Defendant Company supplied goods to such defendant and, on the 24th of April, 1912, obtained from him a chattel mortgage on all his stock in trade and also an assignment of all his book debts. In the month of November, 1913, possession was taken by the defendant Company of such stock in trade, and, with the consent of the defendant Endacott, a sale thereof was made to the defendant Rae. The plaintiff, as a creditor of Endacott, sought to set aside the chattel mortgage and the sale of the stock in trade as being fraudulent and void, but at the conclusion of the evidence the attack upon the chattel mortgage was abandoned. I find that such security was taken in good faith to secure the indebtedness from the defendant Endacott to the defendant Company, and there was

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no evidence to support the allegation that the subsequent taking possession of the stock in trade was fraudulent on the part of the defendant Company. It was acting within its rights, and endeavouring to realize a portion of the large amount owing for goods supplied. Neither the plaintiff nor any other creditor of the defendant Endacott was then in a position to interfere with the sale of the goods by the mortgagee. I am satisfied that the sale to the defendant Rae was *bona fide,* especially in view of the fact that the mortgagee was naturally desirous of realizing as much as possible, to apply on its claim. It was contended that the sale to Rae was really made by the defendant Endacott, but the evidence does not support this contention, and the proceeds of such sale were properly received by the defendant Company. The sale was attacked on the ground that the Bulk Sales Act, 1913, had not been complied with, but finding, as I do, that the defendant Company was acting on the strength of its chattel mortgage, I do not consider that this Act has any application. Defendant Company held the legal ownership of the property described in the security, and the equity retained by the defendant Endacott was worthless. The Act was not intended to destroy a security, in the shape of a chattel mortgage on a stock in trade, and enable the general creditors of a mortgagor to share equally with a secured creditor. This would be the result if the plaintiff were entitled to set aside the sale under the chattel mortgage, for non-compliance with any provision of that Act.

Judgment

Objection was taken by the defendant Company that the plaintiff, in any event, had no status to attack the chattel mortgage or the sale of the stock in trade. This point was not raised in *Thomson* v. *Nelson* (1913), 4 W.W.R. 712, but in my opinion is well taken, as the plaintiff is not a judgment creditor. An application was then made to amend the statement of claim and allege that the action was brought by the plaintiff on behalf of himself and all other creditors of the defendant Endacott. I allow the amendment, though the application was only made during the course of the argument, as I do not think the defendants would be prejudiced: see *Scane et al.* v. *Duckett* (1883), 3 Ont. 370; *Wooldridge* v.

Norris (1868), L.R. 6 Eq. 410 at p. 414. It necessarily follows, however, from my findings, that the action is dismissed as against the defendants other than Endacott, with costs. Plaintiff is entitled to a judgment for $2,000 against defendant Endacott, with costs as of a default judgment.

Defendant Company seeks by way of counterclaim to recover against the plaintiff the sum of $4,000, under a guarantee in writing given by the plaintiff to the defendant Company, bearing date the 4th of September, 1911, as follows:

"I will guarantee Harry E. Endacott's account up to $4,000."

Defendant Company, on the strength of this guarantee, supplied goods to the defendant Endacott to an amount far in excess of the $4,000, and even with a credit of the amount realized from the sale to defendant Rae under the chattel mortgage, and placing a value on real-estate security held by the defendant Company, the defendant Endacott would still owe the defendant Company more than the sum of $4,000. It was contended the document was not in the nature of a continuing guarantee, but I think its proper construction and the true intention of the parties was, that the defendant Company, in supplying goods to the defendant Endacott would be entitled at any time during the currency of the account, to call upon the plaintiff for payment of such account up to the amount of $4,000. As late as the month of January, 1913, the plaintiff entertained this view of his liability, and wrote the defendant Company that at the time he gave the guarantee:

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"I did not expect to be called upon for anything more, believing what you really wanted was security for your account and not the actual money mentioned in the guarantee."

He then referred to his financial position and the probability that within two or three months a certain bond transaction, which had required his lengthy absence in England, would be finally closed and money sent to Canada. He added:

"When this is done the matter of paying the amount of my guarantee will be of small consequence."

He expressed a desire that the Vancouver agency, carried on by the defendant Endacott, should continue along the lines followed during the previous year until he obtained the proceeds of the bond issue and be in a position to furnish defendant Enda-

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cott with sufficient funds to carry on his business in a satisfactory way. He, apparently, at the time was quite satisfied, when in funds, to pay the amount of the guarantee, and even disposed to further assist the defendant Endacott, with whom at some time previous he had been associated in business. It is contended on the part of the plaintiff that in any event he was released from such guarantee. Several grounds were taken by the plaintiff in support of this contention. It was submitted that the taking of the chattel mortgage operated as a release of the guarantee, and also that the indebtedness of Endacott to the defendant Company was merged in the chattel mortgage. The point was also taken that the chattel mortgage was a substituted security for the guarantee, and thus had operated to destroy its effect. In my view of the case I do not consider it necessary to deal with these points. I think that the guarantee was released, on account of the manner in which the defendant Company dealt with the defendant Endacott as its debtor. The guarantee was entered into in good faith. The plaintiff had a right to conclude that the business in which he thus sought to assist his friend would be carried on in the ordinary way. While he might expect that the bulk of the goods, to be sold by the defendant Endacott, would be the product of the defendant Company, still, he could assume that the purchases would not be confined to this Company alone. Business had only proceeded a short time when, on the 24th of April, 1912, the chattel mortgage referred to was taken, and also an assignment of the lease of the premises then occupied. If the defendant Company had been satisfied with simply taking this security and filing the chattel mortgage, though it would doubtless have impaired, if not destroyed, the credit of the debtor, still the Company might have been within its rights and not have lost the benefit of its guarantee. It was not satisfied, however, with trusting to its customer accounting for moneys received on the sale of goods, but made it a condition of the business continuing that only a limited amount should be allowed to Endacott, as withdrawal in the shape of salary, and that the balance of the moneys received from time to time should be deposited in the bank at Vancouver to its credit. Security was then taken and almost immediately

enforced. This virtually operated as a taking over of the business by the defendant Company. What had been an independent business became practically a supply house for the defendant Company. Endacott was not able to purchase from other wholesale establishments. This state of affairs was surely at variance with the way in which the business was expected by the plaintiff to be carried on. He was in England at the time, and, while the law was complied with as to filing the chattel mortgage, he was not advised of the change, or the proceedings taken by the defendant Company. The business continued under these circumstances until November, 1913. The defendant Company had thus obtained an outlet for its goods under the most favourable auspices. It had security upon all its goods and any other goods that might be supplied to the defendant Endacott, who, you might say, was managing the business for the Company in Vancouver. The defendant Company, in taking the chattel mortgage from defendant Endacott, coupled with an assignment of the lease of the premises and a real-estate mortgage, seems, as far as the documents shew, to have ignored the guarantee as an additional security. There is a clause in the mortgage declaring it to be collateral to the indebtedness, but no clause stating that the mortgagee was not to affect or impair any other security held by the mortgagee. The guarantee itself is not drawn in such a way as to enable the defendant Company to deal as it saw fit with its debtor without discharging the plaintiff, and was not drawn in a form similar to that adopted by banks. I feel satisfied that when the plaintiff gave his guarantee he never intended, nor did the defendant Company expect at the time, that within the short period mentioned, an indebtedness which amounted to $7,071.81 should be secured by chattel mortgage and otherwise, and that further goods should, on the strength of such security, be ordered by Endacott to the amount of $6,910.50. I believe this was contrary to the intention of the parties when the guarantee was given, and the plaintiff should be released, even if the taking of such security and the subsequent actions of the defendant Company did not injure the defendant Endacott.

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From the time that the chattel mortgage was given there was

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such a substantial variation between the condition of affairs then and at the time when the plaintiff agreed to assist Endacott that his liability ceased. I think the defendant Company, in securing itself in April, 1912, without the consent of the plaintiff, and allowing the business to be continued in the manner indicated, was prejudicially affecting the plaintiff.

"It is the clearest and most evident equity not to carry on any transaction without the privity of him [the surety], who must necessarily have a concern in every transaction with the principal debtor":

per Lord Loughborough, L.C. in *Rees* v. *Berrington* (1795), 2 Ves. 540 at p. 543. Instead of informing the plaintiff that such security had been taken from Endacott, the defendant Company, as appears by the correspondence, was simply using the business to dispose of its products and endeavouring to strengthen its position. As late as the 6th of February, 1913, the defendant Company wrote to the plaintiff stating that:

"In spending two days in Vancouver it was ascertained that Mr. Endacott's business had shewn a profit over and above the expenses of running same, which, considering the fact of its being its first year, was encouraging, to say the least."

Judgment

In view of the circumstances, already shortly outlined, this statement as to profits was not in accordance with the facts. This matter is only referred to for the purpose of shewing how the plaintiff was kept in ignorance. He was lulled into fancied security and prevented from taking any steps to protect himself, while the financial condition of Endacott was doubtless getting worse and worse.

The ways in which a surety, as a favoured debtor, may be discharged are numerous, but the acts referred to are, in my opinion, sufficient to relieve the plaintiff from his liability under the guarantee.

The counterclaim is thus dismissed, with costs.

Judgment accordingly.

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Surety—Discharge of—Building contract—Arrangement between building owner and contractor for extension of time for completion and increased remuneration—Custom.

A surety is not discharged by dealings between the creditor and the principal debtor subsequent to the contract, which are manifestly to the advantage of the surety, or which are contemplated in the contract between the creditor and the principal debtor, or which do not amount to a binding contract founded on valuable consideration.

Per MARTIN, J.A.: A surety may be bound by a term annexed by custom to the contract between the creditor and the principal debtor.

APPEAL from a decision of GREGORY, J. delivered at Victoria on the 23rd of January, 1914.

This was an action by the plaintiff, the building owner, against the defendant, who had guaranteed the performance of a contract by the West Coast Construction Company with the plaintiff to erect a house upon the plaintiff's land. The contract, dated the 15th of July, 1912, was in the ordinary form of building contracts approved by the American Institute of Architects, and bound the contractor to complete the building by the 31st of December, 1912, under the direction of a named architect, whose decision as to the true construction and meaning of the drawings and specifications annexed should be final. The contract contained provisions for the building owner to terminate the contract in the events which in fact happened and to complete the building himself, and for the ascertainment by the architect of the amount payable by the contractor to the owner for the completion of the contract. The contract also contained, *inter alia,* two articles as follows:

Statement

"Article III. No alterations shall be made in the work except upon written order of the architect; the amount to be paid by the owner or allowed by the contractors by virtue of such alterations to be stated in said order.

"Article VII. Should the contractors be delayed in the prosecution or

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completion of the work . . . . by any damage caused by fire or other casualty . . . . then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid, which extended period shall be determined and fixed by the architect."

The defendant, by a bond dated the 20th of July, 1912, became bound, jointly and severally with the contractor, to the plaintiff in the sum of $4,000, to be paid by the defendant to the plaintiff, subject to a condition whereby, after reciting that the West Coast Construction Company had agreed with the plaintiff, by a written contract dated the 15th of July, 1912, to erect a certain building, which said contract of the 15th of July, 1912, was incorporated in the said bond, the condition of the said bond was declared to be that if the West Coast Construction Company should well and truly perform the terms and provisions of the said contract of the 15th of July, 1912, then the said bond should be void.

In the course of excavating for the foundation for the building rock was struck, and the contractor then applied to the architect for an extension of time for completion and for an extra payment for the heavier work of excavation involved. The architect, by a letter to the contractor, purported to extend the time for completion from the 31st of December, 1912, to the 21st of February, 1913, and a fresh contract, under seal, between the building owner and the contractor was prepared for the payment of an extra $3,000 to the contractor for the excavation, and executed by the contractor. The contractor went on with the excavation thereafter, but subsequently the building owner, in consequence of default on the part of the contractor, terminated the original contract and proceeded to complete the building through the instrumentality of another contractor. When the building was completed, the architect, in accordance with the original contract, estimated the total cost of erection, and found a sum due from the contractor to the building owner for increased cost in excess of the amount of the bond.

Statement

The plaintiff sued for the amount of the bond, and the defendant refused to pay, on the ground that, being only a surety, it had been discharged by the extension of time for completion granted to the contractor, and by the making of a fresh

contract with the contractor for the excavation for the foundation. At the trial evidence was given by two architects and a contractor that it was the practice in the building trade in Victoria that when rock was met in excavating for foundations in that city, an extension of time and extra payment should be granted by the building owner to the contractor, and no evidence was tendered in disproof of the alleged custom. The learned trial judge gave judgment in favour of the plaintiff, and the defendant appealed.

The appeal was argued at Vancouver on the 29th of April, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Stacpoole, K.C., for appellant: Any variation in the terms of the original contract will discharge the surety, who is to be the sole judge as to whether he will assent to the variations or not: *Greenwood* v. *Francis* (1899), 1 Q.B. 312.

Mayers, for respondent: In the first place, the rule as to the discharge of a surety by the giving of time to the principal debtor does not apply here, for this reason: The cause of the discharge of a surety by the giving of time to the principal debtor is that thereby the surety is prevented from using the name of the creditor to sue the principal debtor: *Polak* v. *Everett* (1876), 1 Q.B.D. 669 at pp. 673-4. But the giving of time in this case did not postpone any right of the surety, as, had the time for completion not been extended, the creditor, that is, the building owner, could not have sued the principal debtor, the contractor, until the completion of the building, as the only right of the building owner would have been one for unliquidated damages for the delay, which could only have been ascertained when the building was complete. Secondly, it is not a true proposition that any variation will discharge the surety; a variation manifestly to the advantage of the surety will not have that effect: *Croydon Gas Co.* v. *Dickinson* (1876), 2 C.P.D. 46 at p. 51; *Holme* v. *Brunskill* (1878), 3 Q.B.D. 495 at pp. 505-6. Moreover, it is not every failure of the creditor to exact the uttermost from the principal debtor which will discharge the surety (*Mayor, &c., of Kingston-upon-*

Argument

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Argument

Hull v. *Harding* (1892), 2 Q.B. 494 at p. 501), and here what was done was contemplated in the original contract by articles 3 and 7, and by the term which custom annexed to the original contract. Lastly, the contractor was bound to complete the building, notwithstanding that rock had been met with: *Jones* v. *St. John's College* (1870), L.R. 6 Q.B. 115; and, therefore, the excavation for the foundations was nothing more than the contractor was bound to do by the original contract, and could not form any consideration for a fresh contract: Leake on Contracts, 6th Ed., 444. In order to discharge the surety there must be a binding contract for the extension of time, founded on valuable consideration, which was here absent.

Stacpoole, in reply.

Cur. adv. vult.

14th July, 1914.

MACDONALD, C.J.A.: By its terms, the contract requires the construction company to excavate for the basement of the building as well as to erect it. Nothing is said as to the character of the material to be excavated, and hence, *prima facie* at least, the contractors were bound to excavate rock as well as earth, if rock should be encountered. But it is manifest from their subsequent acts and conduct, that both the plaintiff and the contractors understood that if rock should be encountered, something extra should be paid to the contractors for excavating it. Some evidence of a custom to pay extra for such work and to extend the time for completion of the building on account thereof was offered, but in my opinion, it falls short of proving such a custom so as to affect the rights of the guarantors. In the view I take of this case on another ground, the question of custom becomes of no importance. When the rock was encountered, the contractors notified the plaintiff of that fact and asked that an extra price should be paid for the removal of the rock, and that the time fixed by the building contract should be extended. This request was acceded to, and a contract was entered into fixing the extra price, and by letter of the architect, written with the plaintiff's approval, the time was extended. The defendant, who had entered into the bond sued on, guaranteeing the due completion of the contract, was not consulted,

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and they now contend that this extension of time released them from their obligation.

I am of the opinion that there was no binding extension, for the reason that it was not founded on a valuable consideration. If the contractors were obliged, under their contract, to excavate irrespective of the material they might encounter, a subsequent agreement to do what they were already bound to do is no consideration. But taking a more liberal view of the contract, and the one which, in the light of the plaintiff's subsequent conduct, appears to me to be the correct one, that rock-work would be an extra, the subsequent agreement was nothing more than an agreement to fix the price to be paid for it, as contemplated in article 3 of the original contract.

The situation, then, was that the plaintiff, either under the impression that he was obliged by the contract to pay extra for rock work, or being willing to do it, agreed with the contractors upon a price, and there is no suggestion that the price was affected one way or the other by the extension of time. If the contractors had said: We will do this extra work at a lower price than we are entitled to charge for it if you will extend the time for completion of the building, and the plaintiff had agreed accordingly, then there would undoubtedly have been consideration given by the contractors to him for the extension. But there is nothing in the case from which such an agreement can be inferred, and if I am not at fault in my recollection of his argument, counsel for the defendant did not suggest that there was. On the contrary, both parties seem to have had the idea that by some vague sort of custom or local usage, the contractors had a right to an extension when rock had been encountered.

MACDONALD, C.J.A.

I am also of the opinion that there is nothing in any of the other grounds of appeal to justify interference with the judgment appealed from.

I would, therefore, dismiss the appeal.

IRVING, J.A.: As stated by Lord Loughborough in *Rees* v. *Berrington* (1795), 2 Ves. 540, it is the clearest and most evident equity not to carry on any transaction without the knowledge of the surety, who must necessarily have a concern in

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every transaction with the principal debtor. You can not keep him bound and transact his affairs (for they are as much his as your own) without consulting him.

The bond given by the defendant did not contain a clause providing that the surety's liability should not be affected by breaches of building contract, such as is set out in the Encyclopædia of Forms, Vol. 6, p. 246. The result is that the liability of the defendant must depend on the strict adherence to the contract which is incorporated in the bond.

Conceding this, I would, nevertheless, dismiss this appeal on the following grounds: (1) The granting of the rock contract did not violate the bond; (2) what was done was for the advantage of the principal and his surety; (3) there was not such a grant of further time as would discharge a surety; (4) there was no binding contract to extend the time.

According to *Thorn* v. *Mayor and Commonalty of London* (1876), 1 App. Cas. 120; 45 L.J., Q.B. 487, the contractor was bound to do this rock-work. But, as the architect thought that by some local custom this was work not to be regarded as included in the contract, he gave the contractor an additional sum for doing it, and postponed the time for completion. I do not think any custom or local usage was proved to exist. It would be an unfortunate thing if slackness on the part of some architects would prove an established custom. Nor

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do I think the architect had power to alter a written contract by adding thereto a supposed custom: see *In re North Western Rubber Company, Limited and Huttenbach & Co.* (1908), 2 K.B. 907. Amphlett, J.A., in *Croydon Gas Co.* v. *Dickinson* (1876), 2 C.P.D. 46 at p. 51, said:

> "The rule is, that when time is given, or the position of the surety has been altered by the dealings of the principals, the surety is discharged. That must, however, be taken with certain limitations; that is to say, if it depends upon inquiry, the Court will not go into that inquiry, and unless the fact is self-evident, the Court will not consider the question: and of course the rule will not be applicable where the change cannot be otherwise than advantageous to the surety."

He illustrates this as where a creditor reduces his demand.

In *Holme* v. *Brunskill* (1878), 3 Q.B.D. 495, Cotton and Thesiger, L.JJ. at pp. 505-6, accept this statement as the law, and lay down in the plainest terms that where it is, without

inquiry, evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged. In cases where it is not self evident, then it is a matter for the surety to decide.

The paying extra (for it amounts to that) for the removal of something the contractor was bound to do is manifestly for his advantage. That disposes of one point.

As to the extension of time. In this case the contract, of necessity, contemplated the contractor being bound by the arbitrament of the engineer or architect. It also contemplated an extension of time for completion.

In *Mayor, &c., of Kingston-upon-Hull* v. *Harding* (1892), 2 Q.B. 494 at p. 501, the jury found that the contract had not been complied with; that the work had been scamped and fraudulently done; that the plaintiffs were cheated by the way the work was done; that the certificates issued by the architect had been obtained by fraud of the contractors; and that there was an omission on the part of the corporation to properly superintend the work. The sureties tried to escape on these findings, but failed to do so. In the judgments of the Court of Appeal it is pointed out that it is not every failure on the part of the owner to exact the uttermost from the contractor that entitles the surety to be discharged. To release the surety there must be some act done which deprives the surety of a right under the contract or of the power to insist on its exercise, or some omission to do some act which the contractor has contracted with the surety to do, or to preserve some security to the benefit of which the surety is entitled. The extension of time for completion consequent upon the architect's construction of the contract does not fall within these cases.

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The provision as to completion on or before a fixed day, with a penalty thereafter, was for the owner's benefit, because the owner signified his willingness not to look for completion. The expression of intention to extend the time was not founded on any valuable consideration, as the contractor was in any event bound to do this excavation: see Leake on Contracts, 6th Ed., 444. If—and then it might be a good consideration—the transaction amounted to a compromise, that is to say, if there

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was a reasonable doubt to be settled by the arbitrator architect, then the surety would remain bound under the bond and contract.

MARTIN, J.A.: This appeal, in my opinion, should be dismissed, because, apart from other matters not necessary to discuss, the judgment can be supported on the ground that, according to the custom or usage of the building trade in Victoria, when rock is unexpectedly struck in making an excavation, the additional cost of excavating the same is treated as an extra, and a new contract is made to cover the cost, and the time for completion of the original contract is extended. The evidence in support of the custom is that of two architects, and it is not disputed, and sets up facts which sufficiently establish it within the authorities which will be found conveniently cited in Taylor on Evidence, 10th Ed., pars. 1187-9, and Phipson on Evidence, 5th Ed., 91-2, in the latter of which it is said (p. 92):

> "A business usage, as distinguished from a common law custom, need not be long established, or strictly uniform; it is sufficient if it be reasonably certain, and so notorious and generally acquiesced in that it may be presumed to have formed an ingredient of the contract."

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There can be, in my opinion, no question of the reasonableness of such a custom in Victoria, where the rocky formations, which add so much to the picturesque beauty of the locality, yet have a way of turning up in unexpected places.

I note that the citation, which we were given by the appellant's counsel, from Halsbury's Laws of England, Vol. 15, par. 1038, p. 555, that "Custom of trade does not justify the creditor in agreeing to give time to the principal debtor" is too broadly stated and is misleading, the cases cited in support of it referring simply to the private practice or custom of the creditor in the conduct of his own business, and not to a general usage of trade.

GALLIHER, J.A.: The grounds upon which the appellant seeks to evade payment under its bond which were seriously urged before us were: (a) the granting of an extension of time to the contractors in which to complete the building in question; (b) the making of the contract for excavation of rock materially

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varies the first contract entered into. These two grounds may be considered together.

The plans and specifications in the original contract provided for earth excavation for foundation and basement, no provision being made in case rock was encountered. After this excavation was started a large quantity of rock was encountered, and the contractors wrote to plaintiff on the 9th of September, 1912, asking that this matter be taken up and arrangements made for excavating same and for an extension of time in consequence thereof. This was granted by plaintiff in a letter written to the contractors by L. W. Hargreaves, plaintiff's architect, dated September 25th, 1912, extending the time from the 31st of December, 1912, to the 21st of February, 1913, and on the same day a contract was entered into between the contractors and the plaintiff for such rock excavation for the sum of $3,243, less the sum of $902 for yardage of clay not excavated according to the original contract.

The defendant had no notice either of the extension of time or of this second contract.

The rule as laid down in the decided cases, and summed up in Halsbury's Laws of England, Vol. 15, p. 546, par. 1025, is as follows:

"Any material variation of the terms of the contract between the creditor and the principal debtor will discharge the surety, who is relieved from liability by the creditor dealing with the principal debtor (or with a co-surety) in a manner at variance with the contract the performance of which is guaranteed. When a person becomes surety for another in a specific transaction or obligation, the terms and conditions of the principal obligation are also the terms and conditions of the suretyship contract, and if the creditor, without the consent of the surety, alter those terms to the prejudice of the surety, the latter will be free, it being the clearest and most evident equity not to carry on any transaction without the privity of the surety, who must necessarily have a concern in every transaction with the principal debtor, and who cannot as surety be made liable for default in the performance of a contract which is not the one the fulfilment of which he has guaranteed."

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We have to consider: Was the granting of the extension of time for completion and the entering into the contract for rock excavation material variations of the terms of the contract, or could it be said that they were within the contemplation of the contract?

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Rock underlies all of the City of Victoria at greater or less depth, and in many cases outcrops many feet above the surface of the ground, and in this particular case, after excavation was started, rock was encountered which it was necessary to remove, the cost of which was fixed by contract at exceeding $3,000. The result of this was to render it practically impossible to complete the contract within the time first limited.

What was done in regard to extending the time seems to me to have been so advantageous, both to the contractor and to the sureties who guaranteed the completion of the contract, that in the words of Amphlett, J.A. in *Croydon Gas Co.* v. *Dickinson* (1876), 2 C.P.D. 46 at p. 51, "the rule (as to extension of time) will not be applicable where the change cannot be otherwise than advantageous to the surety."

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Article III. of the contract, which was incorporated in the bond, contemplates alterations in the work, and I do not think it is going too far to say that what was done here in entering into the new contract for excavation of rock was covered by section III. of the original contract. I also think there was no valuable consideration for the extension of time granted by the owner.

The appeal should be dismissed.

MCPHILLIPS, J.A.

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

Appeal dismissed.

Solicitors for appellant: *Bradshaw & Stacpoole.*
Solicitors for respondent: *Bodwell & Lawson.*

FINCH & FINCH v. MINNIE.

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FINCH & FINCH v. MINNIE

County Court—Husband and wife—Contract—Liability of husband for goods supplied to the wife.

The defendant's wife purchased goods from plaintiffs from time to time during three years to an amount of more than $1,000. The price of the goods was charged to the wife, who occasionally made payments on account. Finally this action was brought against the husband to recover a balance of account amounting to $346.75. The plaintiffs had no dealings with defendant until he issued a notice that he would not be responsible for his wife's debts, when they sought to fix the debt upon him. It was proven at the trial that defendant had always furnished his wife with sufficient money to clothe and feed herself and her children and that he knew nothing about the goods having been obtained from plaintiffs, and had expressly forbidden his wife to pledge his credit.

Held, that the husband has rebutted the presumption placed upon him by law that he authorized his wife to purchase the goods.

ACTION for price of goods sold by the plaintiffs to the defendant's wife. Heard by LAMPMAN, Co. J. at Victoria on the 7th of October, 1914. Statement

H. E. A. Courtney, for plaintiffs: The fact that defendant offered on two occasions, first to settle the account in full by monthly instalments, and secondly, to settle for $200, is evidence against his claiming no responsibility. The acticles were necessaries, and the husband is liable: *Waithman* v. *Wakefield* (1807), 1 Camp. 120.

Davie, for defendant: On the evidence we are entitled to a dismissal of the action. The law is clearly set out in Shirley's Leading Cases, 7th Ed., pp. 44 to 49. First, the wife was always supplied with money to purchase sufficient clothes, and the husband did not know of her dealings with the plaintiffs: *Seaton* v. *Benedict* (1828), 5 Bing. 28; *Jolly* v. *Rees* (1864), 33 L.J., C.P. 177; approved in *Debenham* v. *Mellon* (1880), 50 L.J., Q.B. 155. Secondly, defendant expressly forbade his wife to pledge his credit: *Jolly* v. *Rees, supra; In re Cook,* Argument

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Ex parte Holmes (1893), 10 M.B.R. 12. Thirdly, the credit was given to the wife: *Bentley* v. *Griffin* (1814), 5 Taunt. 356; *Morel Brothers & Co.* v. *Westmorland* (*Earl of*) (1902), 72 L.J., K.B. 66. The presumption as to the wife's authority has been rebutted, and burden of proof *contra* lies on plaintiffs (*per* Collins, M.R. in *Morel Brothers & Co.* v. *Westmorland* (*Earl of*), *supra,* at p. 70), which has not been attempted.

LAMPMAN, Co. J.: I think the husband has rebutted the presumption placed by the law upon him that he authorized his wife to purchase such of the goods as are necessaries. The particulars shew that in a period of three years the wife has got goods to the value of over $1,000, and as she has paid about $700 during that time, I think the husband has pretty liberally supplied her with money. Many of the things are necessary, but I do not think a $26 hat is necessary for a teamster's wife. Furthermore, the goods were charged on the plaintiffs' books to the wife, and the defendant was not for some three years consulted or made acquainted in any way by the plaintiffs touching the account of the wife—not until they found it impossible to get any more money from the wife did they notify the husband. It is clear from this, and from the defendant's evidence, that he knew nothing about the matter. The case of *Waithman* v. *Wakefield,* cited by Mr. *Courtney,* is authority only for the proposition that if the husband, originally not liable, ratifies the contract, he is bound to pay. Such circumstances do not arise in this action.

Judgment

Action dismissed.

ATTORNEY-GENERAL OF CANADA *ET AL.* v. RITCHIE CONTRACTING AND SUPPLY COMPANY *ET AL.*

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Constitutional law—Property in bed and foreshore—Within right of Province—Public harbour—British North America Act, 1867 (30 & 31 Vict., c. 3), Sec. 108.

English Bay is not a public harbour within the meaning of section 108 of the British North America Act, and the bed and foreshore thereof (which includes the Spanish Banks) are the property of the Crown in the right of the Province.

Per IRVING, J.A.: The width of its mouth, having regard to its area, prevents it falling within the definition of harbour, and should be described as a roadstead.

Decision of MACDONALD, J. affirmed.

APPEAL by defendants from a decision of MACDONALD, J. at the trial in Vancouver on the 8th of April, 1914. The action was for damages for trespass committed by the defendants in a portion of Vancouver harbour, and for the wrongful removal therefrom of sand and gravel, for an accounting of the profits derived from the sale of said sand and gravel, and for an injunction. The defendant Company, in common with various persons (building contractors), had been taking gravel from the bed of the sea near Vancouver, at a place known as the Spanish Banks. A dispute having arisen over an exclusive lease granted by the Dominion Government, this action was commenced in order to test the ownership of the location, and the Province intervened, whereupon the Provincial Attorney-General was added as a defendant to establish the right of the Province. The question argued at the trial was whether the location was or was not a public harbour. The learned trial judge took the view that English Bay was not, within the meaning of the British North America Act, a public harbour in 1871, and the bed and foreshore thereof remained the property of the Crown in the right of the Province, and the Dominion had no proprietary interest or right of interference therein. He dismissed the action.

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S. S. Taylor, K.C., and *R. R. Maitland,* for plaintiffs.
McPhillips, K.C., and *G. B. Duncan,* for defendants.

8th April, 1914.

MACDONALD, J.: This action was commenced against the defendant Company, claiming damages and an injunction for an alleged trespass to the property of the Dominion of Canada, namely, the bed and foreshore of English Bay, in the Province of British Columbia. It was contended that such body of water was a public harbour and that the defendant Company was without authority removing sand and gravel therefrom. Upon application being made for an injunction, the Attorney-General for the Province of British Columbia intervened, and an order was made adding the Province, through its Attorney-General, as a party defendant.

The defendant Company had for a number of years, in common with others, been taking sand for building purposes from the Spanish Banks, being a portion of the locality in question. No question arose that a right, in the sense of an established custom, had been created to remove such material, nor was it contended that, even if English Bay were a public harbour, the Spanish Banks did not form a portion of such harbour.

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The Province disputed the right of the Dominion to interfere with the defendant Company in its operations, and the important point to be decided is whether the bed and foreshore of English Bay are the property of the Crown in the right of the Dominion, or in the right of the Province.

British Columbia entered Confederation in May, 1871, under the Terms of Union, and section 10 thereof provided that the British North America Act, 1867, should, except those parts which were specially applicable only to one of the Provinces then comprising the Dominion—

"be applicable to British Columbia, in the same way and to the like intent as they apply to the other Provinces of the Dominion, and as if the colony of British Columbia had been one of the Provinces originally united by the said Act."

Section 109 of the Act provided that

"All lands . . . . belonging to the several Provinces . . . . shall belong to the several Provinces . . . . in which the same are situate . . ."

The scope of this section was considered in *St. Catherine's*

Milling and Lumber Company v. *The Queen* (1888), 14 App. Cas. 46 at p. 57, as follows:

"The enactments of section 109 are, in the opinion of their Lordships, sufficient to give to each Province, subject to the administration and control of its own Legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown, with the exception of such lands as the Dominion acquired right to under section 108, or might assume for the purposes specified in section 117."

If the land forming the bed and foreshore of English Bay did not pass to the Dominion either under sections 108 or 117 of the Act, then it remained the property of the Province, and the Dominion had no right of interference therewith. But it is contended that it became the property of the Dominion as being a "public harbour," and was included within the Third Schedule, referred to in section 108.

Section 108 of the Act provides that:

"The public works and property of each Province, enumerated in the Third Schedule to this Act, shall be the property of Canada."

This section is an exception from section 109 and is carved out of it, and the onus rests upon the Dominion of shewing that the land in question did not remain the property of the Province, but passed to the Dominion under such section. The caption to such Third Schedule is "Provincial Public Works and Property to be the Property of Canada." Amongst such public works and property "public harbours" is enumerated. There is no doubt that all matters connected with trade and commerce, including shipping and navigation, became, by the British North America Act, vested in the Dominion. The Dominion thus might have jurisdiction over the waters of English Bay for the purpose of controlling and regulating navigation, and still have no proprietary interest in the land forming the bed and foreshore, unless such property passed to the Dominion as being a public harbour.

The Governor in council has power by proclamation, under section 849 of the Canada Shipping Act, R.S.C. 1906, Cap. 113, to—

"(*a*) declare to be a public harbour any area covered with water within the jurisdiction of the Parliament of Canada; and, (*b*) extend the area of any existing public harbour in Canada."

It does not appear that this authority was exercised at any

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time, so far as concerns Vancouver harbour or English Bay. In the year 1912 an order in council was passed, under section 850 of such Act, defining the limits of the port of Vancouver as being the navigable waters east of a straight line drawn from the west tangent of Point Grey to Point Atkinson Lighthouse, including Burrard Inlet, with Port Moodie and North Arm, to the head of navigation. This was passed for the purpose of applying Part XII. of the Act. It thus brought into operation certain powers and procedure outlined in that portion of the Act. But I do not think such proclamation could have bearing upon the issue to be determined in this case.

Whether the public harbours were so well known at the time to the high contracting parties that it was deemed unnecessary to enumerate them is not apparent, but, at any rate, there does not appear to have been any list of the harbours that were transferred either at the time of Confederation or subsequently when British Columbia became part of the Dominion. The point thus arises, at this late date, whether English Bay was a public harbour in 1871, and on that account ceased to belong to the Province and became the property of the Dominion. This involves consideration of the important question as to what is a "public harbour" within the meaning of the British North America Act. It was contended in *Holman* v. *Green* (1881), 6 S.C.R. 707, in support of a Provincial Crown grant of a portion of the foreshore of Summerside harbour, that section 108 of the British North America Act only contemplated the transfer to the Dominion of "public works," and that it would not include a natural harbour as distinguished from an artificial harbour upon which a Province had expended public money. The Court did not accede to this contention, and held that there was nothing in the Act to justify such restriction. It was pointed out that the general scope of the Act in relation to matters with which harbours are connected made it apparent that "Parliament intended the words 'public harbours' to be considered in their full grammatical sense." Reference was made by Sir Henry Strong, in that case, to the fact that no public works had been erected, or no public money expended for the improvement, or in any way in connection with Summerside harbour,

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either by the Dominion Government since, or by the Provincial Government before or since, Confederation, so that, in this respect, the facts are similar to the present case. It is worthy of mention that this finding is questioned by Burton, C.J. in *McDonald* v. *Lake Simcoe Ice Co.* (1899), 26 A.R. 411 at p. 415, and he states that Strong, C.J. was mistaken in supposing that there had not been a large expenditure of money upon Summerside harbour. The judgment, however, is a binding authority that the harbours which passed to the Dominion under the term "public harbours" were not necessarily such harbours as had been artificially constructed by the Provinces prior to Confederation. It applied to such harbours as the public had a right to use. The facts are not of assistance in the present case, as that particular harbour had been recognized by the Provincial Government and, assuming the correctness of Chief Justice Burton's remarks, had become a public work in the sense that public moneys had been expended in its improvement before Confederation, while English Bay was in a state of nature at the time when British Columbia joined the Dominion.

In my opinion the statutory conveyance created by section 108 was intended to operate at the time so as to apply to and transfer to the Dominion only then existing "public harbours." If a body of water, with its bed and foreshore, did not pass as a public harbour to the Dominion under the Act at the time when the Province entered Confederation, then it would not subsequently become the property of the Dominion. Should the Dominion desire further property for harbour purposes, it would require to compensate the owners for any property thus acquired. There could not well be a condition of affairs whereby, without legislation to that effect, after a number of years the Dominion could claim ownership in property which had not passed from the Province under the British North America Act. This point was considered by the Privy Council in *Attorney-General for British Columbia* v. *Canadian Pacific Railway* (1906), A.C. 204 at p. 209, where it was decided that whether the foreshore of Burrard Inlet at the City of Vancouver formed part of the harbour depended upon the facts and circumstances existing prior to 1871. After referring to the

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judgment in the *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia* (1898), A.C. 700 at p. 712, that—

> "because the foreshore on the margin of a harbour is Crown property, it does not necessarily form part of the harbour [and that] it may or may not do so, according to circumstances, if, for example, it had actually been used for harbour purposes, such as anchoring ships or landing goods, it would, no doubt, form part of the harbour"

the judgment then applies such ruling in the case then being decided as follows:

> "The question whether the foreshore at the place in question formed part of the harbour was in the present case tried as a question of fact, and evidence was given bearing upon it directed to shew that before 1871, when British Columbia joined the Dominion, the foreshore at the point to which the action relates was used for harbour purposes, such as the landing of goods and the like. That evidence was somewhat scanty, but it was perhaps as good as could reasonably be expected with respect to a time so far back, and a time when the harbour was in so early a stage of its commercial development. The evidence satisfied the learned trial judge, and the Full Court agreed with him."

This decision carries increased weight in coming to a conclusion that the year 1871 was the determining period when property previously owned by British Columbia either passed to the Dominion as a public harbour or remained vested in the Province, when it is considered that between that year and the advent of the Canadian Pacific Railway to Burrard Inlet there had been considerable commercial advancement and increased landing of goods, evidence of which, if useful or essential, could have been easily obtained to support the contention of the railway company.

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In *Pickels* v. *The King* (1912), 7 D.L.R. 698, the question in the Exchequer Court was, whether a suppliant's property on Annapolis river was, at the time of Confederation, situated on a public harbour so as to pass to the Dominion and thus render the Provincial Crown grant therefor invalid. The condition of the river at the point in question in 1867 governed, and not the subsequent expenditure by the Federal Government for wharves or other purposes incidental to a harbour.

If the facts existing in 1871 are to govern as to whether English Bay is a public harbour or not within the Act, then a fair test to apply in order to determine the question is: If, at

that time, the public harbours of the Province of British Columbia had been enumerated, would this body of water have been designated as a property thus passing to the Dominion? Would it have been termed English Bay? It certainly could not have been called "Vancouver harbour," as the name "Vancouver" was not applied to any portion of the mainland of British Columbia for a number of years afterwards. The evidence shews that there was no one then resident on the shore of the bay, which was then in a state of nature. There was no trade or commerce, and, except at uncertain intervals, ships did not utilize these waters for anchorage, and then only to a limited extent. The townsite known as Old Granville Townsite, which subsequently formed a portion of the City of Vancouver, had been laid out on what is now charted as Vancouver harbour or Burrard Inlet, and a sawmill had been located on the opposite side of the inlet. But this early indication of commercial development had no relation to English Bay.

In the scheme of Confederation it was deemed advisable that the Dominion should have full control of navigation and shipping, and, incidental thereto, a proprietary interest in the public harbours throughout the different Provinces should become vested in the Dominion. This would remove any financial burden from the Provinces which existed previously, with respect to establishing, maintaining and improving the harbours from time to time. If it had been decided that the Act intended to convey only harbours upon which public moneys had been expended by the Provinces, then it could speedily be determined that English Bay did not come within this category. However, the decision to the contrary, already referred to, imposes the consideration of a more difficult question.

The same point as is to be decided in the present action arose in *McDonald* v. *Lake Simcoe Ice Co., supra,* where the question was whether a small bay on Lake Simcoe was a public harbour, and thus transferred to the Dominion at Confederation, or whether the ownership remained vested in the Province of Ontario. McLennan, J., in his judgment in that case, refers to the fact that there was no authoritative definition of a "public harbour" within the meaning of the British North America

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Act, and I believe the matter remains in the same position at the present time.

In the *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia, supra,* a number of questions which had already been submitted to the Supreme Court of Canada were considered by the Privy Council. In the submission of these questions advice was not sought as to what constitutes a public harbour within the British North America Act, but the Dominion and the Provinces interested sought to obtain judicial decision as to the ownership of the beds of public harbours. Counsel dwelt upon the fact that the question, as to harbours, was confined to the ownership of the bed and foreshore. The Lords of the Privy Council, in dealing with this particular question, decided as follows (pp. 711-12):

"Their Lordships think it extremely inconvenient that a determination should be sought of the abstract question, what falls within the description 'public harbour.' They must decline to attempt an exhaustive definition of the term applicable to all cases. To do so would, in their judgment, be likely to prove misleading and dangerous. It must depend, to some extent, at all events, upon the circumstances of each particular harbour what forms a part of that harbour. It is only possible to deal with definite issues which have been raised."

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In view of the question submitted with respect to public harbours, and the context of this portion of the judgment, I think, if I may be permitted to place an interpretation on this language, that it was only decided that the extent of the property that "falls within" or "forms part of" a public harbour is a question of fact, dependent upon the circumstances of each particular case. Whether this interpretation be correct or not, I am in the same position as the learned judge found himself when deciding the *McDonald* v. *Simcoe* case, *supra*—I have no authoritative definition to assist me. I have thus to come to a conclusion whether, upon the facts, in 1871 English Bay was a public harbour within the Act, bearing in mind that this means, so far as the decisions have gone, simply a harbour which the public have the right to use.

Stroud's Judicial Dictionary, Vol. 2, p. 849, thus defines a harbour:

"'A harbour, in its ordinary sense, is a place to shelter ships from the

violence of the sea, and where ships are brought for commercial purposes to load and unload goods. The quays are a necessary part of the harbour': (*per* Esher, M.R., *Reg.* v. *Hannam* (1886), 2 T.L.R. 234)."

The same case is also reported in 34 W.R., p. 355, and there the Master of the Rolls, in dealing with the harbour of Ramsgate, says at p. 356:

"The word 'harbour' in that section [Harbours and Passing Tolls Act, 1861], in the absence of any special definition, being used in its ordinary sense [is] a place to shelter ships from the winds and sea, and where ships come for commercial purposes to load and unload goods."

In the Encyclopædia of the laws of England, Vol. 6, p. 152, the only definition of the word "harbours" is derived from *Reg.* v. *Hannam,* in terms already quoted. If this definition of "harbours" be accepted, then English Bay was not a harbour in 1871, and did not pass to the Dominion. Aside from the question of whether it afforded shelter to ships or not, they were not brought there for commercial purposes—to load and unload goods. No business of any kind was carried on there until many years after. It is true that since 1871 some wharves have been constructed upon the shore of the bay and that the department of Marine and Fisheries, in exercising its control of navigable waters, has approved of the location of such wharves; but, having taken place long after the determining period of ownership, it does not affect the situation. The Dominion has also placed certain lighthouses, buoys and beacons on the shores of, and in, these disputed waters, but this was in accordance with the general practice and expenditure throughout the Dominion. It was also in compliance with the requirements of the 5th paragraph of the Terms of Union.

It is contended, however, that a more liberal construction should be given to the term "harbour."

Should the definition given in Coulson & Forbes on Waters, 3rd Ed., 464, as follows—

"A harbour or haven is a place naturally or artificially made for the safe riding of ships"

be applied? Hale's De Portibus Maris, Cap. 2, is cited as supporting this definition. If a public harbour within the meaning of the Act is as thus defined, then does English Bay fulfil the requirements of such definition? This involves a question of fact. I am quite satisfied that a bay, in order to

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ATTORNEY-GENERAL OF CANADA v. RITCHIE CONTRACTING AND SUPPLY CO.

MACDONALD, J.

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be a natural harbour, does not require to be land-locked. First, one has to consider what degree of shelter for the safe riding of ships is necessary to constitute such body of water a harbour. Is it to be absolute safety from the winds and sea, or only partial safety? If only a limited degree of security is required, then, what is the measure of safety that determines whether it is a harbour or not? What would be safe anchorage for one ship might mean disaster to another. A number of witnesses were called on both sides. Some of them dealt with facts shewing the degree of safety to be obtained in English Bay, and others outlined the dangers attached to endeavouring to use it for anchorage purposes. I am not, however, to any appreciable extent, required to decide as to the credibility of the witnesses. The major portion of the evidence consists of opinions given by witnesses, more or less familiar with the locality, as to whether it was a harbour or not. It was termed by one of the witnesses for the Dominion as being a "roadstead."

Assuming that the natural harbours of Canada, unimproved and unused for commercial purposes, passed to the Dominion under the Act, then I must determine whether this body of water is a natural harbour or not.

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English Bay is more than three miles wide at its entrance between Point Grey and Point Atkinson, and carries the same breadth for nearly its entire length of almost four miles. The Spanish Banks, extending from Point Grey for a distance of two miles along the southern shore of the bay, reduce its width to some extent. These banks, composed of hard sand, form a protection or breakwater, and, even with westerly winds, afford anchorage in that portion of the bay lying to the east. I am not overlooking the evidence of some of the witnesses that there is anchorage in some other parts of English Bay under certain conditions, but it does not differ from the anchorage that may be obtained at many other points in the very much indented coastline of British Columbia. Particulars of such favourable places for anchoring is afforded by a copy of the Vancouver Island Pilot, 1864, which I allowed as evidence, though its admission was objected to. The principal portion of the bay on the south shore terminates in a shoal arm known as False

Creek. It was held in *Attorney-General of Canada* v. *Keefer* (1889), 1 B.C. (Pt. 2) 368, on an unopposed application for an *interim* injunction, that this body of water was a public harbour within section 8 of the British North America Act, but I do not think this decision affects the question at issue. The portion of the bay affording the limited anchorage referred to forms a small part of the area claimed by the Dominion as a public harbour. It was admitted the prevailing winds in summer are from the west, and thus the bay, with its open entrance, is exposed to the stress of weather. It does not, except under the circumstances and to the limited extent referred to, afford for ships a haven of safety.

Several Canadian and American decisions were cited, but they were not, in my opinion, of any assistance, as each case was dependent upon its own particular facts.

I do not think any useful purpose would be served by my dealing specifically with the evidence of the different witnesses. Giving such evidence due consideration, and even applying the more liberal definition to the term "harbour," I find that English Bay was not, within the meaning of the British North America Act, a public harbour in 1871. It follows that its bed and foreshore remained the property of the Crown in the right of the Province, and the Dominion has no proprietary interest therein or right of interference.

The action is dismissed with costs.

The appeal was argued at Victoria on the 9th and 10th of June, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

R. R. Maitland, for appellant (plaintiff): The subject-matter of this action is the taking of sand and gravel from the Spanish Banks by Ritchie & Co., the Dominion Government being of opinion that their proprietary rights in the bed and foreshore of English Bay were infringed upon. The question is whether English Bay is a "public harbour" within the meaning of section 108 of the British North America Act and therefore the property of the Dominion. We contend, first, that it is a harbour in itself (*i.e.,* irrespective of use), and, secondly,

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that it was used as a harbour before Confederation. There is good anchorage throughout English Bay, and ships anchored and took shelter there before 1871. Burrard Inlet has been included as within the jurisdiction of the customs control of the Dominion Government. It is conceded that the entrance to Burrard Inlet is a straight line between Point Grey and Point Atkinson, within which is English Bay.

S. S. Taylor, K.C. (on the same side): We must come within section 108 of the British North America Act and the Third Schedule thereof. The words used are "public harbour." We contend that English Bay is a public harbour because, (1) before Confederation it was used as such; (2) it was used as a harbour for shelter before 1871; (3) it is of itself a natural harbour: see Gould on Waters, 3rd Ed., pp. 8-12; *Reg.* v. *Hannam* (1886), 2 T.L.R. 234. A haven and a harbour are practically the same thing: see Coulson & Forbes, pp. 63, 64, 464. The words "public harbours" are not confined to harbours used before Confederation, but applies to all harbours which the public can use for harbour purposes: see *The St. John Gas Light Co.* v. *The Queen* (1895), 4 Ex. C.R. 326 at pp. 329 and 339; *Attorney-General* v. *E. & N. Ry. Co.* (1900), 7 B.C. 221. *Holman* v. *Green* (1881), 6 S.C.R. 707, has not been reversed by the Privy Council except that they will not say that the foreshore is, in all harbours, a part of the harbour. The foreshore (*i.e.*, the land between high and low-water mark) is *prima facie* vested in the Crown: see *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia* [*Fisheries Case*] (1898), A.C. 700; *Attorney-General for Australia* v. *Colonial Sugar Refining Co., Ltd.* (1914), A.C. 237 at p. 253; *Attorney-General for British Columbia* v. *Attorney-General for Canada, ib.* 153 at p. 174; *The Queen* v. *Keyn* (1876), 2 Ex. D. 63 at pp. 73, 76 and 83; *Attorney-General* v. *C.P.R.* [*Street Ends Case*] (1905), 11 B.C. 289; (1906), A.C. 204. It is impossible for the Dominion to own one part of the foreshore and the Province another part. *Attorney-General* v. *C.P.R., supra,* is authority for the right of the Dominion to take any harbours for any purpose. The argument that the Province owns everything and that the Act takes away certain property from the

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Province for the Dominion is not correct: see *Kennelly* v. *Dominion Coal Co., Ltd., et al.* (1904), 36 N.S. 495; *Fader* v. *Smith* (1885), 18 N.S. 433; *Nash* v. *Newton* (1891), 30 N.B. 610 at pp. 620, 626; *McDonald* v. *Lake Simcoe Ice Co.* (1898), 29 Ont. 247; (1899), 26 A.R. 411; (1901), 31 S.C.R. 130. In *Pickels* v. *The King* (1912), 7 D.L.R. 698, Audette, J. bases his judgment on the *Fisheries Case,* but he is in error in his construction of that case. As to the right of Ritchie & Co. to take the sand from between high and low-water mark, see Moore on Foreshore, 3rd Ed., 868. The right to take the sand must be supported by title and not by custom: see Gould, pp. 53-4. The trial judge wrongfully excluded all evidence comparing English Bay with the other harbours of the world.

McPhillips, K.C. (*G. B. Duncan,* with him), for respondents (defendants): This is an action for trespass, and the plaintiff must prove his title. British Columbia owned all this land at the time of Confederation. The onus is, therefore, on the Attorney-General for the Dominion to prove that English Bay is a harbour and that the ground in dispute belongs to the Dominion. The ground does not necessarily belong to the Dominion because it is a harbour. Plans made by the authority of the Dominion Government are put in and can be used against the Dominion. English Bay is called a bay and may fairly be called a roadstead, but a roadstead is not a harbour: *The Aurania and The Republic* (1886), 29 Fed. 98 at p. 103; Encyclopædia of the Laws of England, Vol. 6, pp. 152-8; *Attorney-General of Canada* v. *Keefer* (1889), 1 B.C. (Pt. 2) 368. Proprietary rights that were in the Province before Confederation remained with them. The foreshore may or may not form part of the harbour: see *Attorney-General* v. *E. & N. Ry. Co.* (1900), 7 B.C. 221; *Kennelly* v. *Dominion Coal Co., Ltd., et al.* (1904), 36 N.S. 495; *Attorney-General* v. *C.P.R.* (1905), 11 B.C. 289.

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Taylor, in reply.

Cur. adv. vult.

3rd November, 1914.

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MACDONALD, C.J.A.: The appellants' main contention is that

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English Bay was, at the date of British Columbia's admission to Confederation, a public harbour within the meaning of section 108 of the British North America Act, and that by virtue of that section and the Terms of Union it then became vested in the Dominion. They also contended alternatively that if it were not then a public harbour it became such subsequently by user for harbour purposes, and thereupon came within the purview of that section. There was the further contention that if neither of these claims could be sustained, still the appellants were entitled to object to the removal of sand from the *locus in quo* under the jurisdiction vested in the Dominion over shipping and navigation, which would, the appellants contended, entitle them to prevent interference by anyone with the bed of the sea, though the property therein had not passed to the Crown in right of the Dominion, but remained in the Crown in right of the Province.

The jurisdiction of the Dominion over shipping and navigation is legislative. What is conferred is the power to make laws in relation to shipping and navigation, and, of course, as a necessary incident thereto, power to enforce the same. The Navigable Waters Protection Act, R.S.C. 1906, Cap. 115, deals with cognate matters, but does not cover such an interference with the bed or shore of the sea as the one complained of here.

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Had there been legislation forbidding such interference, I should have had to consider it in the light of what was said by their Lordships in the *Fisheries Case* (*Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia* (1898), A.C. 700), but in the absence of such legislation, the Dominion officers of the Crown have no authority to interfere with or to invoke the assistance of the Courts to enjoin the taking of the sand in question unless proprietary rights in it are vested in the Crown in right of the Dominion.

Coming, then, to the real issue between the parties, namely, the ownership of the *locus in quo,* it becomes necessary to consider what was meant by the term "public harbours," as used in said section 108. It was declared in the *Fisheries Case, supra,* that the question of what formed part of a public harbour was

to be decided with reference to the facts of the particular case. Their Lordships' observations had more particular reference to foreshore, but I think the same rule is to be applied in deciding what part, if any, of the waters and bed of the sea have been used for harbour purposes in ascertaining whether or not that part is or is not within a public harbour. When the British North America Act was passed there were some well-defined harbours in the Province—not well defined as to area, but as to their character of harbours. There were also almost innumerable bays, inlets and arms of the sea and lakes capable of affording shelter to ships, but which were still in a state of nature, and were not resorted to, or not habitually resorted to, for the purposes of shelter or of commerce. At that date these were in the main the property of the Crown in right of the Provinces respectively. In these circumstances it was declared by said section 108 that the public harbours which were public works and property of each Province should be the property of Canada. That section vested in the Dominion all such harbours belonging to each Province, but their boundaries were not defined. The consequence is that in every case of dispute it is a question of fact, first, as to whether or not (assuming for the moment that only such as were public harbours at the date of Union passed) a public harbour existed at that time in the locality in question, and if so, was the place in dispute within it?

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No authority was given by the British North America Act either to the Dominion, or to a Province, to arbitrarily define the boundaries of harbours, and such boundaries, in respect to the harbours of British Columbia at least, were not defined by the Province before the Union, and hence the Courts alone can now decide that a particular body of water, with its adjuncts, is or is not a public harbour, or that a particular spot is or is not within a public harbour.

Where the dispute relates to foreshore, its determination is comparatively simple, and is governed by the rule suggested in the *Fisheries Case, supra.* Where foreshore is in dispute, the boundaries will generally be accurately defined, and the character and extent of its user will not be subject in any large measure to the uncertainty which is apt to arise from an

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equivocal user such as may be the user of the waters and bed of a bay which may be referable either to the purposes of navigation merely or to something more, namely, user for harbour purposes as well. There must be some point at which the bed of the sea changes its character from sea-bed to harbour-bed, using the latter term in contradistinction to the former. If it cannot, as I think it cannot, be said arbitrarily that because a body of water is so situated as to afford shelter for the safe riding of ships, therefore the whole must be considered to be a harbour, then the rule applied in the *Fisheries Case* to foreshore must equally be applicable to the beds and waters of what are alleged to be harbours. It may be that the lines cannot, in the nature of things, be as closely drawn in reference to the bed as to the foreshore, but the principles upon which they are to be drawn, I think, must be the same. It is conceivable that there could be several harbours within English Bay, which has an area of twelve square miles.

The inquiry, then, in this case is not, was shelter for the safe riding of ships found in English Bay, or were goods loaded or unloaded on its shores, but, was the locality from which the sand was taken a public harbour, or part of a public harbour within the bay?

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While there is evidence that ships had found some shelter and good anchorage in English Bay in an area of considerable extent, the nearest point in that area to Spanish Banks, from which the sand was taken, as fixed by the plaintiffs' witness Reed, the harbour master of the Port of Vancouver, was a mile to the east and northeast of the bank. The good anchorage so much relied upon by plaintiffs, in their efforts to impress upon English Bay the character of a public harbour, was not shewn to exist anywhere in the immediate vicinity of the Spanish Banks. Indeed, it would appear to be manifest that good anchorage could not be found in a bed of sand, at all events, in sand of a character which could be pumped by the process employed by the private defendants.

There is a suggestion in the evidence that the bank could be used, and had been used on a few isolated occasions, for the beaching of ships or small boats. It was admitted, however,

that the bank is covered daily by the tides, sometimes to a depth of 14 or 15 feet. In any case the evidence is not sufficient to justify the inference which the appellants ask us to draw that the bank, or any part of it, was, in the true sense of the term, used even for that purpose. There is no pretence, either, that goods were loaded or unloaded there at any time.

I am, therefore, of opinion that the sand was not taken from any part of a public harbour, and as there has been no change in the character of the place in this respect since the date of Union, it becomes unnecessary to express an opinion concerning the appellants' alternative contention that not only those harbours which were public harbours at the time of the Union passed to the Dominion, but that those which afterwards became public harbours also passed.

I express no opinion as to whether other parts of English Bay do or do not fall within the designation "public harbour."

The appeal should be dismissed.

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IRVING, J.A.: The facts established beyond question are that English Bay has many of the requisites of a good harbour, *viz.*: protection from wave and wind from many directions; good holding ground with plenty of depth, and freedom from rocks and shoals. Yet, in my opinion, it is not a harbour. The width of its mouth, having regard to its area, prevents it falling within the definition of harbour. I would describe it as a roadstead.

Assuming that it is a harbour, I do not think it falls within section 108 of the British North America Act, either as a public work or public harbour. Under the scheme of the Act, the assignment, by section 108, of the then existing Provincial works and harbours to the Dominion was a necessary and natural complement to the conferring on the Dominion of the owners of the legislation specified in section 91. It is admitted that there is no evidence that it was ever used as a harbour for loading or unloading goods prior to 1871. I agree with the learned trial judge that the Dominion Government has no proprietary rights in respect to the foreshore of English Bay. But, irrespective of proprietary rights, a question arises on the 11th

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plea. The British North America Act gives to the Dominion Parliament legislative power over: (10) Navigation and shipping; (12) Sea-coast; (9) Beacons and buoys, and such works as may be declared for the general advantage of Canada. In respect of these matters, the Attorney-General of Canada, I think, is the proper officer to represent the Crown in an application to the Court to prevent any interference with the drift, or wall of sand, which forms part of the natural protection of the roadstead, and which barrier may be necessary to secure the entry to, or the safe anchorage of vessels off, the mouth of False Creek.

There is evidence to the effect that "in the freshet season" (*i.e.*, of the Fraser River) this sand comes in in vast quantities, and that so long as the dredging is confined by the means adopted by the defendant, it would take a long time to pump the barrier out. On this evidence, and upon the evidence of Balkwill, who has in some years taken away as much as 50,000 yards of sand, it was argued that the removal of some of it can do no harm.

It seems to me much may be said in favour of the Dominion authority obtaining an injunction under the 11th plea, but I am embarrassed by the course of the trial. When Mr. *McPhillips* examined one of the defendants' witnesses, counsel for the Dominion objected to any evidence being given as to the effect on the bank by the removal of the sand. The judge did not rule on the objection, nor did counsel for the Dominion Government say "No" when Mr. *McPhillips* said: "You admit that it does not have any effect on it." Counsel was not bound to make any admission, nor could he have done so in view of the amendment he had made and the fact that a witness named Sparrow had already given evidence that the pumping did have some effect. The judge then entered into the conversation of counsel, and the question as to the effect of the pumping is lost sight of. Later on the defendants' witnesses went into it more fully, Balkwill giving the evidence I have already set out. He was not cross-examined on this point. If there is anything in the 11th plea, the case for the Dominion was not pressed, and I, therefore, feel that it is enough to notice it.

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I would dismiss the appeal.

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MARTIN, J.A.: In this case is raised the question of whether English Bay is a "public harbour" under the British North America Act. No full definition of that term has been attempted, and their Lordships of the Privy Council said in *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia* (1898), A.C. 700 at pp. 711-12, that they

"think it extremely inconvenient that a determination should be sought of the abstract question, what falls within the description 'public harbour.' They must decline to attempt an exhaustive definition of the term applicable to all cases. To do so would, in their judgment, be likely to prove misleading and dangerous. It must depend, to some extent, at all events, upon the circumstances of each particular harbour what forms a part of that harbour."

I cited this passage when considering the subject in one aspect (the ownership of coal mines in the bed and under the foreshore of Nanaimo harbour) in *Attorney-General* v. *E. & N. Ry. Co.* (1900), 7 B.C. 221 at p. 242, wherein the leading decisions are reviewed, and I need only say, to avoid misconception, that my observations were made on the assumption that the whole foreshore of Nanaimo harbour did in fact form part of the harbour, which it was admitted was a public one and the property of the Dominion Government—p. 240. I note this because, as their Lordships observe in the first cited case, p. 712:

"It does not follow that, because the foreshore on the margin of a harbour is Crown property, it necessarily forms part of the harbour. It may or may not do so, according to circumstances. If, for example, it had actually been used for harbour purposes, such as anchoring ships or landing goods, it would, no doubt, form part of the harbour; but there are other cases in which, in their Lordships' opinion, it would be equally clear that it did not form part of it."

Since then there is the further decision of their Lordships (affirming the judgment of the Full Court of this Province, 11 B.C. 289) in *Attorney-General for British Columbia* v. *Canadian Pacific Railway* (1906), A.C. 204, wherein it was decided that certain ends of streets in the City of Vancouver formed part of a public harbour, and wherein they said (pp. 209-10):

". . . . The question whether the foreshore at the place in question formed part of the harbour was in the present case tried as a question of fact, and evidence was given bearing upon it directed to shew that before 1871, when British Columbia joined the Dominion, the foreshore at the point to which the action relates was used for harbour purposes, such as

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the landing of goods and the like. That evidence was somewhat scanty, but it was perhaps as good as could reasonably be expected with respect to a time so far back, and a time when the harbour was in so early a stage of its commercial development. The evidence satisfied the learned trial judge, and the Full Court agreed with him. Their Lordships see no reason to dissent from the conclusion thus arrived at."

I pause here to note that in the said Full Court, HUNTER, C.J. made certain observations on the effect of the British North America Act as to harbours and mines thereunder which were *obiter dicta* and were not concurred in by the other members of the Court, and which, as will hereinafter appear, it is unnecessary to consider now. As to the decision of the Supreme Court of Nova Scotia in *Kennelly* v. *Dominion Coal Co., Ltd., et al.* (1904), 36 N.S. 495, which goes so far as to hold (pp. 500-1) that the future adaptability and use "in the course of time" of the *locus* for harbour purposes should be considered as a test of whether it at present is in fact a harbour, I think, with all deference, that it is erroneous and should not be followed.

Recently the question has been further discussed in the Exchequer Court of Canada in *Pickels* v. *The King* (1912), 14 Ex. C.R. 379, 384; and *The King* v. *Bradburn* (1913), *ib.* 419, 429, wherein it was found that the area in question in each case was not a harbour; in the latter, Cassels, J. at p. 429 said: "As I read the authorities, it is really a question of fact," and pointed out that "In Upper Canada, certainly as far back as 1859, there were private harbours as distinguished from public harbours" (as there were also in New Brunswick, as appears by *The St. John Gas Light Co.* v. *The Queen* (1895), 4 Ex. C.R. 339), and he goes on to say:

> "In reference to a contention that might be raised, namely, that the words 'public harbours' might be harbours as distinguished from private harbours, owned by private corporations, Lord Herschell pointed out ((1898), A.C. at p. 711) that such construction could not be placed on the statute, for the evident reason that the B.N.A. Act, in the section referred to, is dealing with the property of the Provinces, and the words public harbours must mean something other than harbours. If it were intended that every harbour such as a haven was to pass, there would be no object in the use of the word 'public.'"

At pp. 431-2, after citing some authorities, he observes:

> "There is not much to assist in arriving at an exact definition of what is a public harbour within the meaning of the statute. I take it, however, that the language quoted would indicate that in each case it

becomes a question of fact. One point is made clear, that to be a public harbour, it is not necessary that public moneys should have been expended. I think what was intended is that whether it was a public harbour or not would depend, to a great extent, on the question of fact as to whether the particular harbour in question had been actually used for harbour purposes, such as anchoring ships or landing goods, etc. There are definitions of harbours, as for instance, in Farnham on Waters and Water Rights, at page 27, the definition of a harbour is given as 'An indentation in a coast extending into the land in such a way as to afford protection to vessels against wind and storm upon the waters.' It does not seem to me that such so-called harbours can be treated as public harbours within the meaning of the Confederation Act. There is also a distinction between a harbour and a port. If a port, it necessarily follows that it was also a harbour, the exact boundaries of such harbours being a question of fact."

In the earlier case of *Nash* v. *Newton* (1891), 30 N.B. 610, Allen, C.J. remarks at p. 618, speaking of the making of a new harbour by giving access to it from the sea:

"But I think that when the channel was opened between the Bay of Fundy and Dark Harbour by the expenditure of public money granted expressly for that purpose, and the tide flowed and reflowed into and from Dark Harbour, and the water therein became salt, and sea fish resorted there, it became an arm of the sea, and the public had the right to go there, either for shelter in stormy weather, or for the purpose of fishing. It became then a harbour in fact, whether it had ever been so before or not."

And Tuck, J. at p. 623, gives effect to the unanimous decision of the Court of Appeal in *Reg.* v. *Hannam* (1886), 2 T.L.R. 234, wherein, at p. 235, it was said by Lord Esher:

"A harbour in its ordinary sense was a place to shelter ships from the violence of the sea, and where ships were brought for commercial purposes to load and unload goods. The quays were a necessary part of the harbour."

He also adopts this definition from Coulson & Forbes on Waters:

"A harbour . . . . is a place naturally or artificially made for the safe riding of ships. A port is a haven and something more; it is a harbour where customs officers are established, and where goods are either imported or exported to foreign countries."

Mr. Justice King concurred in these judgments.

In *Perry* v. *Clergue* (1903), 5 O.L.R. 357, Street, J. said, p. 364:

"It is difficult to say what it is that constitutes a harbour, but in my opinion something more is necessary to convert an open river front into a public harbour within the meaning of the B.N.A. Act than the erection along it of four or five wharves projecting beyond the shallows of the

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shore for the convenience of vessels receiving and discharging passengers and goods."

Turning, then, in the light of these authorities, to the facts before us, I have reached the conclusion, after carefully reading and weighing all the evidence in the appeal book, that we would not at all be justified in reversing the finding of the learned trial judge that the *locus* now in dispute was not a public harbour at the time of the Union, in 1871, and I add that it has not become one since, and therefore, seeing that this appeal is decided upon this question of fact, it is undesirable and unnecessary to express any opinion on the question whether a place which was not a public harbour at the Union might later become one so as to vest in the Federal Government, or upon any other question. It was not an easy matter for the learned judge to decide the question of fact on the conflicting evidence, some of the witnesses being of an unsatisfactory type, given to gross exaggeration (as in the case of George Marchant, who, moreover, was flatly contradicted in essential facts by Tofte and Balkwill), and I think he has reached the right conclusion. It is a question of degree, to be decided on the facts of each case, and in this one the protection or shelter afforded by the shores of English Bay in general, and that part of it at Spanish Banks in particular, is not sufficient to raise the bay into the class of a public harbour, artificial or natural, in the proper sense of

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that term. In the New English Dictionary a roadstead is defined as "A place where ships may conveniently or safely lie at anchor near the shore." I should describe English Bay as a convenient but only moderately safe roadstead, being a valuable adjunct to the true harbour of Vancouver, but not forming part of it. A harbour may include a roadstead, but it does not at all follow that a roadstead is a harbour. I have no more hesitation in finding, on the evidence, that English Bay is not a harbour than I would have in finding that what is known as Esquimalt Harbour is a true and natural harbour, chiefly for the main reason given by Captain William Cox, *viz.*: that it is as absolutely landlocked as a harbour can be. Of course, no harbour is perfectly safe at all velocities of the wind from all quarters and at all stages of the tide, and it is not easy to define the dividing line

with exactness, but in practice the difficulty is not so great, and the distinction may often be more easily expressed in negative than in positive terms. I think, perhaps, some difficulty has been created here by laying too much stress upon the wide official limits of the port jurisdiction of Vancouver and the exercise of Federal rights over shipping and navigation within these limits.

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

GALLIHER, J.A.: I concur in the judgment of the Chief Justice, for the reasons given.

MCPHILLIPS, J.A.: This appeal is from a decision of MACDONALD, J. dismissing the action, being one for trespass—the removal of sand and gravel from the bed and foreshore of English Bay, known as the Spanish Banks—the contention of the Attorney-General for Canada being that English Bay, inside a line drawn from Point Grey to Point Atkinson, constituted a public harbour within the meaning of section 108—and the Third Schedule referred to in it—of The British North America Act, 1867.

The question as to whether or no the limits of English Bay, as contended for by the appellant, was a public harbour, was the issue of fact before the learned trial judge, and a great amount of evidence was adduced at the trial—held to be wholly insufficient in the opinion of the judge—to establish that the *locus in quo* was a public harbour at the time of the admittance of the Colony of British Columbia into the Dominion of Canada, namely, on the 20th of July, 1871.

English Bay, within the limits called in question in the action, would appear to be three miles wide at its entrance between Point Grey and Point Atkinson, with that breadth for nearly its entire length to the eastward, a distance of four miles, the Spanish Banks extending from Point Grey a distance of two miles along the southern shore of the bay.

It was apparently put forward at the trial that English Bay formed a part of Vancouver harbour or Burrard Inlet, as it is sometimes also called, but this was in no way established.

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The city of Vancouver is situate upon Vancouver harbour, to which there is an entrance from out of English Bay to the east, known as the First Narrows, and the question as to whether or no Vancouver harbour—otherwise Burrard Inlet—was a public harbour was specifically dealt with by Duff, J. in *Attorney-General* v. *C.P.R.* (1905), 11 B.C. 289. At pp. 291-2 he said:

"I find, as a fact, that at the time of the admission of British Columbia into Canada, that part of Burrard Inlet between the First and Second Narrows was a public harbour, and that the parts of the foreshore subject to the public rights of passage referred to were in use as, and were in fact part of the harbour; as was the whole of the foreshore adjoining the townsite of Granville."

Attorney-General v. *C.P.R., supra,* was carried to appeal to the Privy Council ((1906), 75 L.J., P.C. 38), and their Lordships, in their judgment, referred to the case of *Attorney-General for Canada* v. *Attorneys-General for Ontario, Quebec, and Nova Scotia* (1898), 67 L.J., P.C. 90, 93, and said at p. 40:

"In accordance with that ruling the question whether the foreshore at the place in question formed part of the harbour was in the present case tried as a question of fact, and evidence was given bearing upon it directed to shew that before 1871, when British Columbia joined the Dominion the foreshore at the point to which the action relates was used for harbour purposes, such as the landing of goods and the like. That evidence was somewhat scanty, but it was perhaps as good as could reasonably be expected with respect to a time so far back, and a time when the harbour was in so early a stage of its commercial development. The evidence satisfied the learned trial judge, and the Full Court agreed with him. Their Lordships see no reason to dissent from the conclusion thus arrived at. And on this ground, if there were no other, the power of the Dominion Parliament to legislate for this foreshore would be clearly established."

Unquestionably in the present case the evidence which the learned trial judge had before him was of the most meagre kind, and failed utterly to establish that English Bay was a public harbour—or a harbour at all in the widest sense of the term. In fact, the learned trial judge was moved to use this language in his judgment:

"The evidence shews that there was no one then resident on the shore of the bay which was then in a state of nature. There was no trade or commerce and except at uncertain intervals ships did not utilize these waters for anchorage and then only to a limited extent."

In *Attorney-General for Canada* v. *Attorneys-General for*

Ontario, Quebec, and Nova Scotia, supra, their Lordships of the Privy Council, at p. 92 said:

"They must decline to attempt an exhaustive definition of the term ['public harbour'] applicable to all cases."

Therefore, it still remains a question to be determined, in my opinion, upon the particular facts of each case, without, however, in my view, wholly disregarding the ordinary and natural meaning of the term, as Parliament must have assuredly intended the words "public harbour" to have the generally accepted meaning that would be attached to them, and it would seem to me to follow that at the time of the enactment of the British North America Act there were harbours that would be covered by the words used and others that would not, and this meaning would be likewise carried down to the time of the admission of British Columbia into the Dominion of Canada, namely, 1871.

It would not appear that any evidence was given to prove that English Bay had been recognized or declared to be a harbour under The Harbour Regulation Ordinance, 1865, of the Colony of British Columbia, or the Harbour Ordinance, 1867, and it may rightly be assumed, in my opinion, that it was never in any way deemed to be a harbour within the purview of any existing statute law affecting harbours either at the time of the passage of the British North America Act, 1867, or at the time of the admission of British Columbia into the Dominion of Canada.

It will be seen that under section 19 of the Harbour Ordinance, 1867, R.L.B.C. 1871, No. 92 (this ordinance being in force at the time of the admission of British Columbia into Canada), we have an interpretation clause of the word "harbour," which reads as follows:

"19. The word 'harbour' shall include all ports, inland places, and waters to which the provisions of this Ordinance may be applied or from time to time varied by any Proclamation of the Governor to that effect."

The words "public harbour" would not appear to have been used in the legislation of the Colony of British Columbia, but it is evident that there was existent legislation dealing with the regulation of harbours, and it is apparent that the regulations had application to all the harbours and ports existent both at

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the time of the passage of The British North America Act, 1867, and at the time of the Union of British Columbia with Canada.

It is plain that there was to be a harbour master of every harbour or port in the Colony of British Columbia. Section 2 of the Harbour Ordinance, 1867, which reads as follows, is very emphatic as to this:

"2. The harbour master of every harbour or port in the colony of British Columbia shall give directions for regulating the time at which and the manner in which every vessel shall enter into, go out of, or to or be in any harbour, pier, or wharf within the jurisdiction of such harbour master; and the position, mooring, or unmooring, placing, and removing of every vessel whilst therein; for removing unserviceable vessels and other obstructions from the harbour, pier, or wharf, and keeping the same clear; and for regulating the use of fires and lights within or upon the vessels in the harbour, or in or at any pier or wharf."

It might be said that this is, perhaps, too emphatic a statement—that there was to be a harbour master of every harbour or port in the Colony of British Columbia. In my opinion, however, the statement may well be justified, as, unless the Harbour Ordinance, 1867, was applied, it could not be successfully contended that it was a harbour or port. That is to say, unquestionably, under the scheme of government in the Colony of British Columbia, a harbour was to have a harbour master, and harbour masters were in office at the time of the Union with

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Canada in the then recognized harbours. But English Bay was not one of them.

At the time of the Union with Canada, British Columbia had legislation imposing customs duties, namely, the Customs Ordinance, 1867, R.L.B.C. 1871, No. 79, and in connection with the customs duties leviable at the Port of New Westminster—port dues on sailing vessels is dealt with in The Harbour Dues Amendment Ordinance, 1865, R.L.B.C. 1871, No. 56—and an examination of the statute law at the time of the Union with Canada would not appear to prove that there was any other harbour recognized as such upon the mainland of British Columbia, and the only recognized harbours on Vancouver Island were Victoria and Esquimalt: see Victoria Harbour Act, 1860, The Victoria and Esquimalt Harbour Dues Act, 1860,

and The Vancouver Island Road and Harbour Loan Act, 1862, R.L.B.C. 1871, No. 10.

It is true that one other harbour upon the mainland of British Columbia, as above referred to, has been held to be a public harbour, namely, Vancouver harbour, otherwise known as Burrard Inlet. But with respect to it, unquestionably there was some material evidence of its being a harbour at the time of the Union with Canada, evidence which is wholly absent in respect to English Bay.

In my opinion it is necessary to determine the spirit in which the words "public harbour" were used to rightly interpret the meaning. To do this it would be a matter of proper inquiry to attempt to explain the meaning by other existing Imperial statute law referring to harbours. Now, it would appear, at the time of the passage of the British North America Act, 1867, The Harbours Transfer Act, 1862 (25 & 26 Vict., c. 69), was in force, and that Act referred to two other Acts also in force, namely, Public Harbours: 46 Geo. III., c. 153; and Ballast: 54 Geo. III., c. 159. There is not to be found in any of these Acts any definition of "public harbours" or "harbours," but it is to be remarked that 46 Geo. III., c. 153, in its title reads: "An Act for the Preservation of the Public Harbours of the United Kingdom." This simply must mean known public harbours—that is, harbours of importance, well known publicly, and officially recognized to be "public harbours." This is the more impressed upon one, when the clause is read—saving the privileges of the City of London.

With this consideration in mind, what harbours can reasonably be said to be included in the words "public harbours" as found in The British North America Act, 1867?

To arrive at a correct conclusion in this, it is helpful to see what interpretation has been put on words of somewhat similar character. As pointed out, I fail to find any statutory definition of "public harbours," and the controlling decision so far is *Attorney-General for Canada* v. *Attorneys-General for Ontario, Quebec, and Nova Scotia*, *supra*, but their Lordships guard themselves from laying down any inelastic definition.

In *Nicholson* v. *Williams* (1871), 40 L.J., M.C. 159, Lush,

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J. had to consider 54 Geo. III., c. 159, s. 14, previously referred to, being "An Act for the Better Regulation of the Several Ports, Harbours, Roadsteads, Sounds, Channels, Bays and Navigable Rivers in the United Kingdom and of His Majesty's Docks, Dockyards, Arsenals, Wharfs, Moorings, &c.," and at p. 166 he said:

"And it contains various enactments, some of which apply to the whole coasts of the Kingdom, and others only to places frequented by ships for the purpose of loading and discharging."

Section 14, which was under consideration, had reference to preventing damage being done to the shores and banks of the ports, harbours and havens. Lush, J. at pp. 166-7 further said:

"The enactment applies as the object and purpose of it require; that it should apply to 'any' and every port, harbour, and haven in the Kingdom.

"Ports and havens are not mere geographical expressions. They are places appointed by the Crown, 'for persons and merchandises to pass into and out of the realm,' and at such places only is it lawful for ships to load and discharge cargo. The assignment of such places to be 'the inlets and gates' of the realm is and always has been a branch of the prerogative, resting as Blackstone remarks (vol. 1, p. 264), partly upon a fiscal foundation, in order to secure the King's marine revenue. Their limits and bounds are necessarily defined by the authority which creates them, and the area embraced within those limits constitutes the port. Having once granted the franchise the King had not at common law the power of resumption, or of narrowing and confining their limits, when once established, but any person had a right to load and discharge his merchandise in any part of the haven: 'whereby,' as observed by Blackstone in the same volume, 'the revenue of the customs was much impaired and diminished by fraudulent loadings in obscure corners.' This occasioned the statutes of 1 Eliz. c. 11, and 13 and 14 Chas. II. c. 11."

It may not be possible to place a great amount of reliance upon this decision in the way of determining the present case, but it brings out very clearly that "harbours" cannot be looked at as being used in the geographical sense. They are the "inlets and gates" of the realm, not the whole coast line, and by adapting the language of Lush, J., also appearing at p. 166, it may well be said that the public harbours in British Columbia, known and recognized as such, became vested in the Dominion of Canada—"not the . . . . whole of the coast . . . . but only . . . . such portions thereof as are within the ambit of a . . . . harbour" and that would be a "public harbour" at the time of the Union with Canada.

Prima facie, there must have been a reason in placing the

word "public" before the word "harbours," and, in my opinion, the only correct conclusion and the only way to construe the words, taken together, is to give them the meaning they naturally import, and that would be—harbours publicly known and officially declared, or at all events, harbours over which the Colony of British Columbia was exercising jurisdiction and official control at the time of the Union with Canada. Otherwise it means that hundreds of harbours—*i.e.*, capable of sheltering ships—along the thousands of miles of indented coast line of British Columbia were transferred to the Dominion of Canada under The British North America Act, 1867, being at some time used to shelter ships and possibly in other cases not, but being potential harbours yet to be called into existence.

It is to be further noted that although customs and excise duties admittedly would come under the legislative authority of Canada, yet under the Terms of Union—section 7, p. lii., Vol. 1, R.S.B.C. 1911—the existing customs tariff and excise duties were to continue in force until the railway from the Pacific coast and the system of railway in Canada were connected, unless the Legislature of British Columbia decided to accept the tariff and excise laws of Canada. This provision in the Terms of Union brings the matter of harbours prominently up, as, with a customs tariff in existence, it is patent that there must be ports of entry, and that means, of course, harbours, and the harbours would be well known and officially recognized and would be properly termed public harbours, and such harbours only could be said to be transferred to the Dominion of Canada.

The name English Bay, which it is contended is a harbour, *prima facie* in its name would deny its being a harbour. It might be that some portion of a bay would form a harbour, but not the whole bay, and there is the evidence of Captain William H. Logan, special salvage officer for Lloyd's Underwriters, and ten years with Lloyds, that the whole bay is nothing more than a good roadstead, in easterly weather poor anchorage and very undesirable anchorage in westerly winds, with but about 24 points of shelter, leaving about eight points very much unsheltered.

What is to be determined here is whether English Bay may

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be said to be included in the words public harbours, and as to that the onus is upon the plaintiffs, as what is contended for is the property in the Spanish Banks, the alleged trespass being the removal of sand and gravel therefrom, the Province of British Columbia having granted the right of removal. Unquestionably the property in the Spanish Banks was, up to and preceding the Union with Canada, in British Columbia. Therefore it is incumbent upon the plaintiffs to establish a transfer of title, and the attempt is by setting up that the whole of English Bay comes within the term public harbours. The actual *locus in quo, i.e.,* the Spanish Banks, stretch from Point Grey a distance of two miles along the southern shore of the bay, leaving still some two miles of the bay extending easterly to the foot thereof.

The evidence fails to establish that any portion of English Bay was a harbour at the time of the Union with Canada so as to come within the term public harbour. But if there can be said to be even a scintilla of evidence that there was a harbour in any sense of the term, at most it could only have application to a small portion of this very considerable bay. But to expand that evidence and apply it to the property in all the foreshore and the beds or lands beneath the whole of the waters of English Bay is a proposition of such magnitude that the clearest and most convincing evidence would need to be forthcoming.

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To accede to the contention of the plaintiffs and upon such evidence as has been adduced, so incomplete and inconclusive, would admit of it being possible to contend—by claiming from headland to headland—that the whole coast line of British Columbia was transferred to the Dominion of Canada at the time of the Union—a proposition only to be stated to carry with it its refutation.

Assheton-Smith v. *Owen* (1907), 76 L.J., Ch. 308, was a case which called for the consideration of what the limits of a port were, and indicating that there may be waters of a port which would not be part of a harbour, and certain statutes had to be construed, and whilst it cannot be said to be an authority which would have bearing on the present case, yet the language

of Lord Atkinson at p. 312 is interesting when it is here contended that the whole of English Bay is a harbour:

"The Act of 1809 clearly drew a distinction between the port and the word 'harbour' and requires that a wider meaning should be given to the former word than to the latter. For instance in section 15 the words used are 'cause to be removed all, every, or any rocks at the Swellies or in any other part of the said straits within the said port of Carnarvon for the more convenient passage of vessels to and from said harbour, and through the said straits.'"

Without a doubt, if a harbour should be capable of being established from and out of any portion of English Bay, it would not in its limits be so extensive as contended for by the plaintiffs, and be inclusive of the Spanish Banks.

When the scheme of Confederation of the Provinces into the Dominion of Canada was worked out, undoubtedly questions of revenue and taxation were given close attention, and the question of relative burden upon the exchequers, Dominion and Provincial. And whilst it may well be said that all public harbours were transferred to the Dominion, it never could have been the intention, nor was it the spirit or intention of Parliament to impose upon the Dominion the right of property in harbours other than those which could be proved to be public harbours within the true meaning of the term, *i.e.*, harbours in use by the public and recognized as such by the respective Provinces at the time of the Union, and it would only be as to these harbours that the duty of conservancy on the part of the Dominion of Canada would extend.

I cannot agree with the conclusion of HUNTER, C.J. in *Attorney-General* v. *C.P.R.* (1905), 11 B.C. 289, where he said at p. 296, dealing with the question of public harbours:

"The jurisdiction, in my opinion, is latent, and attaches to any inlet or harbour as soon as it becomes a public harbour, and is not confined to such public harbours as existed at the time of the Union."

It is to be noted, however, that the Chief Justice qualifies this statement by this further language, appearing at the same page:

"At the same time I would not be understood as holding that the subsoil of a public harbour is or becomes vested in the Dominion *usque ad centrum*: it is vested only as far as it is necessary for the proper management of the harbour, much after the same mode in which streets are commonly vested in municipalities. For example, I think that the

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beneficial interest in a copper mine underlying a public harbour would belong to the Province or its grantee, subject to the right of the Dominion to dredge or otherwise improve the harbour."

Bearing in mind the decisions of their Lordships of the Privy Council in *Attorney-General for Canada* v. *Attorneys-General for Ontario, Quebec, and Nova Scotia* and *Attorney-General* v. *C.P.R., supra,* that the question is really one of fact, and that the abstract question of what falls within the description "public harbour" is not to be defined, it might be said that I have travelled somewhat far afield. It has been done, however, and with great respect, because of the very extensive limits of the harbour that we are asked to find comes within the term "public harbour," that is, the entirety of English Bay.

In *Pickels* v. *The King* (1912), 7 D.L.R. 698, Audette, J. referred to the *Fisheries Case* at pp. 701-703, and in my opinion has righly interpreted the decisions of their Lordships of the Privy Council, and his reasons for judgment are exceedingly apposite and forceful in arriving at a determination of the present case.

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The question of fact being determined, and that adversely and, in my opinion, rightly, against the contention made that English Bay was transferred to the Dominion of Canada at the time of the Union, it follows that, in my opinion, the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Maitland, Hunter & Maitland.*
Solicitors for respondents: *McPhillips & Wood.*

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R. agreed with C. (who had influence with the Kitsilano band of Indians) that if they, working together, could bring about a sale to the Province of the rights of the Indians in their reserve, he would pay C. $20,000. Negotiations proceeded, C. arranging meetings with the Indians, at two of which R. and C. were present, but without results. After the first meeting, R., who had a meeting with the Provincial representative, was induced by him to make A. a party to the transaction. Three days after the second meeting a third and final meeting was held with the Indians (an adjournment of the other meetings), at which R. and A. were present, but from which C. was excluded. The Indians came to terms at this meeting, and a form of option, which had been previously prepared by R. for use at the former meetings, was signed by the parties after A's name had been changed for R's. An action by C. for the recovery of the $20,000 was dismissed.

Held, on appeal (MARTIN, J.A. dissenting), that R. was bound to discharge his obligation to C. upon the success of the enterprise, and the fact that A's influence may have been most potent in bringing about a sale, did not affect the relationship between R. and C.

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

APPEAL by plaintiff from a decision of HUNTER, C.J.B.C. at the trial in Vancouver on the 2nd of March, 1914, on an action claiming a commission of $20,000 in respect of the sale of certain land. The action arose out of the sale to the Provincial Government by the Indians of the Kitsilano tribe of their interest in their reserve. The plaintiff, a half-breed, who lived in Mission, and was well acquainted with the different members of the tribe, entered into an agreement with the defendant on the 9th of February, 1913, whereby it was agreed that if the plaintiff used his influence with the Indians in order to bring about a sale of the reserve, and if a sale was actually brought about, he would be paid $20,000 by the defendant. The plaintiff entered into negotiations with the Indians and

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brought the defendant to a meeting in the Indian Chief's house at Capilano, on the 22nd of February, 1913. The meeting was adjourned without the parties coming to any definite arrangement. The defendant then had a conference with the Attorney-General as to the possibility of bringing about a sale, and as to the amount the Government would be willing to pay for the reserve, the Attorney-General suggesting that the defendant should associate himself in the undertaking with Mr. H. O. Alexander, of Vancouver, as in the previous year Mr. Alexander had attempted to bring about a sale, but had failed in his negotiations. The plaintiff and Mr. Alexander then entered into a reciprocal arrangement, whereby they agreed to share the commission in case either of them brought about a sale. The adjourned meeting with the Indians was held on Saturday, the 8th of March, at which the plaintiff and defendant were both present, but during the meeting the defendant made an excuse and left, the plaintiff remaining on for some time, when the meeting was adjourned until the following day. On leaving the meeting, the defendant telephoned Mr. Alexander that the negotiations had failed. No meeting was held on either Sunday or Monday, but on Monday afternoon some five of the Indians saw Mr. Alexander, and told him they were willing to arrange for a sale. A meeting was held on Tuesday, at which Mr. Alexander and the defendant were present, but from which they managed to exclude the plaintiff. They then came to an agreement with the Indians on a more liberal basis than what had been offered previously by the defendant. Alexander obtained from the defendant the form of agreement which he had drafted for use in the event of his having effected a sale at the previous meetings. Mr. Alexander changed his own name for that of Read's in this document, which was then signed by himself and the Indians. The transaction was subsequently carried out on the terms of this agreement. The action was dismissed by the trial judge. The plaintiff appealed.

Statement

The appeal was argued at Victoria on the 15th of June, 1914, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

Argument

J. W. de B. Farris, for appellant: The arrangement was that

Read was to pay Cole $20,000 for using his influence as best he could in inducing the Indians to sell their interest in the reserve, if a sale were eventually brought about. Alexander had tried to effect a sale during the previous year, but failed owing to Cole having blocked him. The parties were close to coming to terms at the meeting on the 8th of March, through Cole's efforts, and at the meeting on the 11th, which was practically an adjourned meeting of the 8th, Read and Alexander came to terms with the Indians by offering them a little more, they having increased the offer from $200,000 to $225,000. Alexander used the same option as Read had prepared before, only changing his name for Read's. It cannot be denied that it was chiefly through Cole's efforts that the Indians were induced to sell. The whole transaction was such as to entitle him to his commission under his contract with Read.

Argument

Ritchie, K.C., for respondent: The question is: What was the real bargain between the parties, and was this man the efficient cause of the sale? See *Robins* v. *Hees* (1911), 19 O.W.R. 277; *Burchell* v. *Gowrie and Blockhouse Collieries, Limited* (1910), A.C. 614; *Stratton* v. *Vachon* (1911), 44 S.C.R. 395; *Travis* v. *Coates* (1912), 5 D.L.R. 807.

Farris, in reply: Alexander's attempt to sell through his own efforts alone had been hopeless; it was only through Cole's efforts that anything was done. Cole was represented by Read both before and after Alexander had been brought into the deal: see *Rice* v. *Galbraith* (1912), 26 O.L.R. 43 at pp. 44-5; *Singer* v. *Russell* (1912), 1 D.L.R. 646 at p. 658.

Cur. adv. vult.

3rd November, 1914.

MACDONALD, C.J.A.: The plaintiff, who appears to have had some influence with the Kitsilano band of Indians, entered into an arrangement with the defendant, the effect of which, as I gather it from the evidence, read in the light of the conduct of the parties, was that if they could bring about a sale to the Province of the rights of the Indians in their reserve, from which they anticipated a large profit, the plaintiff should receive from the defendant $20,000. The plaintiff had already opened negotiations with the Indians and with the Attorney-General,

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acting for the Province, and, in furtherance of their scheme, he brought about a meeting of the Indians on the reserve at which, and at subsequent meetings, the plaintiff and defendant attended. In further pursuance of the scheme, defendant had an interview with the Attorney-General and ascertained from him the sum which the Province would likely pay for the Indians' rights. At this interview the Attorney-General informed the defendant that H. O. Alexander had, in the previous year, devoted some time to a like enterprise without success, and intimated that defendant should associate Alexander with the present scheme. On his return from that interview the defendant informed plaintiff of this suggestion, to which he assented, and also mentioned it to Alexander. The latter professed to deride the idea that the plaintiff and defendant should reach an agreement with the Indians. Defendant promised Alexander that if he, the defendant, succeeded, he would give half what he made to Alexander. This inspired in Alexander a reciprocal impulse of generosity, which led him to say a day or two later:

"Read, you made me a sporting proposition the other day, I will tell you what I will do. If I ever put that through at any future day, I will give you half what I make."

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Some days later plaintiff and defendant were negotiating with the Indians at a meeting of the band, and had reached a critical stage of the negotiations, when defendant made an excuse, left the meeting, and returned to Vancouver, leaving the plaintiff with the Indians. On arriving at his house the defendant telephoned to Alexander that he had failed with the Indians. This was on Saturday night. On Monday or Tuesday Alexander got from defendant the form of agreement which defendant had been endeavouring to get the Indians to accept, and, taking defendant with him "as a witness," they attended a meeting of the Indians which appears to have been a continuation of the one which defendant had left. They procured the exclusion of the plaintiff from the assembly, and secured the consent of the Indians to the contract in the form prepared by defendant, but on somewhat more liberal terms to the Indians.

The transaction was subsequently carried out by the Indians and the Provincial Government, and resulted in a profit to the

promoters of slightly under $80,000, of which Alexander made defendant a "present" of half. When the plaintiff demanded his share, defendant dismissed him with this letter:

"This is to confirm what I have stated to you, namely, that Alexander does not recognize you at all in the transfer of the Kitsilano reserve."

Plaintiff then brought this action for the said $20,000.

The impression which the evidence leaves on my mind is very unfavourable to the defendant. I do not suggest that Alexander was a party to defendant's attempted betrayal of the plaintiff. He merely assisted in bringing the sale to completion, and divided with defendant the profit which resulted from that sale. The defendant, in effect, transferred the conduct of the matter to Alexander because, as I am convinced, from what he learned at the meeting of the band, he felt that his hands would thereby be strengthened. But, assuming that but for Alexander's assistance the Indians could not have been induced to make the sale, the defendant could not rid himself of his obligations to the plaintiff by professing to relinquish the transaction and taking advantage of Alexander's "sporting proposition" of a "present" of half the profits. Defendant may have concluded that plaintiff's assistance was of little or no value, indeed, that appears to have been the learned trial judge's view of it, but that cannot affect the plaintiff's rights, which depended not on the value or degree of his influence with the Indians, but on the success of the common enterprise.

The appeal should be allowed, and judgment should be entered for the plaintiff for $20,000 and costs, here and below.

IRVING, J.A.: When Read made his arrangement with the plaintiff, the contract was one of mutual promises. Cole, on his part, promised to use his influence with the Indians to secure the option and to share the profit with Read. Read, on his part, promised to use his influence with the Indians and to share the profit with Cole. I have no doubt that it was perfectly understood between them that they were to work together and in harmony, and that Read was to pose as the man in authority having influence with the Government, and that he was to supply the legal knowledge and prepare all documents necessary for the carrying out of the transaction. The work

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involved the determination of the price that these two men would offer to the Indians, which price was to be something considerably less than the amount of money which the Government was willing to pay. The difference between the price they would have to pay the Indians and the price the Government was willing to pay them was to constitute their profit. It is clear, on the evidence, that this was the understanding between them, as well after, as before Alexander was concerned in the affair. One of the implied terms of the contract was that they should continue to work together until the matter was completed, or either of them could, upon giving the other reasonable notice, put an end to the joint venture. Thereupon it would be open for the one who was willing to continue, to do so, and in continuing he would be entitled to use the knowledge that he had received from the other and the documents that had been prepared to carry out the joint scheme. If either party intended to withdraw, the notice of discontinuance ought to be a reasonable and definite one, so that the person continuing in the venture might be in a position to increase the offer to the Indians. This increase could be a substantial one, as the difference between the price that the Government was to pay and the price that was to be paid to the Indians would now not be divided between two. Mr. Read ignored all his duties in this respect. After several interviews had been had, he left Cole one night still in consultation with the Indians, and without consulting Cole, put himself into communication with Alexander and turned over to him the papers he had prepared at Cole's request. In a word, Read betrayed Cole. At the final meeting when the $11,000 was offered, Cole, who was at the door, was not permitted to enter by reason of Alexander's inquiry addressed to the Indians. It was Read who informed Alexander that Cole was present. Having regard to the expectations created in Read's breast by Alexander's gratituous promises, and having regard to the assistance given by Read to Alexander before and at that final meeting, I have no hestitation in reaching the conclusion that Read jockeyed Cole in order that Alexander might earn the commission, and I infer that in doing so he was actuated by the promise that Alexander had made to him. If

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not, why should he actively do anything to frustrate Cole's efforts?

Under the contract between them Cole had done a great deal of work. He had brought the matter to Read's notice when he came to consult him as his solicitor, and, irrespective of that confidential relationship, he was entitled to rely on Read's assistance. What Read did in helping Alexander made it less probable that Cole would succeed. That seems to me a violation of the contract with Cole, and brings Read within the doctrine of *Inchbald* v. *Western Neilgherry Coffee Co.* (1864), 17 C.B.N.S. 733, where Willes, J. at p. 741 says:

"I apprehend that wherever money is to be paid by one man to another upon a given event, the party upon whom is cast the obligation to pay is liable to the party who is to receive the money, if he does any act which prevents or makes it less probable that he should receive it."

IRVING, J.A.

In short, Read has received some $39,000 as the price of his betrayal of Cole. I would give judgment against him for $20,000, the amount he promised to pay under his contract with Cole.

MARTIN, J.A.: This appeal turns upon a bald question of fact, *viz.*: that if the evidence of Alexander is to be given full effect to, then the plaintiff has no legal claim, because Alexander's successful negotiations with the Indians were entirely on his own account, after those of Read had failed. The Court below has accepted Alexander's account of the matter as true, and I see nothing to warrant us in coming to a different conclusion. The way in which Read most fortunately happened to profit by Alexander's bounty is satisfactorily explained, and leaves the plaintiff with no legal claim upon Read, though I feel impelled to say that I should have thought Read would have been glad to be at least as generous towards Cole (who admittedly was of much assistance to him in his fruitless negotiations) as Alexander was to him (Read), though he, Read, was of no assistance to Alexander.

MARTIN, J.A.

Appeal allowed, Martin, J.A. dissenting.

Solicitors for appellant: *Farris & Emerson.*
Solicitors for respondent: *Tupper, Kitto & Wightman.*

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Fraudulent preference—Insolvency of tranferor—Onus of proof—Knowledge of transferee—Failure of transferee to give evidence—Pressure—Fraudulent Preferences Act, R.S.B.C. 1911, Cap. 94, Sec. 3.

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In order to defeat a transfer of property to a creditor on the ground of fraudulent preference, the creditor must be shewn to have concurred therein, and the burden of proof to establish the *mala fides* of the creditor rests upon the complainant.

If *bona-fide* pressure is exercised by the transferee upon the debtor, the transfer should be upheld even if the inference that the transferee knew of the debtor's financial difficulties is justified on the evidence.

Adams and Burns v. *Bank of Montreal* (1901), 32 S.C.R. 719, followed.

The absence of the defendant at the trial is not a ground to give rise to suspicion that the transaction in question was fraudulent, when a reputable physician testifies that it was on his advice and not at the desire of the defendant that she did not attend for examination.

Per IRVING and GALLIHER, JJ.A. (dissenting): In a case of this kind the decision of the judge of first instance is of great weight, and it is always necessary that there should be strong ground before he is overthrown as to the inferences at which he has arrived.

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

Statement

APPEAL by defendant from a decision of HUNTER, C.J.B.C. at the trial, in Vancouver, on the 31st of October, 1913, in an action to set aside a bill of sale for $3,000 as having been made to defeat the plaintiff and other creditors of the defendant. The defendant resided with and acted as housekeeper for her brother, who gave her the bill of sale sued on three months after he had confessed judgment in favour of the plaintiff for over $50,000, she taking over the properties set out in the bill of sale (including horses) and keeping them at her own expense. The defence was that the brother was heavily indebted to the sister, and that it was merely through legitimate pressure on him to either pay or give security for his indebtedness that the transfer was made. The learned Chief Justice came to the conclusion, on the evidence, that the surrounding circumstances were suspicious, and put the burden of proof on the defendant to support the validity of the transaction. The only witness called in support of the defendant was the brother himself, who testified that

the property was transferred to liquidate an outstanding claim for unpaid salary pressed by the sister; that they were compelled to reduce their living expenses, and that the idea was to reduce these expenses by getting rid of the property (horses and carriages) transferred. There was no corroborative evidence produced in the shape of cheques, books of account, or correspondence between the brother and sister. The plaintiff's claim was, therefore, allowed, and the bill of sale set aside. Defendant appealed.

Statement

The appeal was argued at Victoria on the 2nd of June, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

M. A. Macdonald, for appellant: The question is whether Smith was insolvent when he executed a bill of sale to his sister. There is no question but that he owed her this money. Smith is not a party to the action, so it is only a question of the conduct of the defendant that affects the case. To set aside the transaction it must be shewn that she took part in the fraudulent intent, and the onus is on the plaintiff to establish this. The learned trial judge put the onus on us largely because the defendant did not appear, but the doctor in attendance on her testified that she was too ill to appear. On the question of insolvency, and the necessity of shewing that defendant had lent herself to the fraud, see *Mulcahy* v. *Archibald* (1898), 28 S.C.R. 523 at pp. 528-9; *Adams and Burns* v. *Bank of Montreal* (1899), 8 B.C. 314; 32 S.C.R. 719. On the question of pressure by the creditors under section 3 of the Fraudulent Preferences Act, see *The Molsons Bank* v. *Halter* (1890), 18 S.C.R. 88 at p. 95; *Stephens* v. *McArthur* (1891), 19 S.C.R. 446.

Argument

Burns, for respondent: There is no question but that Smith was hopelessly insolvent at the time the transfer of the horses was made. As to a demand for payment, a demand must be in the way of a threat: see Parker's Frauds on Creditors and Assignments, 191; *In re Ramsay. Ex parte Deacon* (1913), 2 K.B. 80. The question is whether it is the intention of the debtor to evade the consequences of the refusal to comply with the demand.

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Macdonald, in reply: On the question of evidence of insolvency, see *Rae* v. *McDonald* (1886), 13 Ont. 352 at p. 366.

Cur. adv. vult.

3rd November, 1914.

MACDONALD, C.J.A.: The plaintiff's case is that the bill of sale in question in this action was a fraudulent preference.

Our Fraudulent Preferences Act, R.S.B.C. 1911, Cap. 94, makes a clear distinction between transfers of property made with intent to prefer and those which have that effect. In this it follows the Ontario and Manitoba statutes, as amended since such decisions as *The Molsons Bank* v. *Halter* (1890), 18 S.C.R. 88; and *Stephens* v. *McArthur* (1891), 19 S.C.R. 446, so that now the only distinction between 13 Eliz., c. 5, s. 2, as re-enacted by section 3 (1) (*a*) of our Act, and clause (*b*) of the same section, which declares that transfers, "if made to or for a creditor with intent to give such creditor preference over his other creditors or over any one or more of them as against the creditor or creditors injured, delayed, prejudiced or postponed," shall be utterly void, is that the one relates to transactions with creditors, while the other voids transfers which offend against its provisions, though made to persons who are not creditors of the transferor. The *mala fides* aimed at is expressed in identical language in each. The decisions, therefore, under 13 Eliz. may now be more confidently applied than before the change in the wording and arrangement of the statutes above referred to.

MACDONALD, C.J.A.

As I read the authorities, the better opinion, even before such amendments, was that in order to defeat a transfer of property to a creditor, the creditor must be shewn to have concurred in the fraudulent intent. That opinion, it is manifest, was adopted by the Legislatures making such amendments, and by our own Legislature in passing the statute now under consideration. That the burden of proof to establish the *mala fides* of the defendant rests upon the plaintiff is not open to doubt, and hence, in the absence of proof of notice, or knowledge on the part of the transferee of the transferor's financial embarrassment, the plaintiff will fail to make out a case of intent on

the transferee's part: *Johnson* v. *Hope* (1890), 17 A.R. 10; *Burns and Lewis* v. *Mackay* (1885), 10 Ont. 167.

It is also clear that if there was *bona-fide* pressure exercised by the defendant upon her debtor the transfer should be upheld, even if the inference that she knew of her debtor's financial difficulties be justified on the evidence in this case: *Adams and Burns* v. *Bank of Montreal* (1899), 8 B.C. 314, may be referred to as one of the most recent authorities on this point, and one in which the cases bearing upon it are collected and considered.

The facts, briefly, are that T. J. Smith was indebted to his sister, the defendant, for two years' arrears of wages, amounting to $3,000. The *bona fides* of this debt are not questioned. The only evidence in the case from which any inference can be drawn, either favourable or unfavourable to the defendant on the question of her *bona fides,* is that of her said brother. I will assume for the purposes of this decision that T. J. Smith was insolvent when he executed the bill of sale in question. It may be that the fair inference from the evidence is that he was then insolvent, or knew that he was on the eve of insolvency. I do not find it necessary to decide that question because, in my opinion, the bill of sale was given for valuable consideration, and no want of *bona fides* on the part of the defendant has been shewn.

MACDONALD, C.J.A.

Smith's evidence is to the effect that on the death of his wife, about eight years before the trial, he induced the defendant, who was then a school teacher in one of the other Provinces, to become his housekeeper at a salary of about $1,500 a year. For six years he paid her wages regularly, but for two years before the execution of the bill of sale, owing to illness and absence from business, and pressure upon his financial resources in connection with his large business interests, he had allowed her wages to fall into arrear. She requested payment on several occasions, and finally Smith offered her the horses and other effects described in the bill of sale in full satisfaction of the arrears, which she accepted, and thereafter maintained the horses at her own expense. Smith emphatically affirms that the transaction was *bona fide,* but I do not rely upon that, as, appar-

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ently, the learned trial judge did not accept that statement. Where the burden of proof is on the defendant I accept the finding against her of the learned trial judge, whether expressed or implied in his conclusion, but where the burden is on the plaintiff, I must see whether there is any evidence from which a proper inference can be drawn in support of such an issue. Now, the plaintiff offered no evidence from which it can be inferred that the defendant knew of her brother's financial embarrassment (assuming that he was embarrassed) other than what was given by Smith himself. He says that the only knowledge she could have, so far as he knew, was what she might infer from the fact that he had not been able for some time prior to the execution of the bill of sale to provide as liberally for his domestic establishment as theretofore. Now, unless it could be properly inferred from the fact of retrenchment in household expenses, and his failure to pay her wages in cash, that she knew he was so financially embarrassed as to make it a fraud on his part to offer, and on her part to accept the mode of payment offered her, then the finding of *mala fides* against her cannot be supported.

MACDONALD, C.J.A.

An attempt was made by plaintiff to shew that the goods comprised in the bill of sale were worth very much more than the debt, and that the discrepancy was so great as to brand the transaction with fraud. Doubtless great inadequacy of consideration is a badge of fraud, but such has not been made out in this case. Smith had owned a large number of show horses, kept by him not for profit, but for pleasure. They were a source of expense to him, not of revenue. When he felt the need of retrenchment, he desired to get rid of his stable. The best horses, harness and driving traps were sold to the Provincial Government. He had made efforts to sell some or all the others and had failed. It was then that he gave the bill of sale in question. The evidence does not convince me that the horses and other effects so transferred were saleable at a better price than that at which she took them, at all events, not at a price so much above her debt as to raise a presumption of fraud. I have a recollection that counsel agreed in the statement that the horses had either been sold by the consent of both par-

ties to this action for $3,500, or were to be sold if that price could be obtained, the money realized to abide the result of litigation, but whether I am mistaken in this or not, I am satisfied that the consideration was sufficient and was *bona fide.* Nor is there anything singular in defendant's acceptance of horses in payment of the debt, as it is conceded that she was a horse-woman, and drove and rode these horses in the shows before the transfer of them to her.

The judgment appealed from, as I understand the reasons of the learned judge, rests in no small degree upon circumstances of suspicion, and that it was incumbent upon defendant to testify in her own behalf to remove such suspicion. Without discussing the alleged obligation of a party to remove suspicion, it is enough to say that her counsel moved for a postponement of the trial on the ground that she was unable, by reason of ill-health, to give evidence. The application was supported by the evidence of a reputable physician, who gave it as his opinion that it would be unsafe to permit her to give evidence either at the trial or at her own home in her then condition of health, and that it was on his advice, not at her desire, that she had not been examined. The plaintiff, however, insisted upon proceeding with the trial, and the learned judge refused the postponement. In these circumstances no unfavourable inference can, in my opinion, be drawn from her failure to give evidence.

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In *Burns and Lewis* v. *Mackay, supra,* at pp. 169-70, the learned Chancellor said:

> "The only evidence given at the trial was that of the defendant—the creditor. Although suspicion might lead me to infer that he intended a fraudulent preference of himself, yet the rule of the Court is not to act upon mere suspicion in the absence of affirmative evidence of fraud, or of controlling circumstantial evidence leading to that conclusion."

On the whole, I am of the opinion that the plaintiff has not made out a case of want of *bona fides* on the part of the defendant. There is, as I have already intimated, no positive evidence at all to shew a fraudulent intent, nor are the circumstances such as enable one to say that the defendant took the bill of sale with knowledge of Smith's alleged insolvency, or if she had knowledge, that the pressure she exerted was not *bona fide.*

I would allow the appeal and dismiss the action.

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IRVING, J.A.: The case was decided below on the ground that the evidence of T. J. Smith was not sufficient to support the defence.

In a case of this kind the decision of the judge of first instance is of great weight, and it is always necessary that there should be strong ground before he is overthrown as to the inferences at which he has arrived: *Sweeney* v. *Coote* (1907), A.C. 221. I quite agree with his findings. That T. J. Smith was insolvent when he gave the impeached bill of sale of the 15th of May, 1912, cannot be doubted.

T. J. Smith, who was a mining broker and engaged in the development of some mines, went away from Vancouver in May, 1910, on a trip to Europe. We may assume that he was then in good circumstances. He returned in six months and was ill—so ill that he went to the hospital and could not attend to his business at all for about a year. That would carry us down to November, 1910, but there is some confusion about the dates. He says he was not able to give any satisfactory attention to his business until late in the Fall of 1912. In the heyday of his success he bought, for show purposes, a number of horses, including Credential, who jumped over 7 feet; a hackney stallion—Capulet; Canny Campbell, a thoroughbred mare; a pair of matched carriage mares—Lulu and Daisy Brinkley; two Irish saddle mares—Ballytrasma Lass and Secret Commission; about a dozen carriages, including a gig, a coach, a victoria, a brougham and several buggies. These he transferred to his sister on the 15th of May, 1912, by an absolute bill of sale, the consideration being the sum of $3,000. About the same time he transferred to his brother-in-law Bristow, by another bill of sale, another lot of horses. It is the bill of sale to his sister which is attacked in this action as fraudulent.

The plaintiff Koop had, in August, 1910, lent to T. J. Smith large sums of money. These loans were due in 1911, and in negotiations for an extension of time for repayment, Smith submitted a statement shewing what was available for security for such extension. The properties mentioned included "personal property," $15,000, and various shares—mining and otherwise. The total value placed against these securities by Smith was

$400,695. The incumbrances thereon amounted to $155,998. He was also indebted to the Bank of Ottawa in the sum of $50,000. According to his calculations he owed about $200,000 and had assets worth $400,000. But he was unable to sell his shares, his horses went lame, or proved unsound; his health failed, and he was compelled to reduce his household expenditure. He was, after May, 1910, unable to pay his sister the amount which he says he had agreed to pay her for looking after his household, and on the 13th of February, 1912, he confessed judgment in favour of Koop, the present plaintiff, to the amount of $50,000, and in the following May gave the impeached bill of sale to his sister and the other bill of sale to Bristow. In September, 1912, Koop signed final judgment and issued execution, and then (17th October, 1912) brought this action.

It is said that Smith was not insolvent on the 15th of May, 1912. I do not think anyone would undertake to say he was solvent. In May, 1912, T. J. Smith was in such a condition that he could not resist payment of the debts that had then matured; he could not await his opportunities; and he could not sell. The fair inference was that he could not realize enough by the sale of his assets to meet his liabilities. He was, in my opinion, in insolvent circumstances, within the meaning of the statute. To succeed in an action of this kind, it must be established that the grantee of the bill of sale was aware that the grantor was in insolvent circumstances.

IRVING, J.A.

The grantee is the plaintiff's sister. She had been living under his roof for eight years, five or six of which we may regard as years of plenty. But in May, 1910, or shortly after the change had occurred, there was difficulty in finding money to meet the household expenses. She was authorized to sell the horses if she could find purchasers. She herself had to stand out of her own allowance for two years. Is it possible to draw the inference that she did not know the true condition of affairs? Having regard to their close relationship, their long association under the same roof, and participation in the same expensive amusement of exhibiting horses, it seems impossible to draw any such inference. Family transactions by which creditors are defeated are ordinarily looked upon by Courts with a good

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deal of suspicion. Bump on Fraudulent Conveyances, 4th Ed., at p. 51 says:

"Anything out of the usual course of business is a sign of fraud."

And at p. 54:

"The omission of the grantee to testify affords ground for an unfavourable presumption, and frequently exercises an important influence upon the final determination of the question of fraud."

The defendant, it is said, was too ill to attend to give evidence. That is unfortunate: Kerr on Fraud and Mistake, p. 384. An excuse for the absence of a necessary and material witness cannot supply the evidence. I would draw the inference that T. J. Smith and the defendant entertained the hope that by putting the horses in her name they would be safe from attack by execution creditors, and that when the mining shares improved in value he could receive them back again.

The contention that this was a *bona-fide* transfer seems to me absurd. Here we have a lady who has received no salary for two years asked to accept in satisfaction for a debt of $3,000 a dozen horses, the keep of which, even if they were turned out to grass, would amount to $70 a month, and it is said that she did keep them. It seems to me they must have been so many white elephants. Further, the obligation entered into by T. J. Smith with the plaintiff, and upon which the alleged indebtedness is based, has been questioned. The only testimony we have as to that is from T. J. Smith, unsupported by any corroborating

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evidence. On the death of his wife some eight years ago, the defendant, Miss Smith, was teaching school in Manitoba at $75 per month. Smith's evidence is in these words: "I told her [if she would keep house for me] she would get not less than twice as much as she was earning as a school teacher." That may or may not amount to a contract to pay. The witness wishes to convey the idea that it was a definite contract for a sum of $1,500 a year, but he has avoided saying so in so many words. Does he say anything more than this: "You will be twice as well off out in British Columbia with me as you will be in Manitoba by yourself?" Promises of this kind are difficult to bring home to the promisor: *cf. Moorehouse* v. *Colvin* (1851), 15 Beav. 341; affirmed (1852), 21 L.J., Ch. 782, on acount of their vagueness, or on account of the fact that they were not

made or accepted with the intention of establishing a contractual arrangement, but simply with an understanding that he, the promisor, would take care of her and that her condition in life would be very much bettered. The promisor has decidedly the best of it, because a promise of this indefinite kind, though it creates no enforceable contract, is effectual to this extent: it prevents the promisee from falling back on any promise to pay on a *quantum meruit* basis: *cf. Roberts* v. *Smith* (1859), 4 H. & N. 315; 28 L.J., Ex. 164.

It is by no means uncommon in insolvency cases to find stale demands being put forward by members of the insolvent's household for services truly rendered under similar circumstances. In order that an offer may become binding by acceptance it must be made in contemplation of legal consequences; a mere statement of intention will not constitute a binding promise, though acted upon by the party to whom it is made: *cf. In re Fickus. Farina* v. *Fickus* (1900), 1 Ch. 331; *Montreal Gas Company* v. *Vasey* (1900), A.C. 595.

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The best proof of the existence of an intention to create legal relations in such a case as is set up here would be the production of the correspondence, and the proof of payments regularly made in consequence, prior to the insolvency. These proofs were not produced, and, therefore, I am not satisfied that the arrangement between T. J. Smith and the plaintiff was not made in contemplation of legal consequences. I think the admitted failure to pay anything for two years supports this conclusion. I would dismiss the appeal.

MARTIN, J.A.: This is an action to set aside a bill of sale of certain horses to the defendant, and it was not begun till more than 60 days thereafter, so is not within subsection (2*a*) of section 3 of the Fraudulent Preferences Act. There is very little dispute on the facts, the real question being the inference to be drawn from them. The submission is that the learned trial judge has not correctly applied the law relating to preference and pressure, which essentially remains as it was when decided in *Adams and Burns* v. *Bank of Montreal* (1899), 8 B.C. 314, affirmed by the Supreme Court of Canada (1901),

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32 S.C.R. 719, and leave to appeal refused by the Privy Council. I think this submission is correct, and that there was clearly good consideration and legal pressure. In addition, I am of the opinion that the fair value of the horses was not, on the evidence, more than $3,000, which is the consideration given in the bill of sale. We were invited to assume that the defendant had no means of her own and, therefore, the sale was obviously a sham one, as the keep of the horses pending a sale thereof would be only an expensive burden upon her which she could not bear. But the evidence is that the defendant had for about eight years been housekeeper for her brother at the salary of about $1,500 per annum, having left Manitoba, where she was a school teacher, to go to Vancouver for that purpose—at least double the salary she had been getting as a teacher, and her board. So, if anything is to be assumed, it should be that the defendant, in all that time, would have saved something at least. But it is quite sure that it cannot be assumed she was penniless, even though she was not paid for about two years.

MARTIN, J.A.

I have only to add, with respect to the fact that the defendant's evidence was not given, that she applied, supported by reputable medical testimony, for a postponement of the trial on account of her illness, which was refused, as her severe nervous disorder seemed to be of such a nature that it could not be said when she would be fit to appear in Court, and therefore the trial judge held that "it is quite obvious that the plaintiff's rights cannot be deferred indefinitely, and therefore the case had to go on." In such circumstances, no unfavourable inference could fairly be drawn against her, but apart from that, the case against her fails of itself.

The appeal, therefore, should be allowed.

GALLIHER, J.A.

GALLIHER, J.A.: I agree with IRVING, J.A. for the reasons given.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The appeal is one from the decision of HUNTER, C.J.B.C., the action being one brought to set aside a bill of sale, of date the 15th of May, 1912, given by Thomas J. Smith, the brother of the defendant (appellant), covering a number of horses, carriages and harness.

The evidence shews that the defendant, the sister of Thomas J. Smith, left other employment and went to reside with her brother, and her salary as housekeeper was to be $1,500 a year, and at the time of the making of the bill of sale had been some eight years in this employment, receiving her salary, and had been paid the salary up to May, 1910, when her brother went to England. Besides acting as housekeeper, the defendant exhibited her brother's horses at various horse shows in different places, riding and driving them, being a skilled person in such work. And since the giving of the bill of sale the horses have been kept at the expense of the defendant, and she has had possession of them. The consideration, as expressed in the bill of sale, is stated to be $3,000, and the defendant made the affidavit required by statute, under date of the 18th of May, 1912, that the assignment made was *bona fide* and for valuable consideration, and that it was not made for the purpose of enabling the grantee (the defendant) to hold the goods mentioned therein as against the creditors of the grantor (Thomas J. Smith), nor for the purpose of protecting the goods against the creditors of the grantor, or of preventing the creditors of the grantor from obtaining payment of any claim against him.

The plaintiff (respondent) in the action is a judgment creditor, having taken from Thomas J. Smith a confession of judgment, under date the 13th of February, 1912, for the sum of $63,698.77 and interest and costs. Judgment, however, was not entered up until the 18th of September, 1912, and then entered for the sum of $53,917.19 and costs of suit—that is, there had been paid in the interim a sum of approximately $10,000.

MCPHILLIPS, J.A.

The contention of the plaintiff at the trial, and given effect to by the learned Chief Justice, was that the bill of sale was given with the intent to defeat, hinder, delay and prejudice the plaintiff and the other creditors of Thomas J. Smith, and that the bill of sale was null and void under the Fraudulent Preferences Act and the Fraudulent Conveyance Act. It is to be noted that the judgment of the learned Chief Justice, as contained in the appeal book, does not specifically set forth the findings of fact which, in my opinion, with all respect, are

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called for when a conveyance is set aside as being void under the Fraudulent Preferences and the Fraudulent Conveyance Acts, or either of them. What is found is this: that a confession of judgment being given on the 13th of February, 1912, the giving of the bill of sale some three months afterwards, being a sale by a brother to a sister, constituted suspicious circumstances, and that the burden of proof rested upon the defendant to support the validity of the transaction, and the defendant did not appear at the trial. Again, with all respect, I cannot subscribe to this view of the law. It was the bounden duty of the plaintiff to establish by evidence that the transaction was one that could reasonably, fairly and justly be impeached upon statutory grounds, and failing that, the conveyance should be allowed to stand. In my opinion, no cause of action such as was alleged by the plaintiff existed upon the facts as disclosed at the trial, and the judgment cannot be supported.

A striking commentary upon the contention of the plaintiff is the plaintiff's own action and conduct. What do we find the plaintiff doing? Taking a confession of judgment from Thomas J. Smith on the 13th of February, 1912. What was Thomas J. Smith's financial condition at that time? It can only be assumed that the plaintiff believed him to be solvent, otherwise the confession of judgment would be void under the invoked statutes. To indicate solvency, the plaintiff's claim was reduced by nearly $10,000 in the space of seven months, yet he complains of a bill of sale given to the defendant about three months after the giving of the confession of judgment to himself. A further circumstance that calls for consideration—and which indicates to my mind that the plaintiff did not consider that Thomas J. Smith was in insolvent circumstances, and unable to pay his debts in full—is the non-entry of the judgment confessed on the 13th of February, 1912, and not entered until the 15th of September, 1912. The entry of this judgment at the time when given would have enabled the plaintiff to proceed to execution against the personal property of the judgment debtor, and the horses, the subject-matter of the bill of sale, could have been levied upon and a certificate of

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judgment could have been registered against the real property of the judgment debtor. This course was not adopted, the plaintiff no doubt preferring to wait and receive the substantial sum evidently received by way of cash payments, and then, notwithstanding this substantial advantage attained, it is sought to be made out that within three months of the giving of the confession of judgment, and during the time substantial payments were made to the plaintiff, Thomas J. Smith was in insolvent circumstances and unable to pay his debts in full, and that in such circumstances the impeached bill of sale was given, and that in the giving of it Thomas J. Smith intended to delay, hinder or defraud his creditors. Now, this was the case the plaintiff had to make out. If it were the case, the plaintiff was a substantial gainer, as during this time of insolvency he had received substantial payments, and if these payments were made by Thomas J. Smith when in insolvent circumstances, they could, if attached within 60 days thereafter, have been declared utterly void: see Fraudulent Preferences Act, section 3. Therefore, approaching the facts of the present case as presented, it is conclusively impressed upon me that no such facts existed at the time of the making of the bill of sale which would warrant or support the same being set aside.

Certain statements were put in at the trial shewing the assets of Thomas J. Smith, and in the plaintiff's case exhibit 6 was put in, dated September 8th, 1911. Comparing that statement with the statement which went in upon the cross-examination of Gerrard G. Koop (a son of the plaintiff), and which is marked as exhibit 12, there is ample evidence to rebut any evidence (although I fail to see any) given upon the part of the plaintiff that Thomas J. Smith was at the time of the giving of the bill of sale in insolvent circumstances, or on the eve of insolvency, or that the facts were such as would entitle the bill of sale being set aside. It is a matter for remark that when exhibit 12 was introduced in evidence it was accepted as being a statement of the assets of Thomas J. Smith, as examined into by Messrs. Riddell, Stead, Hodges & Winter, of the City of Vancouver, chartered accountants. Now, this statement is very complete, and is in no way impugned. In fact, as stated, it

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would seem to have been admitted in evidence as portraying the actual state of Thomas J. Smith's business affairs and assets as of the 6th of September, 1912, and would indicate that there was an estimated surplus of $445,179.43. It is only necessary to glance over the statement to see that the properties and holdings of Thomas J. Smith are very considerable, and no doubt of possibly fluctuating value, but can it be said, bearing in mind all the attendant facts, and the evidence as adduced at the trial. that it has been demonstrated—as it should be demonstrated in a Court of law, and proved as it should be proved in a Court of law—that Thomas J. Smith, at the time of the giving of the bill of sale, namely, on the 15th of May, 1912, was in insolvent circumstances and in any way constrained by the statute law? See *Uplands, Limited* v. *Goodacre* (1914), 50 S.C.R. 75, where insolvency was held to be not proved.

In my opinion there can be but one answer, and that is that the plaintiff has absolutely failed to make out a good and sufficient case to successfully impeach the challenged bill of sale.

The plaintiff alleges that he sues on behalf of himself and all other creditors of Thomas J. Smith, but it is a matter for remark that no other creditors came forward or gave evidence in the action save one, the Bank of Ottawa, and the bank seems quite satisfied with regard to an indebtedness exceeding $50,000.

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It is true the bank has security, but the plaintiff is also shewn to have security for the indebtedness of Thomas J. Smith to him.

Without further enlarging in detail upon the evidence, it is apparent, upon a careful study of the same, that the plaintiff has fallen far short of establishing the case the law requires established, and evidence even upon which inferences may be drawn is wholly absent.

It is true the learned Chief Justice has drawn inferences from circumstances detailed in his judgment, but, with all respect and deference, I cannot agree with the conclusions arrived at either that the *onus probandi* was shifted to the defence, or that there was any need for corroborative evidence of the *bona fides* of the transaction, *i.e.*, the giving of the bill of sale. It cannot be gainsaid, upon the evidence, that Thomas J.

Smith was indebted to the defendant in the amount which formed the consideration for the bill of sale, and the affidavit of *bona fides,* as required by statute, was made by the defendant.

It would appear that the defendant has been ill for some time, and was ill at the time of the trial, and the defence desired a postponement of the trial. This was opposed on the part of the plaintiff, and the action was tried, necessarily without the evidence of the defendant. Dr. W. D. Brydon-Jack, the family physician, was called, and he testified to the inability of the defendant to be present at the trial, or examined in the action. The evidence of a physician of undoubted standing, in my opinion, must be taken and accepted in a Court of law when the physician is speaking as to the state of health of his patient. Of course, there might be a case where something tangible is developed and where circumstances might call for further inquiry, but nothing of that kind was here disclosed. I cannot at all agree—and it is with respect and deference to the learned Chief Justice I state it—to the proposition that in the present case an independent physician should have been called. I know of no rule of law of this nature as affecting the evidence of a physician. What physician can better speak to the state of health of the patient than the family physician? And what interest can actuate, or would be deemed to actuate a physician in the giving of his evidence other than to give it fairly and frankly, and in accordance with the fact? It would have to be evidence of the most cogent character, and evidence that would affect the professional standing of the physician which would have to be introduced to in any way tend to challenge or weaken the evidence of the attending physician. Therefore, in my opinion, no inference should have been drawn adverse to the defendant because of the fact that she was not present at the trial and did not give evidence thereat.

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In my opinion, the plaintiff failed utterly in making out any such case as warranted the setting aside of a conveyance which, upon the facts, must be accepted as being made for good and sufficient consideration in law, and at a time and under circumstances that were not affected by the existing statute law, and

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that, therefore, the transaction—the giving of the bill of sale—was a valid and effective sale.

Now, to deal with the law as affecting the impeached transaction, if it be that the giving of the bill of sale operated to prefer the defendant to other creditors, and that ever was the intention, which is not proved, the transaction does not offend against the Fraudulent Conveyance Act if the transaction be honestly entered into, *i.e.*, be *bona fide*. Giffard, L.J. said in *Alton* v. *Harrison* (1869), 38 L.J., Ch. 669 at p. 671:

> "I have no hestitation in saying that, if the deed is *bona fide*, it makes no difference, so far as regards the statute of Elizabeth, whether or not it includes the whole property. By *bona fide* I mean that the deed is intended to operate according to its tenor, and is not a mere cloak for providing something for the benefit of the person who makes it."

See also *Ex parte Games. In re Bamford* (1879), 12 Ch.D. 314; *In re Reis; Ex parte Clough* (1904), 2 K.B. 769; 73 L.J., K.B. 929; affirmed (1905), A.C. 442; 74 L.J., K.B. 918; *Mulcahy* v. *Archibald* (1898), 28 S.C.R. 523, Sedgewick, J. at pp. 528-9.

With respect to the application of the Fraudulent Preferences Act, in my opinion, no case has been made out, as it was incumbent upon the plaintiff to have shewn that the giving of the bill of sale was an unfair or improper transaction, and, further, there must not only be proved a preference, but a fraudulent preference: see *The Bank of Australasia* v. *Harris* (1861), 15 Moore, P.C. 97 and 116; *The Molsons Bank* v. *Halter* (1891), 18 S.C.R. 88; *Stephens* v. *McArthur* (1891), 19 S.C.R. 446, Strong, J. at pp. 452-6; *Rae* v. *McDonald* (1886), 13 Ont. 352 at pp. 366-7.

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With respect to the suspicious nature of the transaction and where rests the onus—as remarked upon by the learned Chief Justice—it is noteworthy that in *Ex parte Lancaster; In re Marsden* (1883), 53 L.J., Ch. 1123, suspicious circumstances were considered, being a case where fraudulent preference was alleged. Cotton, L.J. at pp. 1124-5 said:

> "Now undoubtedly the circumstances of the case are suspicious. There can be no doubt about that . . . . But what we have to consider is, not what the object of the father-in-law was, but whether the son-in-law acted as he did in order to give his father-in-law a preference. The words of the statute are, 'with a view to giving such creditor a preference over the

other creditors.' That must mean that it is done substantially with the object of giving a preference . . . . I cannot think that the proper inference to be drawn from the evidence is that the debtor did what he did in order to give his father-in-law a preference over the other creditors. This being a matter which it is for the appellant to make out—not, of course, conclusively, but so as to satisfy us—in my opinion he has failed to discharge the onus, and the appeal must be dismissed."

Also see *In re Laurie; Ex parte Green* (1898), 67 L.J., Q.B. 431.

In my opinion, the transaction impeached was valid. It therefore follows that, in my opinion, the appeal should be allowed and the judgment of the Court below set aside, with costs here and in the Court below to the appellant.

Appeal allowed, Irving and Galliher, JJ.A. dissenting.

Solicitors for appellant: *Russell, Mowat, Hancox & Farris.*
Solicitors for respondent: *Burns & Walkem.*

THE DOMINION TRUST COMPANY, LIMITED v. MASTERTON.

Estoppel—Action for possession of premises—Mesne profits—Res judicata.

Although a judgment in an action for ejectment may not always create an estoppel, it does so where the title to the land itself and the permanent right of possession have been tried and determined.

APPEAL by plaintiff Company from a decision of MORRISON, J. at Vancouver on the 26th of September, 1913, dismissing the action brought to recover possession of a house and lot. The defendant purchased the land in question from a firm of builders and contractors, and the latter proceeded to build upon it under the terms of the agreement. He made certain payments, but the firm getting into difficulties, he, for his own protection, paid the succeeding instalments into Court. William George, the original owner of the land, and father of one of the firm of contractors, after authorizing the firm to erect buildings thereon with a view to making sales, conveyed the land to the plaintiff Company in trust for the contracting firm. A dispute

Statement

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arose with the defendant as to the price of certain extras, and the Company brought action for ejectment, but before the trial William George was substituted as plaintiff, owing to the transfer to the Company not having been registered. The action was then tried on the merits and dismissed. The plaintiff Company later registered the transfer and brought this action. The trial judge was of opinion that the plaintiff Company was precluded by the result of the first action, and dismissed the claim. The plaintiff appealed.

Statement

The appeal was argued at Victoria on the 4th of June, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Brydon-Jack, for the appellant: This is an action for ejectment. The main defence is *res judicata,* but it does not apply in actions for the possession of land. In the first action we could not prove our title, but in this action we have produced our certificate, so there is no question as to title: see Halsbury's Laws of England, Vol. 13, pp. 59, 349, and 354 (par. 486), and Vol. 24, p. 329 (par. 612); *Earl of Bath* v. *Sherwin* (1709), 4 Bro. P.C. 373; *Devonsher* v. *Newenham* (1804), 2 Sch. & Lef. 208. The question of *mesne* profits is before the Court, and we are entitled to reasonable rental while they are in possession.

M. A. Macdonald (on the same side): The registered holder of real estate, unless he has knowledge of a former transfer, is entitled to possession of the property: *Chapman* v. *Edwards, Clark and Benson* (1911), 16 B.C. 334; *Goddard* v. *Slingerland, ib.* 329; *Asher* v. *Whitlock* (1865), L.R. 1 Q.B. 1.

S. S. Taylor, K.C., for respondent: Apart from the Land Registry Act, plaintiff cannot succeed. As to their contention that they are entitled to possession under the Act, see *Entwisle* v. *Lenz & Leiser* (1908), 14 B.C. 51; *Westfall* v. *Stewart and Griffith* (1907), 13 B.C. 111; *Goddard* v. *Slingerland, supra*; *Jellett* v. *Wilkie* (1896), 26 S.C.R. 282. On the question of *res judicata,* it was on the first action that the contest was decided. There cannot be two actions in the same cause or matter: see *Doe d. Strode* v. *Seaton* (1835), 2 C.M. & R. 728.

Macdonald, in reply.

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MACDONALD, C.J.A.: The appellant, in 1912, brought an action against the respondent, claiming possession of the real property in question in this action. That action was, after a trial, dismissed. It then brought this action, claiming the same relief. Respondent relies on estoppel. The record and the evidence in the former action are before us, and shew that an amendment was made at the former trial by which William George was, at the request of the appellant's counsel, and on his undertaking to obtain George's consent, added as a party plaintiff. The reason for this amendment clearly appears: William George was the registered owner of the land, but had conveyed it to the appellant in trust, ultimately, for the benefit of George's children. As this conveyance had not then been registered, appellant's counsel was met with the difficulty created by section 104 of the Land Registry Act, which he surmounted by obtaining said amendment. The trial, with the assent of all parties, was then proceeded with, with the result that judgment was given in favour of the respondent on the merits.

The facts, shortly, are that William George authorized his son and his son's partner to erect buildings on lands belonging to the father, with a view to selling the same. The partners, with the father's consent, agreed to sell the land and building in question in this action to the respondent for $2,416, payable in instalments. Before the building was completed the respondent was let into possession. A dispute arose between the parties with respect to some alleged extras put into the building. William George claimed that the price of the alleged extras should be added to the purchase price of the property. On defendant's refusal to consent to this, the said first action was brought by appellant, to whom the property had in the meantime been conveyed in trust as aforesaid. The real dispute between the parties, therefore, was as to the recovery of the price of the extras. After the dismissal of the first action, the appellant registered the trust deed and brought the second action, which raised precisely the same issues as were raised in the first action. Had the appellant not consented to the said

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amendment and proceeded with the trial on its merits, I should have had to consider its rights apart from those of the immediate parties to the transaction, but in view of the course taken by appellant at the first trial, I think it is estopped from setting up the case now insisted on.

The appellant's whole argument was that there can be no estoppel in ejectment cases. That is too broad a statement. *Doe d. Davies* v. *Evans* (1841), 9 M. & W. 48, is a good illustration of the application of the doctrine of estoppel to possessory actions. The first action in that case failed because the termination of the tenancy was not proven, and, therefore, manifestly it would have been absurd to hold that the tenant could thereafter never be ejected, though in another action termination of the tenancy were clearly proved. In such cases it is the possessory title for the time being which is in issue. In the case before us it was the title to the land itself and the right of possession forever which was tried and determined in the first action. Apart, therefore, from the merits, which appear to be entirely with the respondent, I think the action was rightly dismissed on the ground that the claim therein made was *res judicata.*

MACDONALD, C.J.A.

I would dismiss the appeal.

IRVING, J.A.: I think this judgment can be supported on the ground taken by the learned trial judge. Although *res judicata* cannot be regarded in all cases as an answer to an action for possession of real estate: see *Doe d. Strode* v. *Seaton* (1835), 2 C.M. & R. 728; 5 L.J., Ex. 73; Tyr. & G. 19, yet, in the circumstances of this case I think it is an answer.

The learned trial judge did not deal with the second point, namely, that the conveyance of the 4th of September, under which the plaintiff obtained its certificate of title, was a fraudulent device to obtain an advantage under the Land Registry Act. On that point the defendant has a good defence to an action brought by William George for possession of this land. The question now is as to sufficiency of that defence in an action brought by the present plaintiff in the absence of a counterclaim to set aside the conveyance from George to the plaintiff as voluntary and to rectify the register of the title to the lots in question.

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In the case of *Loke Yew* v. *Port Swettenham Rubber Company, Limited* (1913), A.C. 491 at p. 504, the powers and duty of a Court to direct rectification of a register—even in countries where registration is compulsory, by causing fresh entries to be made or the correction of existing entries—to carry out the principle that (where rights of third parties do not intervene) no person can better his position by doing that which it is not honest to do, are considered. On the power of the Court to make such rectification, the cases of *Hodson* v. *Sharpe* (1808), 10 East 350, and *Battison* v. *Hobson* (1896), 2 Ch. 403, may be referred to.

IRVING, J.A.

The principle on which the duty of the Court rests is one of general application, and has been acted upon by this Court in *Chapman* v. *Edwards, Clark and Benson* (1911), 16 B.C. 334.

On the second ground I am of opinion that the defendant is entitled to succeed.

I would dismiss the appeal and the action.

MARTIN, J.A.: I agree that upon the issue defined by the pleadings in this and the former action, and because of the substitution of a new plaintiff, with the consent of the present plaintiff, said issue must be deemed to be *res judicata* by the result of the former action, and, therefore, the appeal should be dismissed. It should not be forgotten that formerly, in purely ejectment actions, there were no pleadings (Bullen and Leake's Precedents of Pleading, 6th Ed., 5), which explains the reason for certain decisions. Here the title was pleaded and determined. Holding this view, it is unnecessary to express an opinion on any other point.

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GALLIHER, J.A.: This was an action to recover possession and for *mesne* profits. The case was first heard by CLEMENT, J. on the 31st of January, 1913. At the time of the trial the Trust Company held a trust deed from William George, but were not the registered owners of the land in question, the registered title being in William George. Objection was taken that the Trust Company could not maintain the action by reason of section 104, R.S.B.C. 1911, Cap. 127, and the learned trial judge gave effect to that contention, but substi-

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tuted William George, the registered owner, as plaintiff. The case was fully tried out and judgment given dismissing the action, with costs, against both William George and the Company.

Subsequent to the trial plaintiff became the registered owner of the property in question, and brought this action on the 28th of March, 1913. To this the defendant pleaded *res judicata,* and also claimed right to possession by virtue of an agreement of sale from Granger George & Co. as vendors, and the defendant as purchaser, which agreement was ratified by William George, the owner of the property, by agreement under seal prior to the said William George having any dealings with the plaintiff, which facts were known to the plaintiff. This latter plea was in issue in the former trial.

The case came on for hearing before MORRISON, J. on the 24th of September, 1913, who held that the defendant was entitled to plead the previous trial, and had done so effectually, and dismissed the action. From this judgment the appeal is taken.

It was submitted by appellant that the doctrine of *res judicata* does not apply to actions in ejectment, and several cases were cited, and reference made to Halsbury's Laws of England, Vol. 13, pp. 49, 349 and 354; also Vol. 24, par. 612. This latter paragraph reads as follows:

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"Judgment in the action, being merely for the possession of the property, is not conclusive as to the title of the parties. It follows that an unsuccessful claimant may immediately commence another action . . . ."

If the judgment in the former trial had been simply that the Trust Company had no status to maintain the action by reason of section 104 of the Land Registry Act, I quite agree that they could, after they had overcome that objection, have brought a new action of ejectment. But that is not the position of the appellant.

At the first trial William George, the registered owner, was substituted as plaintiff, and the whole matter as to dealings between Granger George & Co., William George, and the defendant, and the right, title and claims of the defendant adjudicated upon, the only dispute between the parties being as to whether the defendant was obliged to pay for certain

extras in connection with a house built upon the premises in question, or whether he was entitled under his agreement, and upon payment of the balance of purchase-money as specified in the agreement, to a conveyance in fee of the property. The learned trial judge found in defendant's favour, and that judgment stands and was not appealed from.

Had the plaintiff been the registered owner of the property when it started its first suit, it could have been in no better position than William George, for whom it held the property in trust, and as the course pursued then was a trial of the whole rights of the respective parties, the judgment, as it stands, unappealed, is a bar to the present action.

The appeal will be dismissed.

MCPHILLIPS, J.A.: The action was one for possession of the east forty feet of lot 27, block 6, subdivision of district lot 153, District of New Westminster. The trial, held on the 24th to the 26th of September, 1913, resulted in the action being dismissed by the learned trial judge.

It was proved that identically the same matter in dispute between the parties had been the subject-matter of a trial on the 31st of January, 1913, before CLEMENT, J., the judgment, as entered following the hearing, reading in its operative part as to the issue tried and determined, as follows:

"This Court doth order and adjudge that The Dominion Trust Company, Limited, or William George are not entitled to possession of the premises known as the east 40 feet of lot 27 in block 6, subdivision of district lot 153 in the District of New Westminster, in the Province of British Columbia, and can recover nothing against the defendant, and that this action be dismissed and that any moneys paid into Court by the defendant be paid out to him forthwith."

The learned counsel for the appellant, Mr. *Brydon-Jack,* quite rightly (see *Doe d. Davies* v. *Evans* (1841), 9 M. & W. 48), in his very careful argument, pointed out that in actions for possession, the judgment in the previous action would not necessarily be conclusive as to title. I did not understand that counsel for the respondent really pressed the point to the extent that the matter in question was *res judicata,* but rather conceded that *res judicata* could not be pleaded, yet the evidence upon the previous trial, and the judgment, was admissible as shewing

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that the self-same matter was the subject of the litigation. There would appear to be authority for the admission of this evidence where the action is between the same parties: see *Doe d. Strode* v. *Seaton* (1835), 2 C.M. & R. 728, 731, 732; 41 R.R. 412.

It would appear that the action first brought to trial was between the same parties as the present action, but at the trial the plaintiff in the present action, The Dominion Trust Company, Limited, was struck out. The portion of the judgment in part above recited, dealing with the striking out, reads as follows:

"The Dominion Trust Company being struck out at the trial as plaintiffs and William George substituted as plaintiff in its stead with the consent of counsel for The Dominion Trust Company and for William George."

In my opinion, upon the facts, the evidence in the former action was admissible. It is patent upon the perusal of same that the present plaintiff was the real plaintiff in the action, William George being introduced as the plaintiff because of the fact that he was the vendor to The Dominion Trust Company, Limited, and was at the time of the trial the registered owner. The action was really the action of the plaintiff, and as it appears in the judgment, the present plaintiff was declared not to be entitled to the possession of the land now called in question in the present action. The present plaintiff was the real litigant in the first action—as in this—and it must be held, upon the facts, that the present plaintiff not only took part at the trial, but had the conduct of the trial. Now, what were the facts adduced at the trial in the first action? Practically the self-same facts adduced at the trial of the present action in all salient features, the only change of situation being the fact that the land in question, instead of being in the name of William George, was registered in the name of The Dominion Trust Company, Limited, and the certificate of title was proved. It is to be noted that the action is not one to establish title to the land, but for possession. That being the case, it may be admitted at once that the present plaintiff is the registered owner of the land, but does it follow that there is the right to possession of the land? In my opinion, this is not a necessary conclusion as a matter of law. Nor do I think that the Land

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Registry Act, in any of its provisions, by way of statutory enactment so declares. Therefore, the question of right of possession to land may be as it in most cases is—a matter of inquiry quite apart from the registered title. Upon the facts, it is clear that the plaintiff was fully aware of the fact that the defendant was equitably entitled to the land under an agreement for sale of date the 1st of February, 1912, and the plaintiff did not acquire a conveyance of the land from William George until the 26th of September, 1912. Further, the plaintiff entered into a trust deed with William George under date the 4th of October, 1912, which included the land in question in this action, which proves beyond question, upon examination of the provisions therein, that the plaintiff was not the purchaser for value of the land in question in this action. Quoting from the trust deed there is found this language:

"Now Know Ye that the said Dominion Trust Company, Limited, doth hereby acknowledge, testify and declare that the said Dominion Trust Company, Limited, doth not claim to have any right in the said land to its own use or benefit, but only to the uses and benefits and upon the trusts hereinafter expressed . . . ."

Therefore, the situation really is that by the action of William George in giving a conveyance of the land in question in this action to the plaintiff without it being set forth therein that it was subject to the agreement for sale of the 1st of February, 1912 (given by Granger George & Co., who held the land under an option from William George, of the 5th of December, 1911), whereby the land was agreed to be sold to the defendant for the sum of $2,416, the plaintiff was enabled to become the registered owner of the land freed from any charge or equitable interest of the defendant.

MCPHILLIPS, J.A.

The certificate of title in favour of the plaintiff, covering the land in question in this action, is of date the 3rd of December, 1912, but, as we have seen, on the 4th of October, 1912, the plaintiff executed a trust deed with William George, disclaiming all interest in the land save in the execution of the trusts therein expressed. In the result, the facts demonstrate beyond peradventure, in my opinion, that there was express notice to the plaintiff of the equitable interest of the defendant in the land in question before the plaintiff acquired the conveyance

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thereof from William George, but if I were wrong in this, certainly before becoming the registered owner of the land in the land registry office. Further, the plaintiff was not a purchaser for value of the land, and, in fact, today hold only as trustees, and from whom? William George, who, unquestionably, was well aware of the defendant's equitable right to the land, subject to performance of the terms of the agreement for sale under which he held. In the result, then, the plaintiff becomes the registered owner of the land by the suppression of the true facts, that is, of the outstanding equitable interest of the defendant in the land, and further, at the time of the conveyance by William George to the plaintiff—the 26th of September, 1912—and down to the trial of the present action, the defendant has been in possession of the land, and I presume is still in possession thereof, *i.e.*, in adverse possession to the plaintiff, the registered owner of the land. The provisions of the Land Registry Act are invoked to entitle the plaintiff being placed in possession of the land. As previously stated, it, in my opinion, does not necessarily follow that registered ownership carries with it right to possession. What does the statute say with respect to a certificate of title? Section 23 of the Land Registry Act reads as follows:

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"23. The registered owner of an absolute fee shall be deemed *prima facie* to be the owner of the land described or referred to in the register for such an estate of freehold as he legally possesses therein, subject only to such registered charges as appear existing thereon and to the rights of the Crown."

In my opinion, this statutory enactment does not determine the right to possession of the land which is called in question in this action. The evidence adduced at the trial of both actions absolutely displaces the *prima facie* title in the plaintiff freed from any right in the defendant. Further, it is noteworthy that notwithstanding the fact that there was issued out of the Supreme Court, in all solemnity, a decree of that Court, of date the 12th of March, 1913, declaring that the plaintiff was not entitled to the possession of the land as against the defendant, the plaintiff proceeded with its application for title to the land, not amending the application and, as I assume, upon some date later than the date of the decree of the 12th of March,

1913, received from out of the land registry office the certificate of title now so strongly relied upon. To indicate about the date when the certificate of title issued, the letter of the 25th of March, 1913, from the plaintiff's solicitors to the defendant, may be looked at. It reads as follows:

"Dear Sir,—You are hereby notified that as you have been a wilful trespasser on the land described as the east forty feet of lot 27, block 6, subdivision of D.L. 153, New Westminster District, since the 3rd of December, 1912, and are now occupying the same without any leave or licence from the owner, you are hereby notified to vacate said land and premises forthwith."

It will be seen that at the date of the application for registration the plaintiff was aware that the defendant was in adverse possession of the land, as the application to register the plaintiff as the owner of the land was of date the 3rd of December, 1912.

The Land Registry Act has to be read as a whole, and it is to be remembered that it was not the intention of the Legislature —nor is it so expressed—that the Land Registry Act is a complete code in itself, and that all real property law, save as set forth in its provisions, has been abrogated. And further, it has been contended that unless there is registration no rights adverse to the registered owner's may be set up. Let a glance be had to the effect of an indefeasible title—a title of greater virtue than the absolute fee which is the title of the plaintiff. It will be seen that even that certificate of title is subject to adverse possession. Section 22, subsection (2) of the Land Registry Act reads as follows:

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"Any certificate of indefeasible title issued under the provisions of this Act shall be void as against the title of any person adversely in actual possession of and rightly entitled to the hereditaments included in such certificate at the time of the application upon which such certificate was granted under this Act."

It is, therefore, apparent that a matter for inquiry and admissible inquiry in the Courts will be: Who was entitled to possession and to the title in the land at the time of the application?

Now, the plaintiff's application for registration to the land in question was of date the 3rd of December, 1912, and there is no question of the plaintiff's knowledge of the adverse possession, as the action first commenced by the plaintiff, against the defendant, alleging the adverse possession of the defendant was

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commenced on the 1st of October, 1912, which action subsequently went to trial and was disposed of, as previously pointed out, by the decree of the Court declaring that the plaintiff was not entitled to the possession of the land.

In view of all the facts, and the determination of the Court in the first action, which, in my opinion, is alone conclusive, it is impossible for the plaintiff to succeed, relying, as it does, wholly upon the certificate of title, and *dehors* the certificate of title the equitable right in the defendant is complete, *i.e.*, the right to the possession of the land in the defendant as against the plaintiff is, in my opinion, unassailable.

With respect to section 104 of the Land Registry Act, in that the defendant's interest in the land remains unregistered, it is strongly urged by counsel for the appellant that the Court is disentitled from giving any effect to the rights of the defendant. My answer to this contention is that the section is directed to the passing of any estate—and the Court is not determining the question of the passing of any estate, but dealing only with a question of possession.

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Further, I am of the opinion, upon the facts as adduced in both actions, and in particular as adduced at the trial in the present action, that to admit of the plaintiff invoking section 104 of the Land Registry Act would be allowing it to make the statute an instrument of fraud. Unquestionably the plaintiff had actual notice of the defendant's title and possession of the land. The effect of section 104—then section 74—of the Land Registry Act is dealt with by this Court in the case of *Chapman* v. *Edwards, Clark and Benson* (1911), 16 B.C. 334, and the plaintiff cannot, upon the facts, be admitted to invoke or rely upon section 104.

On the whole I am of the opinion that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Brydon-Jack & Woods.*
Solicitors for respondent: *Alexander & Sears.*

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Contract—Arbitration—Clause providing for—Construction of—Disputes as to work and damages—Decision of arbitrator—Finality of.

In an action against a corporation by a firm of contractors for damages for losses incurred in the performing of a contract, due to the delay of the corporation in supplying material thereunder, the defendant sets up the following clause in the contract: "To prevent all disputes and litigation it is agreed by and between the parties to this contract that the engineer shall in all cases determine all questions in relation to the work and the construction thereof, and he shall in all cases decide every question which may arise relative to the execution of the work under this contract, on the part of the contractor, and his estimate and decision shall be final and conclusive upon said contractor, and such estimate and decision in case any question shall arise shall be a condition precedent to the right of the contractor to receive any money under this contract, and a condition precedent to the commencement of any action by the contractor to recover any moneys under this contract, or any damages on account of any illegal breach thereof." The contractors had offered to submit to arbitration and to accept the decision of the arbitrator, "if the same were just and reasonable," but the arbitrator refused to proceed on such terms, and there was no determination of the matters in dispute by the arbitrator. The learned trial judge held that owing to the refusal of the arbitrator to proceed the plaintiff had a right of action. He gave judgment in favour of the plaintiff and ordered a reference.

Held, on appeal (MACDONALD, C.J.A. and IRVING, J.A. dissenting), that by the above clause it was the intention of the parties that all matters arising under the contract, including claims arising out of breaches thereof, would be adjudicated upon and determined by the engineer, that the arbitrator was justified in refusing to proceed on the terms imposed by the contractors, and that the right to maintain an action was therefore lost by reason of the non-fulfilment of the condition precedent.

Decision of MACDONALD, J. reversed.

APPEAL by defendant from a decision of MACDONALD, J. at the trial in Vancouver on the 25th of March, 1914. The facts appear in the decision of the learned trial judge. Statement

M. A. Macdonald, for plaintiffs.

S. S. Taylor, K.C., for defendant.

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MACDONALD, J.: Plaintiffs seek to recover damages from the defendant Municipality for breach of a contract entered into between the parties on the 21st of July, 1911. The contract provides for the performance by the plaintiffs of all labour required for the construction of a waterworks system for the Municipality and the supply of a certain portion of materials necessary for that purpose. The plaintiffs were required to commence the work within ten days from the awarding of the contract and to proceed therewith vigorously and continuously until final completion on or before the 31st of January, 1912. There were clauses providing for a penalty for non-completion within the stipulated period, and granting a bonus for fulfilment of the contract within the time specified.

Defendant agreed on its part to supply the bulk of the material required, consisting principally of valves, hydrants, iron and steel pipes, and special castings. Such material was to be delivered either f.o.b. cars or on the wharf at Penticton, B.C., and plaintiffs were to remove and haul it to the site, with as little delay as possible, upon receiving notice from the engineer. They were required to pay demurrage in the event of such removal not taking place within 48 hours after receiving notice.

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Evidence was adduced shewing that a contract of this kind, in order to be carried on profitably, requires that the work should be pursued continuously from the time of commencement, and this would necessitate an adequate supply of material being constantly on hand. I am satisfied that the plaintiff tendered upon this understanding, and that the parties intended that the work should be commenced as soon as the Municipality had made certain financial arrangements, and be carried on so as to be completed in the early part of the then ensuing year.

The Municipality was threatened with an epidemic of typhoid fever, so it was a work of necessity that would not brook delay. The contract being executed upon this clear understanding, plaintiffs allege that they commenced work immediately and sought to proceed vigorously and continuously, but

that there was delay on the part of the Municipality in delivering the material, and that loss resulted therefrom.

As to the right of action by a contractor against a municipality for the extra cost of performing a contract through fault of the municipality, see Dillon on Corporations, 5th Ed., Vol. 2, Sec. 813, p. 1225.

Plaintiffs also seek to recover damages for default on the part of the Municipality in other portions of the contract, but the main issue is as to whether delays took place and whether the defendant is liable therefor.

Defendant, in addition to denying that any delay occurred, invokes the provisions of section 116 of the specifications, which were incorporated with and formed a portion of the contract. This section deals with the supply of the material and the liability that might result from delays in connection therewith, and is as follows:

"It being understood and agreed that the parties of the first part are to supply the necessary pipe, hydrants, valves, herein specified from time to time as required, so as to enable the parties of the second part to proceed continuously, and that in the event of the parties of the first part being unable through any delays, not caused by them or by their negligence, to deliver the said material or any part thereof as required by the parties of the second part the parties of the first part are not to be held responsible or in any way liable for any loss or damage occurring to the parties of the second part thereby. In case of delay in delivering material as aforesaid by the parties of the first part, an extension in time for completion of this contract equal to the time of such delay shall be allowed the contractor."

I do not think this provision relieves the defendant from liability. The language is somewhat difficult to construe, but it would appear that if there is any delay in such delivery caused by the said Municipality, or by its negligence, it is not relieved therefrom, nor is the failure to deliver to be simply compensated by extension of time for completion. Having expressly agreed to supply material, the onus of escaping responsibility for non-delivery is cast upon the defendant. The parties dealt upon the basis that one was to do the work and the other supply the material, and if the plaintiffs were delayed in their work by non-delivery, then, unless this section can be beneficially utilized, the defendant would be liable for breach of the contract. The defendant sought to prove that the section could be so

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applied, and that it was impossible, in the circumstances, to furnish the material from time to time, as required by the plaintiffs. I think that the arrangements made for the supply of material were not carried out in a businesslike manner. The call for tenders provided for a deposit of 5 per cent. of the amount of the tender as a guarantee that the bidder would, if successful, promptly execute a satisfactory contract and furnish a bond if required. While this condition was thus stipulated in the circular asking for tenders, it was not observed, and the Municipality was left unprotected as to time of delivery of the material. For example, a contract was prepared for execution by Robertson & Godson as to supply of cast-iron pipe. It provided for delivery within a certain period, and penalty for non-performance, but it was not executed, and the Municipality was thus not in a position to enforce delivery of the material, nor did the Municipality place the contractors for material under any bond or other penalty in the same manner as it bound the plaintiffs. The plaintiffs had a right to expect, not only from the terms of the circular calling for tenders, but also from the generally accepted way of letting contracts of this kind, that the Municipality had safeguarded itself, so that if delivery of materials did not take place as required, and loss ensued to the plaintiffs through delay, the Municipality would have recourse to such contractors, and thus could recoup itself for any damages paid the plaintiffs. The council of the Municipality may have excused itself from not insisting upon proper contracts for material being executed through stress of circumstances, and the pressing necessity for the work being speedily commenced and completed. However, in the event of delays occurring, through the default of the material man, this would not excuse the Municipality, and it could not be expected that a loss resulting from such delay should be borne by the plaintiffs.

It is contended that, as a matter of fact, there was no delay in the delivery of the material, nor were the plaintiffs' workmen idle at any time on account of the manner of delivery. It is suggested that because the plaintiffs' workmen moved from one portion of the work to another no real delay occurred in the work, or loss resulted therefrom. I find that there was delay

in the delivery of the material. Mr. Bennett, the reeve of the Municipality, candidly admitted that there was no doubt the "material did not come as we expected." Then, as to the men being shifted from place to place in order to facilitate the work on account of non-delivery of the necessary material from time to time as required, I find that this was a form of delay caused by the defendant, and resulted in loss to the plaintiffs.

It was submitted that the only penalty might be an extension of time for completion, and the reeve of the Municipality stated that he understood the time would be extended. But, in my opinion, the loss that ensued is one that was not intended to be, and could not be, compensated by simply extending the time for the fulfilment of the contract. Defendant is not relieved from its covenant as to supply of material as required: see Hudson on Building Contracts, 4th Ed., Vol. 1, p. 546; *Roberts* v. *Bury Commissioners* (1870), L.R. 5 C.P. 310 at p. 327.

It was stated by the engineer that, even if there were any delay, it would have been avoided if the plaintiffs had carried on their work in a different manner. But the evidence did not satisfy me that delays would not have occurred even if the work had been pursued in the manner suggested by the engineer. It is worthy of mention that the engineer had power under the contract, if the methods or appliances appeared insufficient or inappropriate for securing the quality of work, or rate of progress required, to order the plaintiffs to increase their efficiency or improve the character of the work, but no such order was given. It is a fair assumption that the character of work and rate of progress was not of such importance, or so unsatisfactory, as to warrant the order being given. Defendant then sought to escape liability on the ground that the engineer was the sole judge or referee upon all questions arising out of the contract, and that all claims for damages of any kind were required to be submitted to be arbitrated upon and decided by the engineer. It was further submitted that all claims now sought to be recovered had been so dealt with by the engineer of the Municipality, and that the certificates given by the engineer operated as a bar to recovery by the plaintiffs. I do

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not consider that the granting of any of the progress certificates had the effect now contended for by the defendant. There were some small claims allowed for extra work allowed by the engineer, but as to the large amount of claims on account of damages for delay, and other causes, I do not think that the engineer adjudicated upon such claims. It is a question whether under the terms of the contract, even if the engineer were in such a position of independence that he would be entitled to act, that he had power to deal with any damages that might arise through default on the part of the Municipality to supply materials according to the contract. The clause in the contract declaring that the engineer shall be the "referee to prevent all disputes and litigation" seems to provide for deciding every question which may arise relative to the execution of the work on the part of the plaintiffs, and that the decision of the referee shall be final and conclusive. It does not specifically give power to the engineer to decide questions arising out of the performance by defendant of its portion of the contract. I do not think this clause assists the defendant, though the provision at the end as to a certificate being a condition precedent for the commencement of any action by the plaintiffs to recover any damages "on account of any alleged breach" of the contract requires consideration. I think, however, that this latter part of the clause is governed by the preceding portion thereof. Even if the contract was intended to provide for arbitration, and that the engineer should be sole referee, I think, by his course of action and surrounding circumstances, he placed himself in such a position that his independence was destroyed, and he was no longer a free agent. He was in a very delicate position, and should have retained a perfectly neutral position between the parties. The contract, as far as the arbitration proceedings were concerned, thus became inoperative. It is true that plaintiffs sought to have a reference as to their claims, and if such reference had proceeded they might have been bound by the result. It, however, proved abortive, and left the parties in their original position. While the engineer may have been perfectly honest in dealing with the matter, still, in his judicial position, there was the

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danger of his favouring his employers. I think the same ground was also applicable as to his certificates, if they are set up as an adjudication, and that the plaintiffs are free to resort to an action to recover the damages to which they may be entitled. As to independence required in an engineer or architect, acting in a judicial capacity, see *Hickman & Co.* v. *Roberts* (1913), A.C. 229; *Bristol Corporation* v. *John Aird & Co., ib.* 241.

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At a time when the work was nearing completion, the defendant Municipality sought to obtain possession of a portion of the waterworks system, and two agreements were entered into, bearing date respectively 19th August, 1912, and 9th September, 1912. It is submitted that these agreements operate as a waiver and estop the plaintiffs from recovering. I do not think that the agreements were so intended, nor did they have any such effect. In my opinion, the action of the plaintiffs for breach of contract is well founded, and there should be reference to the registrar to determine the nature and extent of the damages arising from delay on the part of the defendant Municipality in delivering material. I am anxious not to trammel the referee, and so am not expressing any opinion as to the liability with respect to any particular item of such claim. All of them, save such that I will presently deal with, are left for his consideration and separate report. I allow and disallow certain items, which need not be included in the reference: Item 14 of $440 is allowed at $220; item 15 of $224 is allowed; item 19 of $480.75 is disallowed, as the plaintiffs have already received credit therefor; item 28 of $15 is disallowed; item 29 of $20 is disallowed; item 31 of $1,575 is disallowed; item 34 of $1,000 is allowed at $800.

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There will be judgment in favour of the plaintiffs for the amount thus allowed, and a reference as to the balance of the claim for damages.

Plaintiffs are entitled to general costs of the action up to trial. The costs of reference are reserved.

The appeal was argued at Victoria on the 18th, 19th and 22nd of June, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

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S. S. Taylor, K.C., for appellant (defendant): Under the contract the Municipality was to supply hydrants, valves and other material as it was required during the progress of the work. The main complaint was that the Municipality did not supply the material as required, thus delaying their work and involving additional expenditure. We say we provided the material as soon as we were able, and in any event, the contractor was not delayed in his work and was not subjected to additional expenditure. Under the contract the Municipality's engineer was to be referee in case of any dispute arising under the contract, and his decision was to be a condition precedent to the commencement of any action to recover money or damages on account of a breach. We contend there was no determination of the matters in dispute by the engineer, therefore, the action is premature and must be dismissed, and this is entirely due to the notice for the hearing given the engineer by the plaintiffs, whereby they sought to curtail his jurisdiction and refused to accept his adjudication as final. They are out of Court, first, because the engineer's estimate is a condition precedent to the right to bring this action; second, because they have not shewn, as provided in the contract, that the delays were caused by the Municipality; third, on the merits they cannot succeed. There is nothing in the evidence to shew that the engineer was not qualified. He was expressly appointed for this work, and there is no finding of improper conduct on his part. They are bound by the engineer's certificates as to the work, and having accepted them, they are now estopped from raising any question as to the work: see *In re Hudson's Bay Insurance Company and Walker* (1914), 19 B.C. 87. The evidence shews the delay was due to the mismanagement of the work by the plaintiffs, who did not have the roads built for conveyance of material to their respective destinations, and the trial judge should have found there was nothing to refer to a referee.

Argument

M. A. Macdonald, for respondents (plaintiffs): They admit there were delays in the arrival of material, but they contend it was not the Municipality's fault. The evidence shews the delay was due to the way they went about ordering the material.

With reference to the submission of disputes to the engineer, as referee under the contract, we say, first, that this does not apply to a breach of contract on the part of the Municipality, but only on the part of the contractor; second, assuming it does apply to a breach by the Municipality, we did submit to the engineer as referee, but the submission proved abortive: see *Cuddy* v. *Cameron* (1913), 5 W.W.R. 56, in which case it was held that if an arbitration proves abortive, the Court is then seized of the whole question at issue. The reference being to the engineer of the Municipality, he is disqualified from acting as to certain items: see *Bristol Corporation* v. *John Aird & Co.* (1913), A.C. 241. We applied for an adjudication, but the engineer refused to act and the arbitration proved abortive: the trial judge has so found.

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Argument

Taylor, in reply, referred to *Roberts* v. *Bury Commissioners* (1870), L.R. 5 C.P. 310, and *Hickman & Co.* v. *Roberts* (1913), A.C. 229.

3rd November, 1914.

MACDONALD, C.J.A.: The learned trial judge finally disposed of several items of the plaintiffs' claim and referred the others to the registrar.

Subject to the defendant's contention that the plaintiffs were precluded by the contract from maintaining an action at law, it was, I think, conceded on both sides, that it was not improper to refer these items. Subject as aforesaid, I agree with the disposition of the items not referred, with the exception of item 34, as to which, admittedly, a mistake had been made, and I would rectify that mistake as proposed by my learned brother IRVING.

Two questions remain for consideration: Firstly, the interpretation of the clause in the contract providing for reference of disputes to the engineer; and secondly, the alleged refusal of the engineer to proceed. On the second of these questions I have come, though not without some doubt, to the conclusion that the plaintiffs' attempt to obtain the engineer's determination of said disputes failed by the fault of the engineer and of the defendant, who, by its counsel, took unwarranted objec-

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tion to the plaintiffs' letter calling on the engineer to adjudicate, and thereby induced the engineer to decline to proceed. The plaintiffs were not acting improperly in notifying the engineer that they were proceeding subject to the reservation of their legal rights. Indeed, in view of the doubt which I entertain as to the true construction of the clause of the contract above referred to, and also in view of the engineer's attitude towards the plaintiffs, as indicated in his letter of the 22nd of April, 1912, I am not surprised at the plaintiffs' caution.

The defendant's counsel, in effect, demanded a new agreement of submission. That is shewn by the form of notice which he said he required the plaintiffs to sign. They very properly refused, and while insisting almost to the last on the propriety of their reservations in the letter, finally abandoned them, and desired the engineer to proceed under the submission contained in the contract. While he did not in exact language refuse to proceed, yet, reading what went before, and his final answer, I think the true conclusion to be drawn from them is that he would not proceed to a determination unless the plaintiffs abandoned their attitude not to be bound by his award. He had no right to take that stand, in my view of the case, and, therefore, his conduct was tantamount to a refusal to make the determination that the defendant says he was the proper person to make. No doubt, parties have the right to bind themselves to submit their disputes to the determination of an arbitrator or a referee, and thereby, in a qualified sense, to oust the jurisdiction of the Courts. But, before refusing to entertain an action, the Court must be satisfied by clear language that the parties so intended. There is no submission in this case unless it be contained in the first five lines of the clause above referred to, nor unless the word "work" in those lines be held to mean "undertaking," a meaning of which I concede it is susceptible. I think two constructions of the clause are open to us: one, that it was only matters relating to the work to be performed by the contractor that the parties had in contemplation; the other, that all matters arising under the contract, including claims arising out of breaches thereof by the defendant, should be adjudicated upon and determined by the

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engineer. While I lean to the latter construction, yet I do not think it was clear that the parties intended so wide a meaning to be given to their language, and in view of this, and the letter above referred to, I think the Court below was right in entertaining the action.

IRVING, J.A.: By contract, dated 21st July, 1911, the plaintiffs contracted to build in the town of Penticton and adjoining district a waterworks system for the defendant. The plaintiffs were to do the work and supply all materials, other than the pipes, hydrants and valves. These were to be supplied by the Municipality (section 116) "from time to time as required, so as to enable the plaintiffs to proceed continuously" with their work. The date fixed in the contract for completion was the 31st of January, 1912. The actual completion was not until August, 1912. The plaintiffs complain that this delay was caused by the defendant's negligence in failing to supply pipes, etc., and the action is chiefly as to the damages sustained by the plaintiffs by reason of such delay.

During the construction, monthly progress estimates were given by the engineer, Mr. Latimer, and on the 9th of October, 1912, he delivered his final estimate, shewing that the work done amounted to $47,645.53, and after deducting some small charges ($55.02) for clearing up, he found that the plaintiffs had been overpaid $758.86. After this certificate had been delivered the plaintiffs wrote two letters, dated 9th and 18th October, respectively, complaining of some differences—to their disadvantage—between the progress estimates and the final certificate of the 2nd of October.

I shall not go through the differences in detail. It is sufficient to say that they amounted to $428.86 in all—a very small percentage, indeed, of the total amount. On the 2nd of December, 1912, the engineer handed them a revised final certificate and a letter. This revised estimate credited them with $48,403.71 for work done, and omitted the deduction of $55.02 made for cleaning up. The changes shewed that the plaintiffs had been overpaid some 63 cents. The letter dealt with the items, amounting to $428.86, in a way that seems to me ought

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to have been satisfactory to the plaintiffs. But before this letter of the 2nd of December had been received, the plaintiffs had made a formal demand on the engineer for an "adjudication by the engineer in respect of their claim for loss and damage sustained by reason of the Municipality's failure to furnish the material as required." The engineer made no demur to this request and appointed a time and place convenient for the parties, who duly met, and a discussion that had been raised in the correspondence between the solicitors before the meeting as to what they were there for—whether it was a reference under the signed contract, or whether there was to be an arbitration apart from the signed contract—was continued. In the result the meeting went off. The engineer refused to act on the notice served upon him. But whatever was his position, I think what took place at the meeting amounted to a refusal to deal with the matters mentioned in the plaintiffs' letter, and that, as a consequence of that refusal, the plaintiffs are in a position to bring their action, notwithstanding anything in section 2 of the contract contained. The refusal of the engineer to act, except upon submission to terms dictated by the defendant's solicitor, brings this case within the principles of *Pawley* v. *Turnbull* (1861), 3 Giff. 70, where plaintiff was able to satisfy the Court that he had not been fairly treated, and although he failed to prove fraud, he obtained from the Court of Chancery a decree declaring that the architect's certificate was not binding.

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Hickman & Co. v. *Roberts* (1913), A.C. 229, is another instance of the Court dispensing with a certificate, although I do not wish to suggest that there was anything like improper conduct on Mr. Latimer's part, but I think his action prevents the defendant relying on the non-production of his certificate as to damages for delay on account of negligence as a defence to this action.

At the trial a schedule of the particulars of loss and damage was referred to. All the items therein mentioned, except 14, 15, 19, 23, 28, 29, 31 and 34, are connected with the delays occasioned by the defendant's negligence. These excepted items were dealt with by the trial judge at the hearing. Some, 19,

28, 29 and 31 were disallowed; some abandoned; 14 and 15 were allowed at $220 and $224 respectively. Item 34, charged at $1,000, was allowed at $800. With reference to the other items, after some misunderstandings, it was agreed during the course of the trial that if the judge was satisfied that the plaintiffs had made a *prima facie* case for damages by reason of the delay caused by defendant's negligence, there should be a reference of these items to the registrar to determine the nature and extent of the damages, but the report was to come before the Court for consideration. Upon that understanding the learned judge disposed of the case, and gave the judgment from which this appeal has been taken.

In addition to ordering the general reference, the learned judge gave judgment in favour of the plaintiffs for $1,244. I see no reason for interfering with this portion of the judgment except as to the $800 allowed in respect of item No. 34. Of this I shall speak later.

Mr. *Taylor,* before us, contended that under section 116, which provides as follows: [already set out], that the learned judge was wrong in finding that negligence on the part of the Municipality caused the delays complained of, and that even if there was such negligence, the plaintiffs' only remedy was to claim an extension of time for completion, and that as they had been granted an extension, they had now no claim for damages, or if they had any claim, they had waived it by accepting the extension. The language of the section by itself might sustain that contention, but when we see that the contract contained a penalty clause of $30 a day if not done within the time agreed to, *viz.*: 31st January, 1912, and also a bonus claim of $15 a day, the plaintiffs' remedy is, in my opinion, not limited to the extension of time only.

IRVING, J.A.

Coming to the merits of the case, I would dismiss the appeal (except as to item 34, as to which I shall speak presently), on the ground that there was evidence to support the learned judge's finding that there was negligence on the part of the defendant in supplying the material it had agreed to supply, and which material was necessary for the carrying on of the work the plaintiffs had agreed to execute, and that the plaintiffs

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were delayed in consequence of such non-supply. Had it been possible for the plaintiffs to do so, it would have been proper for them to regard the contract at an end. But, as they continued, they are entitled to recover the damages they have sustained by reason of the changed circumstances. The work to be done was, according to the contract, to a very great extent a summer contract. The delay in providing the material made it a winter contract, involving slower work, with many shiftings of the men, and in many cases requiring work to be done over a second time, at any rate, in part. In these changed conditions the defendant completed the work, and it is said that they are still to be governed by the contract as to prices. That seems to me unreasonable, in view of the fact that it was the defendant's neglect that brought about the difficulty.

In *Bush* v. *Whitehaven Trustees* (1888), 52 J.P. 392; Hudson on Building Contracts, 4th Ed., Vol. 2, p. 122, a somewhat similar case is reported. I think the principle there adopted should be applied in determining the amount of damages in those items in which the delay is attributable to defendant's negligence.

In an old case—*Robson* v. *Godfrey and Thomas* (1816), Holt, N.P. 236—an action to recover the amount of a shipwright's bill for repairs made to a ship, there was an agreement in writing which described the work to be done and regulated the times of payment—one of the payments was to be deferred for some time. It was contended that it was not right to let the whole contract loose and to take from the defendant the benefit of the stipulations he had made for a six months' credit. But the plaintiff got a verdict and the damages were referred. In a note to that case it is said that if the plan is abandoned, so that it is impossible to trace the contract, and to say to what part of the work it shall be applied in such a case, the workman shall be permitted to charge for the whole work done, by measure and value, as if no contract had been made. The measure of these damages would be the value of work and labour done in the circumstances and in the seasons it was done.

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As to item 34, for which plaintiffs obtained judgment for $800, it was conceded by plaintiffs' counsel that judgment on

that item should not have been entered for that, or any sum; he claimed that the item should have been referred to the registrar to determine whether $800 was sufficient. This item 34 is a claim not connected with the delay of the defendant. Defendant's counsel said that he only attempted to lay a foundation for a general claim for reference in respect of this item, which he says ought to be allowed at a larger sum than $800—the amount allowed. In *South African Territories* v. *Wallington* (1898), A.C. 309, the House of Lords adopted a rule that where a miscarriage of justice had taken place by errors in procedure, the proper remedy is to make the party in default pay for his error in the shape of costs, and not to deprive him of important rights, if any such exist: see *per* Lord Halsbury, L.C. at pp. 313 and 314. Defendant's solicitors, instead of taking out judgment for the $800, should have brought the matter to the attention of the judge. The defendant, therefore, must pay the costs of its mistake, and if that is done, there is no reason why the item should not be dealt with on its merits in the reference.

In my opinion the appeal should be dismissed except as to item 34 and the judgment varied by striking out the allowance of that item. That item, connected with the delay, should be referred to the registrar with the remaining items.

IRVING, J.A.

With regard to work done in the circumstances and in the seasons contemplated by the contract, the prices should be the agreed prices, but as to work delayed by defendant, the registrar should determine the prices according to the circumstances and the seasons in which it was done.

The general costs of the appeal should follow the main result, and the defendant ought to be allowed only such costs as were caused to it by having to appeal to get this $800 item disallowed.

MARTIN, J.A.: This is an action against a municipal corporation by a firm of contractors for damages because of losses incurred in the performance of the contract, alleged to be due to the delay of the Corporation in supplying a large amount of materials thereunder.

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As a first and complete answer to the action the defendant sets up the following clause in the contract [already set out in the head-note], and alleges that there has been no "determination" or "estimate and decision" by the engineer of this question of a claim for damages arising out of the contract and, therefore, this action is premature and must be dismissed. It is admitted that there has been no such decision, but it is first submitted that the clause does not cover the present claim for damages, and therefore is no bar to these proceedings. I am unable to take this view. The clause provides for several subject-matters. It first deals with the power of the engineer to "determine all questions in relation to the work and construction thereof" without limitation, of which delay would clearly be one, irrespective of who it was caused by, because it must be remembered that the "work" in relation to which all questions are to be determined by the referee is the whole undertaking which is the subject-matter of the contract, *viz.*: the waterworks system. Under that contract there are reciprocal obligations, the Municipality being bound to supply a large and valuable amount of material for "the construction of the work" (to use the very words of the preceding clause) according to specifications, and the supplying of the balance of the materials and the doing of all the "work" (*i.e.*, labour, manual and professional) upon the said work (undertaking) is the duty of the contractor. Clause 116 of the specifications shews what material the Municipality was to supply, and provides for the class of delays in so supplying that it is to be liable for to the contractor as damages, and for an extension of time to meet such an event. This is a vital matter in the contract to all concerned, because by the preceding clause, 115, the contractors are obligated to commence work on the ground within ten days "and to proceed therewith vigorously and continuously until completion." Once the true situation is grasped, can it for a moment be seriously contended that in such circumstances the contemplated delay and damage thus provided for are not "questions in relation to the work and the construction thereof" which, "to prevent all disputes and litigation . . . . it is agreed" shall be determined by the referee? I

think not. This is not the case of a contractor undertaking to supply all materials and work in constructing a water system, with the sole obligation of the other party of paying for it upon completion, and therefore any loss or damage for delay being only caused by the contractor. Quite the reverse. The loss or damage herein could arise just as easily from the delay of the other party who took an active part in the performance of the contract, as the event, it is alleged, proved.

Then the clause goes on to direct that "the engineer shall in all cases decide every question which may arise relative to the execution of the work under this contract on the part of the contractor" only. Then there is the general clause applicable to all claims, providing not only that the contractor must obtain such estimate and decision as a condition precedent to his right "to receive any money under the contract," but also that it shall be "a condition precedent to the commencement of any action by the said contractor to recover any moneys under this contract or any damages on account of any illegal breach thereof." This apt and comprehensive language clearly, to my mind, relates to and covers the case of all the questions in relation to the "work" already referred to, and justifies the view that it was the intention to leave just such claims as the present to the decision of the engineer, in order "to prevent all disputes and litigation," as the clause declares its object to be in its opening words. It should also be remembered that the plaintiffs themselves considered this clause covered their present claim for damages, because they invoked it to obtain a decision in their favour in the manner hereinafter considered, and though this would not of itself decide the point against them, yet it is late in the day for them to say now that the clause does not contemplate something which they said it did contemplate when they invoked it. Their actions shew what they considered the intention of the clause to be when they agreed to its being put in the contract.

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To escape from this position the plaintiffs take the ground that they did, by their letter of the 15th of November, 1912, ask the engineer, under said clause, and after recital thereof, for a determination of their claim for damages caused by "failing to furnish said material as required," and offering to "afterwards

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submit evidence touching the matters in question to enable you to fully determine the matters at issue," and calling upon the engineer to "make a finding of the amount due them for breach of said condition to supply material when required," etc. If this demand for a determination of the questions had stopped there no difficulty could have been experienced, but it went on to make the following remarkable and illegal stipulation (which was also in part made in *Scott* v. *The Corporation of Liverpool* (1858), 1 Giff. 216, 230), of which I shall speak later:

> "The undersigned, therefore, are willing and hereby express their willingness as aforesaid to have you adjudicate upon and make a finding on the questions at issue above referred to, and to accept your decision thereon if the same is just and reasonable, and to that end formally make this application to you. This application is made without prejudice to any legal rights of the undersigned under said agreement of the 21st of July, 1911."

In answer to this demand, the engineer, Latimer, by his letter of the 2nd of December, 1912, after reciting said clause, fixed "a hearing" of the said claim thereunder at his office at Penticton, the site of the works, for the 16th of December, but at the request of the claimants it was adjourned by the engineer to the 10th of January, 1913, to suit their convenience. The plaintiffs' solicitors, in their letter of the 6th of December, 1912, to the defendant's solicitor, asking for said adjournment to the 10th of January, say as follows, after referring to the notice to the engineer to "deal with the claim":

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> "There is no need, to our mind, so far as the appearance before Mr. Latimer on the 10th proximo with evidence, etc., is concerned, of having any formal submission to arbitration prepared, as it is not an arbitration in its true sense. Mr. McDougall and his witnesses will appear on the 10th January and submit their evidence and await the finding of Mr. Latimer, after which they will take such action as may seem advisable to them by way of either accepting his finding or taking further action in the Courts, after compliance with this condition precedent to such action."

When the hearing was opened, the said notice of the 15th of November was read, and, as might have been expected, difficulty immediately arose, McDougall flatly taking the position that he would not abide by the decision of the engineer, saying, "we have no right to submit to you as sole arbitrator." The defendant's solicitor very properly objected to going on under a notice

which repudiated the finality of the hearing or determination, and sought to fetter the jurisdiction of the referee. To go on subject to a condition which gave one party to the dispute the power to decide whether or no the referee's decision was "just and reasonable" was a preposterous and impossible position to place either the referee or the other party in, and to agree to it and proceed in such circumstances would have been dangerous. The embarrassing situation was further heightened by the formal notification that the proceedings invoked by the plaintiffs were to be "without prejudice to any other legal rights." McDougall persisted in his unjustifiable and unfair contention, saying that the notice had been drawn up by his solicitors, and that "Mr. Russell is quite good enough for our expenses if he has not made the notice correct. We are acting on our legal instructions here." Also—

"I say that this notice is in order and I am prepared to proceed, and if you are not prepared there can be nothing done. This letter of Russell's to you on our behalf is what I am going to go on, and it is only under that I am going."

The engineer decided that he could not proceed under that notice, and after further discussion, in the course of which the defendant's solicitor asked for a new notice to be given (which was really not necessary if the objectionable features of the existing one had been withdrawn), McDougall finally said, according to the accepted minutes of the meeting:

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"We are not going to alter that notice, and you have agreed under the contract to hear us on our claim and if you have a mind to, give us a decision of it.

"Mr. Latimer: Not in the present instance."

I take this to mean, clearly, not in the way the matter was then present before him, and there can be no doubt that he was perfectly right in so deciding.

Though it does not appear in the report of the proceedings, it appears by the evidence that after this decision there was an interval of a few minutes, in which there was a consultation between certain of the plaintiffs as to their position, after which this occurred, according to the minutes:

"Mr. McDougall: You have ruled against us on our notice, and we would ask you to proceed under the contract.

"Mr. Latimer: I have no power to go on except under that clause."

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The minutes end here, and it is admitted that after that nothing further was done on the hearing. McDougall explains it in his evidence thus:

"Then what happened? We just stayed. In a few minutes Mr. Gahan and the Council left. Mr. Gahan bundled up his papers, and started to go out. I think he was the only one out of the door. My two boys sat still. I was there that day in town, and could not get away until the next morning. I was at the door, and my boys were inside. When the proceedings terminated we all began to scatter."

It is most unfortunate for the plaintiffs that they did not realize and define their position clearly and call their witnesses and submit their evidence in support of their claim, as they said they would do in their solicitors' letter already quoted, because the onus was on them to establish the claim they had set up. There was no refusal on the part of the engineer to hear them. He had been placed in a very unfair and embarrassing position and hardly knew where he stood, but to the last he rightly took the ground that he would hear the claimants under one clause and one clause only, *viz.*: the one they had invoked, and which he had consented to sit under, which conferred upon him the duty and right of making a sole and final adjudication of the claim, unfettered by any unlawful curtailment of his jurisdiction which the claimants sought to impose upon him. Though McDougall finally said to him, "you have ruled against us on our notice," he even then did not withdraw his illegal conditions, but simply recited the fact of the adverse ruling, without saying that he accepted it, thereby still keeping a card up his sleeve in case the hearing went against him. Then he proceeded to say: "And we would ask you to proceed under the contract." What does he mean by that general request? His claim had been launched under a specific clause and the engineer was sitting to hear it under that clause, so he made as safe and reasonable a reply as any much badgered and harrassed layman could have been expected to make in the circumstances —"I have no power to go on except under that clause." In other words, "I have power under the clause you have invoked, and will sit under it alone and hear you if you wish." But the plaintiffs sat still and did nothing to support their claim before this, their chosen tribunal, and obtain the necessary

decision in their favour, and by that default they put themselves out of Court under their own contract and have lost their right to maintain this action, as matters now stand, whatever other rights they may have, if any. I find it impossible to say that the referee refused to do his duty. On the contrary, I think, on the evidence, he acted like a careful and conscientious man who in a trying position was anxious to do his duty between all parties, and if the proceedings that the plaintiffs instituted proved abortive, that unfortunate result was brought about by their own equivocal conduct.

Out of deference to the learned trial judge, I briefly notice his reasons for not giving effect to this defence, which, in the view I take of it, renders it unnecessary to consider the others set up. He gets over it by finding that the engineer, "by his course of action and surrounding circumstances, placed himself in such a position that his independence was destroyed, and he was no longer a free agent." It was, however, admitted before us that there was no evidence to support that finding, so the cases relied upon by the learned judge have no application. They are both decisions of the House of Lords, the first of them, *Hickman & Co.* v. *Roberts* (1911), 82 L.J., K.B. 678 at p. 680; Hudson on Building Contracts, 4th Ed., Vol. 2, p. 426, being a case wherein the Lord Chancellor adopted the view of Fletcher Moulton, L.J., that the architect had so conducted himself that:

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"He is no longer fit to be a judge, because he had been acting in the interests of one of the parties, and by their direction. That taints the whole of his acts and makes them invalid, whatever subsequent matter his decision is directed to."

And Lord Shaw, at p. 684, said that the

"certificate was wrongly withheld on account of the submission of the arbitrator's judgment to the judgment of the proprietors, and the latter preventing the issue of that document."

The second case is *Bristol Corporation* v. *John Aird & Co.* (1913), 82 L.J., K.B. 684, wherein a motion to stay an action so that the differences might be submitted to the adjudication of an engineer, as provided by the contract, was refused because the engineer would be placed in the position of both judge and witness, and as Lord Parker, at p. 695, put it (in considering some circumstances wherein the Court will exercise

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its discretion), on the facts before the Court it appeared that there would be

"a probable conflict of evidence on matters as to which the arbitrator himself will in the normal course be the principal witness on one side. In such a case it might lead to a miscarriage of justice if the arbitration were allowed to proceed, and one of the parties were in consequence deprived of the chance of testing the truth by means of cross-examination, or if the arbitrator had to determine whether he had himself done anything by which one of the parties might be estopped from raising any particular point."

It is unnecessary to note any other authority, except that of *Walkley* v. *City of Victoria* (1900), 7 B.C. 481, where I collected the principal ones up to that date, and later ones are to be found cited in Hudson on Building Contracts, 4th Ed., Vol. 1, pp. 402 *et seq.*, 756, observing only that in the House of Lords cases above cited the engineer or architect, who has been heretofore generally styled a *quasi* arbitrator, is referred to as "arbitrator."

The attitude that the Courts should adopt in considering clauses of this sort is thus laid down by Lord Moulton in the *Bristol Corporation* case at p. 694:

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"It must consider all the circumstances of the case; but it has to consider them with a strong bias, in my opinion, in favour of maintaining the special bargain between the parties, though at the same time with a vigilance to see that it is not driving either of the parties to a tribunal where they will not get substantial justice."

It follows that the appeal should be allowed and the action dismissed.

GALLIHER, J.A.: I must confess that I experienced no little difficulty in coming to a conclusion in interpreting the clause of the contract under the heading "Engineer the Referee." This clause is as follows: [already set out.]

In view of the fact that certain materials had to be supplied by the defendant so as to enable the plaintiffs to continuously carry on the contract, I think the word "work," where it first occurs in the above-quoted clause, must be taken to mean "undertaking," and there is nothing, as I view it, in what follows in that clause to change that character.

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We have, then, a contract in which the parties agree, the one to do the work, and the other to supply the material necessary

to carry on that work continuously, thus forming together the entire undertaking, and the parties, in specific words, agree to refer to the engineer, for his determination, all questions in relation to the work (undertaking) and the construction thereof.

In addition to the cases cited to us at the hearing I find another case, *Lawson* v. *Wallasey Local Board* (1882), 52 L.J., Q.B. 302, and if I read that case aright, had the circumstances there been as in the case at bar, the contention of the defendants there, which is the contention of the appellant here, *viz.*: that the claim for damages caused by delay would be a difference concerning a matter in connection with the contract, and therefore a matter for the decision of the engineer, would have been upheld. Denman, J., who delivered the judgment of the Court, points out, at p. 308, that the dispute regarding the removal of certain staging in a river within a reasonable time was not part of the original contract, but was one which arose out of a breach of an implied contract which was not part of or necessarily connected with the contract under seal. Here the breach complained of is one directly provided for in the contract. Unless it can be said that the engineer has refused to arbitrate upon the difference between the parties (or it can be shewn that he is not a fit and proper person to do so, with which I shall presently deal), the appeal must be allowed.

GALLIHER, J.A.

As to the refusal to arbitrate, I take the same view as my brother MARTIN, and for the same reasons.

As to whether the engineer is a proper person to act, I see no reason why he cannot bring to bear upon the matter an unprejudiced mind. He has done nothing which should disqualify him or render him unfit, as was the case in *Hickman & Co.* v. *Roberts* (1913), 82 L.J., K.B. 678, nor will he be placed in the position of judge and witness, which was the case in *Bristol Corporation* v. *John Aird & Co.*, *ib.* 684.

MCPHILLIPS, J.A.: I am of the same opinion as my brother MARTIN. I think, possibly, if this case had been launched and tried as *Bush* v. *Whitehaven Trustees* (1888), 52 J.P. 392, and the trial judge had held as the jury did in that case, the plaintiffs might have been entitled to succeed notwithstanding

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the conditions of the contract with respect to delay and submission.

The present case, though, is one brought for breach of a contract treated throughout as subsisting—not put at an end—and the plaintiff is claiming damages for breach of contract on the ground of delays on the part of the defendant (the Municipality) in furnishing materials which it was called upon to furnish by reason of the provisions of the contract and specifications.

It will be seen that the question of possible delays were contemplated and dealt with in paragraph 116 [already set out].

In referring to the contract in *Bush* v. *Whitehaven Trustees, supra,* Coleridge, C.J. at p. 393 said:

"The contract is one substantially in terms common enough, whereby the contractor is bound hand and foot to the other party and their engineer . . . . Hence the time may be extended under the authority of the engineer, the effect of which would be to relieve the contractor of the penalty. . . . . In the first place, it seems to me that the construction put upon the contract of the defendants is in a high degree oppressive because it is manifest that the delay being occasioned apart from corruption or *mala fides,* the only power under the contract is to relieve the plaintiff from a thing which he could never do. Nevertheless, the terms of the contract may be so plain that the plaintiff must be held to them."

Bush v. *Whitehaven Trustees, supra,* went to the Court of Appeal (see Hudson on Building Contracts, 4th Ed., Vol. 2, p. 122), and Lord Esher, M.R. at p. 132 said:

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"If the first contract was gone, if the state of circumstances with regard to which it was made were really no longer in existence as between the parties, if the one did work for the other upon the new state of circumstances which the other accepted, knowing that it was being done on the terms of being paid for, that gives rise to a *quantum meruit.*"

And see Lindley, L.J. at p. 133.

Now the present case must be looked at quite differently, and whilst it has been very ably argued by counsel on behalf of the plaintiffs that the judgment of the learned trial judge is right and can be supported, it has been no less ably argued by counsel on behalf of the defendant that, under the terms of the contract, no damages are claimable based upon delay in the delivery of materials, but if it should be that the plaintiffs have any claim requiring determination, same is covered by the submission clause in the contract.

If this contention, so strenuously urged by counsel for the defendant, be the correct construction to be put upon the contract, it follows that the present action is prematurely brought, being brought before the determination of the question by the engineer, there being an absence of *mala fides,* and no suggestion that the defendant has in any way identified itself with the engineer so as to prevent the plaintiffs from obtaining what may be properly due. In my opinion, it is clear from the opening words of the submission clause that the contract of the parties was that every question relative to the undertaking or adventure entered upon was to be determined by the engineer, who was to be the final arbiter in respect thereof. The submission, in my opinion, is absolute, and leaves no question open for agitation in the Courts other than, perhaps, after an award, the due enforcement thereof, *i.e.,* in my opinion, the submission or arbitration clause covers the question which is being litigated in this action, and a determination thereunder is a condition precedent to any action being brought: *Edwards* v. *Aberayron Mutual Ship Insurance Society* (1876), 1 Q.B.D. 563; *Alexander* v. *Campbell* (1872), 41 L.J., Ch. 478 at p. 484. That a submission may oust the jurisdiction of the Court is well settled: *Scott* v. *Avery* (1856), 5 H.L. Cas. 811; *Collins* v. *Locke* (1879), 4 App. Cas. 674; *London Guarantee Company* v. *Fearnley* (1880), 5 App. Cas. 911; *Caledonian Insurance Company* v. *Gilmour* (1893), A.C. 85.

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Turning to the proceedings which took place before the engineer, in my opinion the engineer did not in any way refuse to act, or abdicate his position as the named referee to finally and conclusively decide all questions. But the conduct of the plaintiffs was such that the abortiveness of the proceedings was wholly due to the conduct of the plaintiffs. It was the plaintiffs' duty to then and there, or at some subsequent time, adduce all such evidence as was available to support the alleged claim for damages consequent upon the alleged delays.

The present case is not within the principle, as defined by Lord Shaw, in the judgment of their Lordships of the Privy Council in *Cameron* v. *Cuddy* (1913), 13 D.L.R. 757, which was that if for any sufficient cause the arbitration prove abortive,

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it is then the duty of the Court to hear and determine the question. Here there is no sufficient cause. The plaintiffs should have proceeded before the engineer, and the fault is the plaintiffs' fault. The plaintiffs do not attempt in the pleadings to set up that the engineer refused to hear the alleged claim for damages, and that in so doing he was acting in collusion with the defendant. The truth is, the plaintiffs would not appear to have been willing to proceed before the engineer save upon terms and conditions that the engineer could not admit of, *viz.*: any award made would only be acceded to by the plaintiffs if just and reasonable in the opinion of the plaintiffs—but not otherwise. This was an absolutely untenable position for the plaintiffs to take, and one that the engineer was rightly entitled to disagree with.

There is some suggestion in the evidence that the engineer was not in a position to bring to the consideration of the question that judicial and impartial mind that is to be expected and may be said to be required (*Hickman & Co.* v. *Roberts* (1913), A.C. 229), but I do not so read the evidence.

MCPHILLIPS, J.A.

In *Cross* v. *Leeds Corporation* (1902), reported in Hudson on Building Contracts, 4th Ed., Vol. 2, p. 339, there is to be found this statement:

> "A named arbitrator, who was an official of the Leeds Corporation, wrote a letter in which he said that the claim of the contractors against the corporation was outrageous. The contractors brought an action against the corporation, which the corporation applied to have stayed pending the arbitration; the contractors opposed this. Held, that the arbitrator was not disqualified."

It follows that, in my opinion, the action has been wrongly conceived, and upon the evidence, as we have it before us, there can be but the one result, and that is that the action must stand dismissed and the appeal allowed, with costs here and below.

Appeal allowed,
Macdonald, C.J.A. and Irving, J.A. dissenting.

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

Solicitors for respondents: *Russell, Macdonald, Hancox & Farris.*

IRONSIDE *ET AL.* v. VANCOUVER MACHINERY DEPOT, LIMITED.

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Sale of goods—Railway contractor's plant—Action for price of—Examination before delivery—Neglect of defendant to check upon receipt of goods—Finding of trial judge.

The plaintiffs sold the defendant a railway contractor's plant, consisting of cars, scrapers, and other equipment. The plant, which was a second-hand one, was examined by the defendant before he purchased. Two of the defendant's servants kept tally on the goods as they were loaded at Cloverdale, the place of shipment. Upon reaching the defendant's shops in Vancouver, the goods, without being checked, were so dealt with as to make it impossible to ascertain whether or not they conformed to the description in the contract. On appeal from the judgment in favour of the plaintiff in an action for the price of the goods:—

Held (IRVING, J.A. dissenting), that the judgment of the trial judge should not be disturbed, as it was based upon the direct evidence of the only persons who examined the goods, and made a list of them, the defence having failed in their duty to ascertain, upon receipt of the goods, whether or not they corresponded with the description in the contract.

APPEAL by defendant from a decision of GREGORY, J. at the trial of the action in Vancouver on the 30th of March, 1914, claiming the price of goods sold and delivered. Defendant purchased from plaintiffs certain contractor's equipment, and the question was whether the checking over of the equipment should have been done at the place where they were when purchased, or where received by the defendant. The dispute arose over an alleged shortage. The trial judge made certain allowances and disallowed various items, upon which the defendant appealed.

Statement

The appeal was argued at Victoria on the 11th of June, 1914, before MACDONALD, C.J.A., IRVING, GALLIHER and MCPHILLIPS, JJ.A.

Burns, for appellant.

Macdonell, for respondents.

Cur. adv. vult.

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MACDONALD, C.J.A.: The plaintiffs contracted to sell to the defendant a number of dump-cars, scrapers, and other contractor's plant, and the only question involved in this appeal is as to how many of such articles were delivered and accepted. They were second-hand goods, some in fair condition and others in very bad state of repair, but the defendant had looked them over before entering into the contract. A verbal agreement was confirmed by letters, the result being a contract for the sale of all the dump-cars, scrapers, car frames and wheels at specified prices. For "cars complete," defendant was to pay $28, for wheel scrapers $28, and for car frames and wheels $15. There was some dispute as to the place where defendant was to inspect them for the purpose of determining whether they fulfilled the conditions of the contract or not—plaintiffs say at Cloverdale, the place of shipment; defendant says at Vancouver. They were loaded at Cloverdale by the men employed by the defendant. Two of these men kept tally for the plaintiffs, and theirs is the only available direct evidence of quantities. The goods were brought to defendant's shops, and without being checked over for acceptance by the defendant, as it admits, were repaired, and many of them sold, and others dealt with in such a manner as to have made it impossible at the time of the trial to ascertain whether or not they would conform to the description contained in the contract.

MACDONALD, C.J.A.

The learned judge found that 46 wheel scrapers, 123 complete cars, and 25 frames and wheels had been delivered. The defendant endeavoured to prove that a large number of cars were not complete, or were in such a dilapidated condition that they were worthless. It did not deny that the numbers of cars, scrapers, frames and wheels sworn to by plaintiffs' witnesses, who kept the tally, were not delivered, but denied that all the cars fell within the description above set forth of "cars complete." But they give no satisfactory evidence of the numbers so incomplete, and hence the difficulty mentioned by the learned judge and experienced as well by myself, of arriving at an entirely satisfactory conclusion. If defendant did not make an inspection of the articles when it received them that

was its own fault, and this is so, whether the inspection was to be made at Cloverdale, as the plaintiffs say, or at Vancouver, as the defendant says.

There is nothing to be done, then, but to accept, with such modifications as appear to be just, having regard to the other evidence in the case, the testimony of the only persons who have made a list of the goods, and classified them in such a way as to enable the Court to reach a conclusion with respect to the number answering the descriptions in the contract.

MACDONALD, C.J.A.

The learned judge has done this, and I cannot say that he has not come to the right conclusion.

The appeal, therefore, should be dismissed.

IRVING, J.A.

IRVING, J.A.: I would allow this appeal. It is trite law that if a plaintiff fails to make good his claim to the satisfaction of the tribunal which has cognizance of it, he must, of course, bear the consequences. In the present case the plaintiffs' evidence as to the number of articles taken over by the defendant was rejected by the learned judge. The evidence as to what the defendant had discarded was given by the defendant's agents, and the learned judge thought it had rejected more than it was entitled to. In these circumstances, the learned trial judge thought he was justified in accepting the plaintiffs' evidence, subject to a discount. This method seems to me objectionable, as being nothing else than a conjecture. The doctrine of probabilities illustrated in *Grand Trunk Rway Co.* v. *Griffith* (1911), 45 S.C.R. 380, cannot assist the plaintiffs in a case of this kind.

It may be that by allowing this appeal the plaintiffs are not getting all they are really entitled to receive. If that is the result, it is owing to their own neglect.

GALLIHER, J.A.

GALLIHER, J.A.: I am not prepared to disagree with the finding of the learned trial judge. On the whole I think he came to the right conclusion, and would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal is that of the defendant from a decision of GREGORY, J. The action is one for goods sold and delivered, the goods being cars and equipment used by

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railway contractors in railway construction. The cars and equipment generally had been in use some time, and no doubt, to a considerable extent, the value thereof had been exhausted, yet still serviceable. The defendant examined the goods before purchase at Cloverdale, B.C., and delivery was taken at Cloverdale, servants of the Company loading the goods upon railway cars at the point of delivery, and taking note of the number of cars, scrapers, etc., loaded.

The learned trial judge held that the goods, under the terms of the contract—which was a verbal contract—later referred to in letters which passed between the parties—called for delivery at Cloverdale. The total claim of the plaintiffs was in amount $4,201.72, after giving credit to the defendant for $1,425 paid on account. The items of the account disputed had relation to the number of cars and scrapers delivered, or which had to be paid for under the contract, the plaintiffs alleging that 148 cars and 47 scrapers were duly delivered complying with the terms of the contract, whilst the defendant claimed that but 51 cars and 38 scrapers were received which were in true compliance with the contract. In effect, the defendant's contention was that it did not check over the cars and scrapers at the point of delivery, although it paid men to load same and took delivery at Cloverdale, and further, paid the men employed upon the basis of there being the number of cars and scrapers claimed by the plaintiffs put aboard the cars.

MCPHILLIPS, J.A.

Without entering into details with regard to the evidence, it is clear, in my opinion, that the contract was made for delivery at Cloverdale, B.C., and there the defendant took delivery, and also at that point advised itself of the number of cars and scrapers delivered, and it was only after a long lapse of time—a year or more—that the defendant would appear to have advanced the contention put forward at the trial, that was, that it was not called upon to pay for the number of cars and scrapers claimed to be delivered by the plaintiffs, but the number should be reduced to the number above stated. The learned trial judge would appear to have carefully gone into the facts, and in the result reduced the plaintiffs' claim somewhat, and gave judgment for the sum of $3,763.72. In my opinion, upon

the evidence as adduced at the trial, it would have been quite justifiable to have given judgment for the total amount claimed, but as there has been no cross-appeal, or fault found with the amount allowed upon the part of the plaintiffs, it is not a matter calling for attention at the hands of this Court.

It is evident, when all the surrounding facts are looked at, that the plaintiffs were in possession of, and the owners of, railway construction plant which the defendant was anxious to acquire, and inspection was made of the plant which was for sale, and the defendant bought it, and it would be arriving at a conclusion that both the plaintiffs and the defendant proceeded in a most unbusinesslike way if it were to be held that the transaction was really not complete at Cloverdale.

Without alluding to all the facts which might be alluded to, one fact alone stands out prominently, and that is this: all the plant of which the defendant took delivery was shipped by them to Vancouver and freight paid by them. If so much of the plant so accepted was worthless, this course would appear to be a most unbusinesslike proceeding.

There can be no question, upon the facts of the present case, that the property in the goods was, at Cloverdale, transferred from the plaintiffs to the defendant: see *Tarling* v. *Baxter* (1827), 6 B. & C. 360, 365; 30 R.R. 355; and the Sale of Goods Act, R.S.B.C. 1911, Cap. 203, Sec. 26, r. 1. The Sale of Goods Act being looked at, especially section 50, and the evidence in this case considered, it is, in my opinion, impossible for the defendant to contend that the sale was not complete at Cloverdale. Further, the lapse of time, and the mixing of the goods with other goods, and the contention, at such a late date, that instead of 148 cars being received but 51 were received, and that instead of 47 scrapers being received but 38 were received, and this in the face of a complete statement (upon the basis of which the defendant paid the men who loaded the cars) proving the plaintiffs' case, renders it impossible, in my opinion, for the defendant to successfully contend that there was not complete acceptance of the cars and scrapers, the contract price for which is sued for, and which, in my opinion, is properly payable by the defendant to the plaintiffs.

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Unquestionably this is a case where the maxim *caveat emptor* applies: see section 22, Sale of Goods Act. The defendant was thoroughly conversant with the goods purchased, and it is not open to the defendant, in my opinion, to now set up the unfitness of the cars and scrapers, for which payment is refused, and that was really the defence which was advanced and pressed at the trial.

It follows that, in my opinion, the appeal should be dismissed.

Appeal dismissed, Irving, J.A. dissenting.

Solicitors for appellant: *Burns & Walkem.*
Solicitor for respondents: *D. G. Macdonell.*

GREGORY, J. (At Chambers)

RE WILLIAM COMER, DECEASED.

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Feb. 19.

Practice—Administration—Application for probate—Issue of letters to a corporation—B.C. Stats. 1905, Cap. 69, Sec. 1, Subsec. (4), and Sec. 2.

RE WILLIAM COMER, DECEASED

On an application for probate of the will of a deceased person, letters may be issued direct to a corporation, but the corporation must first appoint some person to take the executor's oath and swear to the administration of the estate by the company.

Statement

APPLICATION by the Royal Trust Company for probate of the will of William Comer, deceased. Heard by GREGORY, J. at chambers in Victoria on the 19th of February, 1914.

W. S. Lane, for applicant.
No one, *contra.*

Judgment

GREGORY, J.: This is an application by the Royal Trust Company for the probate of the will of the deceased, and the question has been raised whether the Company shall appoint a syndic to take letters for it or whether the letters may be

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issued direct to the Company. Under the English practice a corporation aggregate must appoint a syndic. The established practice in this Province, and, it is alleged, in Ontario, has been to issue the letters direct to a corporation, and I see no reason for disturbing that practice, as it appears from the whole tenor of the Royal Trust Company Act, 1905, that it is intended that the corporation shall be executor. In the present case the Company has ample power to take under section 1, subsection (4), and section 2 of their Act. The practice to be adopted should be that the Company should appoint some person to take the executor's oath and swear to the administration of the estate by the Company, and the letters would then issue to the Company. Before the registrar passes the papers, he should be thoroughly satisfied that such appointment has been duly and regularly made in accordance with the by-laws of the Company, and I think it would be well to require the production of a sealed copy of the resolution of appointment, duly verified by affidavit, to be produced and filed with the other papers.

Judgment

Application granted.

CLEMENT, J.

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Sept. 24.

HOPE *ET AL.* v. MUNICIPALITY OF SURREY AND THE VANCOUVER, VICTORIA AND EASTERN RAILWAY AND NAVIGATION COMPANY.

HOPE v. SURREY AND THE V.V. & E. RY. & N. CO.

Highway—Set apart by voluntary agreement—Gazetting—Obstruction of highway—Abatement of by municipality—Highway Act, R.S.B.C. 1911, Cap. 99.

Although a by-law and notice thereof in the Gazette are necessary under the Highway Act whereon to ground compulsory expropriation, they are not essential to the establishment of a public highway where a road is set apart and brought into existence by the combined action of all parties interested.

A municipality cannot undertake to abate a nuisance by tearing down a fence obstructing a highway.

Delta v. *V. V. & E. Ry. & N. Co.* (1908), 14 B.C. 83, followed.

ACTION tried by CLEMENT, J. at Vancouver on the 24th of September, 1914. The facts are that Nettie A. Carncross, owner of the fractional southeast quarter of Section 10, Township 1, New Westminster District, conveyed on the 17th of August, 1906, to the Victoria Terminal Railway and Ferry Company, who later conveyed to the defendant The Vancouver, Victoria and Eastern Railway and Navigation Company, a right of way through said land measuring 100 feet northerly from the centre line of the Railway Company. At the time of the first conveyance the defendant Municipality acquired from Mrs. Carncross a 33-foot strip of land for a public highway adjoining the said right of way on its northerly boundary. The highway was, by arrangement between the Railway Company, the Municipality and Mrs. Carncross, laid out by the Railway Company, its southern boundary being marked by a fence which was erected along the northern boundary of the Railway's right of way. In 1909, under two agreements for sale, the whole of the Carncross property, with the exception of the portion sold to the Railway Company and the Municipality, was transferred to the plaintiffs, who erected a post and wire fence along what they considered the northern boundary of the

Statement

highway separating the highway from their property. In August, 1912, the workmen of the Municipality pulled this fence down, contending that, as originally laid out by the Railway Company, it encroached about eight feet on the highway. The plaintiffs then brought action for damages and for an injunction, for a declaration that they were entitled to the lands as bound by the fence so erected by them, and for a rectification of the boundaries of the right of way and highway, they claiming that the fence first erected by the Railway Company separating their right of way from the highway had been placed eight feet further north than the proper boundary of the right of way; and in the alternative, should it be held that the highway was found to so lie as to leave certain lands between the southerly boundary of the highway and the northerly boundary of the right of way, the plaintiffs are entitled to a declaration that the intervening lands belong to them.

Statement

M. A. Macdonald, for plaintiffs.
A. H. MacNeill, K.C., for defendants.

CLEMENT, J.: I agree with Mr. *Macdonald* that the road in question, as it exists on the ground, did not become a public highway by dedication in the sense in which that term is used in English law. Nevertheless, the road, as it exists, was brought into existence by the combined action of the defendant Railway, the defendant Municipality, and the landowners, including the plaintiffs' predecessor in title, Nettie A. Carncross. All were consenting parties. I must assume that Mrs. Carncross was a party to some bargain fixing the price or compensation which she was to receive for the land required for the road. Apparently there were no expropriation proceedings necessary, the whole matter being amicably arranged so far, at all events, as Mrs. Carncross was concerned. As to such a road so brought into actual existence, it is hardly necessary to invoke section 13 of our Highway Act; for it was deliberately and intentionally brought into being as a highway for the public. Gazetting in such case was, in my opinion, superfluous. A by-law and notice thereof in the Gazette are necessary to ground compulsory

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expropriation. They are not essential in all cases to the establishment of a public highway.

The only question open on this part of the case is whether the northern boundary of the road has been sufficiently fixed by what was done. The road was laid out by the defendant Railway (as part of the arrangement with the defendant Municipality). The southern boundary was marked by the fence erected along the northern boundary of the defendant Railway's right of way, or of what, without objection by Mrs. Carncross, they took to be their right of way as acquired from her. And on the easterly boundary of the Carncross property a stake was planted to indicate the point where the northern boundary of the road would intersect the said easterly boundary of the Carncross property. Between these road boundaries the ground was roughly graded for a width of from 12 to 14 feet, with a ditch on the north side, at least. This, with the surrounding circumstances, was, in my opinion, sufficient to fix the road as a public highway, 33 feet in width, lying north of the defendant Railway's fence. Upon this highway the plaintiffs, in my view, encroached when they built the fence, the tearing down of which by the defendant Municipality is complained of in this action.

Judgment

Nevertheless, the defendant Municipality had no right, as I understand the law, to take upon themselves the abatement of this nuisance. I must follow and apply *Delta* v. *V.V. & E. Ry. & N. Co.* (1908), 14 B.C. 83, in which it was held that a municipality is not entitled to bring action to redress the public wrong done by obstructing a highway. Such an action can be brought only by the Attorney-General. It must equally follow that a municipality cannot undertake to abate such a nuisance *vi et armis*. Such a proceeding is, in my judgment, lawless and reprehensible, as calculated to cause a breach of the peace. The fence in question had stood, as I gather from the evidence, for about a year, and the dispute as to the plaintiffs' right to maintain it in its then position was the subject of correspondence and debate with the engineers of the defendant Railway. While I have no sympathy for these plaintiffs, whose claims I think quite out of the question (as will appear later), the

defendant Municipality is much to blame in resorting to lawless force: see *Waddell* v. *Richardson* (1911), 17 B.C. 19.

The difficulties which it is suggested have arisen by reason of the erroneous description of this highway in the by-law passed by the council of the defendant Municipality seem to me more apparent than real. That by-law has never, in fact, been acted on, except that, apparently, it has been registered in the land registry office. That registration should be vacated and the by-law itself be repealed. This will remove any possible cloud upon the plaintiffs' title.

With regard to the plaintiffs' claim against the defendant Railway, what I have said above reduces to about 8 feet the strip which the plaintiffs claim as their property, lying between the highway and the northern limit of the land conveyed to the defendant Railway by Mrs. Carncross. Of this strip the defendant Railway took possession (without objection from Mrs. Carncross) as being covered by the conveyance from Mrs. Carncross. I do not think it is; but, on the evidence, I think there is little doubt that as between the defendant Railway and Mrs. Carncross rectification would be ordered. Mrs. Carncross, however, is not a party to this record, so that I cannot so adjudicate. The plaintiffs' only claim, as put forward, is under two agreements for sale, the one made by Mrs. Carncross with one Sands, the second made by Sands with the plaintiffs. It seems clear to me that on the proper construction of those agreements the plaintiffs acquired no interest in any part of the property formerly owned by Mrs. Carncross lying south of the highway. If so, the plaintiffs have no *status* to attack the defendant Railway's title, or to question their possession of the strip in question.

Judgment

The result is that the plaintiffs fail as to all their claims other than the claim to damages for trespass. On that there will be judgment against the defendant Municipality for $200, with such costs only as would have been incurred had their claim been limited to that head. As between the plaintiffs and the defendant Municipality there will be no further order as to costs. The defendant Railway are entitled to their costs against the plaintiffs.

Order accordingly.

GREGORY, J. (At Chambers)

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FREEMAN v. LICENCE COMMISSIONERS OF NEW WESTMINSTER

FREEMAN v. LICENCE COMMISSIONERS OF NEW WESTMINSTER.

Municipal law—Liquor licence—Issue of by commissioners—Non-compliance with statutory conditions — Proceedings by certiorari — Order quashing—Crown Office Rules 7, 35 and 40—Municipal Act, R.S.B.C. 1911, Cap. 170, Secs. 318, 337; 349, Subsec. (a), and 352.

Non-compliance with the provisions of the Municipal Act by a Board of Licence Commissioners, in granting an application for a liquor licence, renders the licence null and void.

The words, "block of land," used in subsection (*a*) of section 349 of the Municipal Act mean a block of land shewn on a registered plan, and not a block of lots as subdivided by four streets.

Under Crown Office Rule 35, non-production of the order complained of, on motion for an order for the issue of a writ of *certiorari*, is not fatal where the judge grants leave to file a verified copy; it may, in such a case, be inferred that the absence of the copy was accounted for to his satisfaction (MARTIN, J.A. dissenting).

Certiorari proceedings are proper proceedings by which to question a decision of a Board of Licence Commissioners.

The King v. *Licence Commissioners of Point Grey* (1913), 18 B.C. 648, followed.

Statement

APPEAL by Thomas Freeman from an order for the issuing of a writ of *certiorari* made by GREGORY, J. at chambers in Vancouver on the 31st of March, 1914. Freeman had applied for a bottle licence, which came up for consideration before the Board of Licence Commissioners of New Westminster at their regular meeting on the 10th of December, 1913, and was laid over until the meeting on the 31st of December, 1913. On the 16th of the same month Freeman filed with the clerk of the Municipal Council a petition and map in support of the application. Upon the hearing on the 31st of December, objection was taken by certain ratepayers to the issuing of the licence, on the grounds that the application, when deposited with the clerk of the Municipal Council, was not accompanied by a list of householders resident within the block in which the proposed licensed premises were situated; that the application was not accompanied by a statement of the approximate distance from the proposed licensed

premises to the residence or property of each person signing said petition; that the application did not shew a map or plan of the lots and block of land within which the proposed licensed premises were situated, drawn on a scale of not less than one inch for every hundred feet, shewing each lot or subdivision of a lot and the names of the owners thereof, and stating whether said owners were married or single; that Freeman had failed to obtain the signature to the said petition of at least two-thirds of the said lot owners of the block within which the proposed licensed premises were situated; and that the said petition and map were not deposited with the clerk of the Municipal Council of the City of New Westminster at least 14 days before the sitting of the said Board of Licence Commissioners as a licensing court.

The Board granted the application, and the licence was issued on the 2nd of January, 1914. On the 2nd of March, 1914, the ratepayers aforesaid applied for an order *nisi* directing that a writ of *certiorari* do issue, removing into Court all proceedings before the Board of Licence Commissioners. The order was granted by GREGORY, J. on the 11th of March and was made absolute on the 31st of March, 1914. The applicant Freeman appealed, on the grounds that the affidavit used on the application for the order *nisi* and the order absolute was wrongly entitled (*i.e.*, it should have been entitled only: In the Supreme Court of British Columbia); that the applicants for the writ of *certiorari* were not parties interested or aggrieved; that *certiorari* is not the proper remedy; that the order for the issue of the licence and the licence were not before the Court on the motion for the order absolute, and on other grounds.

Statement

C. W. Craig, for the applicants.
Whiteside, K.C., and *Tulk,* for Thomas Freeman.
G. E. Martin, for the Licence Commissioners.

31st March, 1914.

GREGORY, J.: The licence herein was granted under subsection (3) of section 318 of the Municipal Act, Cap. 170, R.S.B.C. 1911. There is no other authority for granting a bottle licence. Section 349 provides that no licence shall be

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granted under that subsection until the provisions there prescribed shall be complied with, and no real attempt has been made to comply with the same. In fact, there is a flagrant non-compliance. It is unnecessary to enumerate all that has not been done, but it is quite sufficient to state that whereas this section requires that petitions for the Council, to be signed by at least two-thirds of the lot owners, and also by at least two-thirds of the wives (if any) of such lot owners, it appears from the evidence before me that not a single one of such lot owners signed the petition. Section 352 of the Act provides that no petition under the subsection shall be received, acted upon or considered by the Board unless it shall have, in addition to each signature thereon, a statement of the approximate distance from the premises to which such petition refers of the residence or property of each person signing the same. In no instance is this done, and the Board, therefore, never had any authority to consider the petition.

As to the objection that the applicants for the writ have not complied with rule 40 of the Crown Office Rules, that rule only applies to an omission or mistake in the judgment or order, etc., in question.

GREGORY, J.

As to there being no copy of the resolution of the Board produced before me, I think that can be secured by granting Mr. *Craig's* request to file it now, which I do. The other objections are answered by the decision of the Court of Appeal in *The King* v. *Licence Commissioners of Point Grey* (1913), 18 B.C. 648; 5 W.W.R. 572, which decides that certain proceedings are applicable to the present case.

The defence has absolutely no merits, and I think the applicant's procedure sufficient. The order will, therefore, be made absolute.

The appeal was argued at Victoria on the 4th and 5th of June, 1914, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Whiteside, K.C., for appellant: The application from the order *nisi* was wrongly intituled. The words "In the Supreme Court of British Columbia" should be used, and

nothing more: see *Ex parte Nohro* (1823), 1 B. & C. 267. The application for the writ was not made by the parties interested or aggrieved: see *The Queen* v. *Justices of Surrey* (1870), L.R. 5 Q.B. 466; *The King* v. *The Inhabitants of Taunton St. Mary* (1815), 3 M. & S. 465; *Reg.* v. *Nicholson* (1899), 2 Q.B. 455 at p. 470. The order of the Licence Commissioners directing the issue of the licence was not before the Court and the trial judge allowed the applicants to put in a certified copy. Under the rule the order must be before the Court: see Short & Mellor's Crown Office Practice, 2nd Ed., p. 53. Notice of this application was only served on the mayor; the old Board, which made the order, was not served, but the new Board. Sections 348 and 349 of the Municipal Act have not been complied with.

C. W. Craig (*Hansford,* with him), for respondents (applicants): Not an owner in the block signed the petition for a licence. As to this application being wrongly intituled, see *Prudhomme* v. *Licence Commissioners of Prince Rupert* (1911), 16 B.C. 487; Short & Mellor, p. 11. As to the applicants not being interested, the fact of the original block being subdivided does not affect the requirements of the statute; any person in the original block may complain. *Certiorari* proceedings is the proper remedy, as there is no other remedy available: see Seager's Magistrates' Manual, pp. 31-2; *Re Traves* (1899), 10 Can. Cr. Cas. 63; *Ex parte Cowan* (1898), 9 Can. Cr. Cas. 454. The granting of the writ is discretionary, and this is the proper and convenient way to decide the matter: see *The King* v. *Licence Commissioners of Point Grey* (1913), 18 B.C. 648; *Rex* v. *Woodhouse* (1906), 2 K.B. 501. The objection that the licence was not before the Court on this application, as required by Crown Office Rule 35, is answered by the fact that when this objection was taken on the motion, the learned judge granted leave to file a verified copy thereof. Relative to the objection that the proper parties were not served, see *Prudhomme* v. *Licence Commissioners of Prince Rupert, supra.*

Argument

Whiteside, in reply.

Cur. adv. vult.

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MACDONALD, C.J.A.: During the argument the appellant's counsel abandoned that ground of appeal which denied that the licence was improperly and irregularly issued. The commissioners, the predecessors in office of the applicants, appear to have acted without regard to the regularity, or, indeed, the legality of their proceedings, and if this appeal is to succeed, it must be by force of the technical points upon which the appellant relies.

The appellant complains that the affidavit on which the order *nisi* is founded was wrongly intituled. Crown Office Rule 7 directs that affidavits used on the Crown side shall be intituled: "In the Supreme Court of British Columbia." The affidavit in question is so intituled, but there follows the words: "In the matter of," etc. This, if it really adds to the style of cause, is mere surplusage, and is not ground for setting aside the proceedings.

Another ground of appeal is that the applicants who initiated these proceedings were not aggrieved by the granting of the licence complained of, because, as is alleged, they were not, nor was any one of them, the owner of land in the block of land within which the licensed premises are situated. It was, however, conceded by appellant's counsel that Bryson, one of these persons, was the owner of a lot in the block in question if the words "block of land," used in subsection (*a*) of section 349 of the Municipal Act means a block of land shewn on a registered plan, and not a block of lots as subdivided by four streets. That question is set at rest by reference to the interpretation clause of the Municipal Act *sub nom.* "block of land," which shews that where there is a registered subdivision shewing numbered blocks, as is the case here, it is the block there shewn which is referred to in said subsection (*a*).

MACDONALD, C.J.A.

Again, it was contended that *certiorari* proceedings are not the proper proceedings by which to question the rulings of a board of licence commissioners. This objection is met by the decision of this Court in *The King* v. *Licence Commissioners of Point Grey* (1913), 18 B.C. 648.

The appellant further contends that because the order of the

Board directing the issue of the licence was not before the Court on the motion for the order absolute the Court could not properly proceed with the motion. This is based upon Crown Office Rule 35, which provides that a copy of the order or other process complained of, duly verified, shall be produced to the clerk of the Court before the motion is made, unless the absence of the same is accounted for to the satisfaction of the judge. Objection was taken before the learned judge at the time the motion was made, and he dealt with it by granting leave to file a verified copy. It would appear, therefore, that the absence of the said copy was accounted for to the satisfaction of the learned judge, otherwise he would not have so dealt with it.

Another ground of appeal is that service of the order *nisi* was not made on the members of the Board who gave the decision complained of, but who had retired and were succeeded by the applicants, who were in office at the time these proceedings were begun. In my opinion, this objection cannot prevail, for reasons which I have set forth in *Prudhomme* v. *Licence Commissioners of Prince Rupert* (1911), 16 B.C. 487.

MACDONALD, C.J.A.

The last ground of appeal is that the city corporation was not served with notice of the proceedings. The Board of Licence Commissioners are a body having defined duties and responsibilities, and while it is true that by a by-law of the corporation the city clerk is required to act as clerk of the Board of Licence Commissioners, yet, in my opinion, he acts as the official of the Board—not of the City Council. He is required to keep the record of the proceedings of the Board, and he is custodian of them for the Board—not for the city. I, therefore, see no reason why the city should be notified of the *certiorari* proceedings, or should be necessary parties to them.

Upon all grounds I am of the opinion that the appellant must fail.

MARTIN, J.A.

MARTIN, J.A.: It is objected, *inter alia,* by the appellant that the order for *certiorari* should not have been made because the provisions of Crown Office Rule (Civil) 35 have not been complied with. That rule is as follows:

"No order for the issuing of a writ of *certiorari* to remove any order, conviction, or inquisition, or record, or writ of *habeas corpus ad sub-*

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jiciendum shall be granted where the validity of any warrant, commitment, order, conviction, or record shall be questioned, unless at the time of moving a copy of any such warrant, commitment, order, conviction, inquisition, or record, verified by affidavit, be produced and handed to the officer of the Court before the motion be made, or the absence thereof accounted for to the satisfaction of the Court."

This is a very precise and stringent rule, going directly to the jurisdiction, and positively prohibiting the Court from granting, or even hearing motions for the orders mentioned, unless a copy of the document which is called in question, "verified by affidavit, be produced and handed to the officer of the Court before the motion be made, or the absence thereof accounted for to the satisfaction of the Court." It is admitted that no such copy was before the Court when the motion was made on the 31st of March last, and all that was done was that the Court, when objection was taken to the jurisdiction because of the absence of the verified copy, did, on the request of the counsel for the motion, give leave "to file it now." But, in fact, it was not filed till the next day at least, as the affidavit is dated the 1st of April, and is so recited in the order, which is properly dated the day before. The difficulty arises from the fact that advantage was not taken of the leave given to file the affidavit then and there, the Court obviously, and naturally, being of the belief that when counsel asked leave "to file it now," so as to be able to proceed, that he had the necessary affidavit and copy with him in Court ready to file, and that he had done so, and, therefore, proceeded to hear the motion, the bar having apparently been removed, whereas it now appears that he had not, and did not obtain the documents till next day. If he did not have them then, he should have applied for a postponement of the motion, and not taken the risk of going on without them. This is the only possible inference, to my mind, to draw from the facts before us, because no attempt was made to account for the absence of the copy, *e.g.*, that the original had been destroyed, or was mislaid, or inaccessible, or for any other good reason, and the Court did not, therefore, apply its mind towards its "satisfaction" on this head. It follows that the order made is void, as there was no jurisdiction to make it, or even to hear a motion for it. I am clearly of the opinion that the general remedial clause at the foot of the rules as to time, amendment,

MARTIN, J.A.

non-compliance, etc., does not cure this defect. It is stated only to be effective "so far as applicable," and it cannot, I think, be held to apply to a rule which contains a positive and specific prohibition of jurisdiction, and provides its own remedy for failure in compliance, *viz.*: the accounting for the absence of the necessary document.

The appeal, in my opinion, should therefore be allowed.

GALLIHER, J.A.: I agree with the Chief Justice.

MCPHILLIPS, J.A.: This appeal is one calling in question the granting of a retail bottle liquor licence, and the appeal is from GREGORY, J., whose decision was, on *certiorari* proceedings, that the order should be made absolute.

The contention advanced, that *certiorari* proceedings were not the proper proceedings, is immediately set at rest by the decision of this Court in *The King* v. *Licence Commissioners of Point Grey* (1913), 18 B.C. 648.

I do not find it necessary to deal in detail with all the technical and practice exceptions taken in the notice of appeal, and dwelt upon by counsel, further than to say that I do not consider any of them fatal exceptions to the hearing of this appeal. I associate myself completely with the reasons for judgment of GREGORY, J., and view the appeal as one devoid of merits.

MCPHILLIPS, J.A.

The Board of Licence Commissioners apparently proceeded without, I might almost say, any regard to the statute law in granting the application for the licence. The conditions precedent to the issuance or granting of the liquor licence, as set forth in section 349 of the Municipal Act (R.S.B.C. 1911, Cap. 170), would not appear to have been complied with, and when this is considered, and when the Legislature made it plain beyond peradventure that the Board of Licence Commissioners must only act in strict conformity with the Municipal Act, it is impossible to determine otherwise than that the proper order was the quashing of the proceedings of the Board of Licence Commissioners. It is only necessary to refer to section 337 of the Municipal Act to see how impossible it is to give any effect

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to the action of the Board of Licence Commissioners, which, in part, reads as follows:

"That a licence shall not be granted, or the transfer of a licence authorized, or a licence be renewed by the Board of Licence Commissioners, or by their authority, unless the applicant has, prior to the granting or authorization of a transfer or renewal of the licence, fully complied with the provisions of this Act, or of any by-law passed under its authority with reference thereto; and if a licence is granted, transferred, or renewed contrary to the provisions of this Act or of any such by-law, such licence shall be, *ipso facto*, null and void."

Now, unquestionably the licence issued to the appellant is null and void, and that being so, there is nothing for the Court to set aside. But, without the proceedings of the Board of Licence Commissioners being quashed, the appellant would be in possession of a licence, and entitled to sell liquor thereunder, although, upon inquiry, it is found that the same is null and void. It, therefore, is just and proper that the licence should be declared null and void, and that is the effect of the order which is appealed from. In the way of analogy to what I have last stated, *Doe dem. Turnbull* v. *Brown* (1826), 5 B. & C. 384 (29 R.R. 275), may be referred to. In that case, Abbott, C.J. at p. 385 said:

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"This is clear, where an award may be considered as a nullity, and nothing can be done upon it but by suit, the Court will not interfere to set aside the award; because any suit brought to enforce it must fail. But the award before us orders a verdict to be entered for the defendant, who will be entitled to judgment thereon unless we interfere. The rule must, therefore, be made absolute."

It follows that, in my opinion, the appeal should be dismissed.

Appeal dismissed, Martin, J.A. dissenting.

Solicitors for appellant: *Whiteside, Edmonds & Whiteside.*
Solicitor for respondents: *W. F. Hansford.*

SLINGER v. DAVIS. STEVENSON AND CRUM, GARNISHEES.

HUNTER, C.J.B.C.

1914

June 29.

SLINGER v. DAVIS

Practice—Attachment of debts—Garnishee order—Creditors' Relief Act, R.S.B.C. 1911, Cap. 60—Priority of first attaching creditor.

The right of a judgment creditor to an order for payment into Court by a garnishee and payment out to himself after having served an attaching order on the garnishee is not affected by attaching orders subsequently served on the garnishee.

Robert Ward & Co. v. *Wilson* (1907), 13 B.C. 273, not followed.

APPLICATION on behalf of plaintiff for payment into Court by the garnishees of the amount of a judgment recovered by the plaintiff from the defendant, and for payment out of the sum so paid in to the plaintiff. The plaintiff's attaching order, claiming $300, was served on the 19th of June, 1913. The garnishees admitted liability to the defendant in the sum of $313.59, but resisted the plaintiff's application for payment out on the ground that there were several attaching orders subsequently served on garnishees aggregating several times the amount in their hands. Heard by HUNTER, C.J.B.C. at Victoria on the 29th of June, 1914. Statement

F. C. Elliott, for plaintiff: The plaintiff is the first attaching creditor, and is entitled to the benefit of his diligence. The right to attach moneys in the hands of defendant's debtor is statutory, and once the money is attached no subsequent attaching order can affect it; the money is removed from the operation of any subsequent attaching order served on the garnishee. There is nothing in the Creditors' Relief Act or Execution Act altering the advantage gained by service of the first attaching order. Argument

Maclean, K.C., for the garnishee: There are several subsequent attaching orders served on the garnishee aggregating more than is owing by the garnishee. The money should be paid over to the sheriff to be distributed under the Creditors' Relief Act: see *Robert Ward & Co.* v. *Wilson* (1907), 13 B.C. 273.

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HUNTER, C.J.B.C.: The money to the extent of $300 should be paid into Court by the garnishee and paid out to the solicitors for the plaintiff upon their undertaking to repay the amount should a return thereof be ordered. I cannot follow *Robert Ward & Co.* v. *Wilson*. The plaintiff is entitled to the benefit secured by his serving the first attaching order. There is nothing in the Creditors' Relief Act or Execution Act contrary to this position.

Order accordingly.

MURPHY, J.

1914

Feb. 27.

CAMOSUN COMMERCIAL CO. v. GARETSON & BLOSTER

CAMOSUN COMMERCIAL COMPANY, LIMITED v. GARETSON & BLOSTER.

Prohibition—County Court—Absence of jurisdiction apparent on face of proceedings.

Where the objections to the jurisdiction of an inferior Court appears upon the face of the proceedings, prohibition lies at any time, even after judgment.

The defendants are entitled to the writ as of right, even though they had an alternative remedy by motion to set aside the judgment.

Farquharson v. *Morgan* (1894), 1 Q.B. 552, followed.

Statement

APPLICATION by the defendants for a writ of prohibition. Heard by MURPHY, J. at Victoria on the 23rd of February, 1914. The action was commenced in the County Court of Victoria for the price of fire extinguishers sold and delivered. The defendants, who resided and carried on business in the County of Nanaimo, being in default, the plaintiff signed judgment and issued execution. This application was made on the ground that the jurisdiction of the County Court of Victoria was not disclosed.

V. B. Harrison, for the application.
Alexis Martin, contra.

27th February, 1914. MURPHY, J.

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Feb. 27.

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MURPHY, J.: It is undoubted law that the rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior Court but that which specially appears to be so, and on the contrary, nothing shall be intended to be within the jurisdiction of an inferior Court but that which is so expressly alleged: *Peacock* v. *Bell and Kendall* (1667), 1 Saund. 73, approved of in *Gosset* v. *Howard* (1847), 10 Q.B. 411 at pp. 453-4.

It seems to be equally clear that when the objection to the jurisdiction of an inferior Court appears on the face of the proceedings, prohibition lies at any time, even after judgment: Halsbury's Laws of England, Vol. 10, p. 146, and authorities there cited. Here, to use the language of HUNTER, C.J.B.C. in *Beaton* v. *Sjolander* (1903), 9 B.C. 439 at p. 440, *mutatis mutandis,* the particulars given in the plaint do not shew where the goods were sold or delivered, or where they were to be paid for, so that for anything that appears in the summons or plaint, the cause of action may not have been within the jurisdiction of the Court.

Judgment

The plaint does not even shew where plaintiffs carry on business. The only reference in it to the County of Victoria (in the County Court of which County these proceedings were taken) is that plaintiffs had offices in the City of Victoria. It does shew, however, that defendants live in the City of Nanaimo, which is in the County of Nanaimo. In my opinion, the absence of jurisdiction is apparent on the face of the proceedings when the proposition of law first above laid down is borne in mind. That being so, the defendants are entitled to the writ as of right (*Farquharson* v. *Morgan* (1894), 1 Q.B. 552), even though they had an alternative remedy, as I think they had here under the circumstances, by motion to set aside the judgment: *Re Thompson* v. *Hay* (1893), 20 A.R. 379. The writ is granted.

The defendant will have his costs of the application.

Order accordingly.

MURPHY, J.

1914

Sept. 10.

BEAVIS
v.
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BEAVIS *ET AL.* v. STEWART *ET AL.*

Municipal law—Sale for arrears of taxes—Collector acting as auctioneer and agent for purchaser—Validity of—Limitation of action—B.C. Stats. 1901, Cap. 31, Sec. 3.

An auctioneer in charge of a tax sale acting as agent for the purchaser is not, independent of other grounds, a sufficient reason for setting aside the sale as not being "fairly and openly conducted" within the meaning of section 3 of the Land Registry Act Amendment Act, 1901.

Temple v. *North Vancouver* (1913), 18 B.C. 546, followed.

Statement

ACTION tried by MURPHY, J. at Vancouver on the 4th and 5th of September, 1914, for the cancellation of a tax-sale deed of the southeast quarter of section 13, township 7, in the District of New Westminster. A certificate of recommendation for a homestead patent of the land in question was issued on the 23rd of February, 1893, in favour of William Beavis, who, on the 24th of March following, mortgaged the property to R. W. Harris and A. H. MacNeill, which mortgage was cancelled on the 24th of April, 1893. After the date of the mortgage a Crown grant for the property was issued to William Beavis. On the 24th of March, 1893, William Beavis conveyed the equity of redemption to Thomas Nelson, which was duly registered in the registry office at New Westminster. On the 10th of April, 1893, Nelson mortgaged the property to Jenny Coffey and Eliza Coffey, which mortgage was duly registered, and the title deeds, including the Crown grant to Nelson, were delivered to the mortgagees. On the 19th of July, 1910, Nelson sold the property to the plaintiff Lewis A. Beavis, who was unable to register the conveyance, as the certificate of title was in the possession of the mortgagees, and the property had been sold by the defendant Corporation for taxes in June, 1903, to the defendant Jenny Stewart (formerly Jenny Coffey, one of the mortgagees), who had applied to register the conveyance under said sale. Upon the receipt of this application the registrar had proceeded to carry out the provisions of section 3 of the Land Registry Act

Amendment Act, 1901, and in due course a certificate of title was issued to Mrs. Stewart.

The plaintiff took the following objections to the proceedings under this section: (1) That there was no proof of what was done before the registrar; (2) that there was no service of notice as required, on Nelson, and that an order for substitutional service, which was granted, was improperly obtained; (3) that there was no evidence that the registrar satisfied himself that the sale was "fairly and openly conducted," and that it was not so conducted, as the collector of taxes acted both as the auctioneer and as agent for the defendant to buy the property in; (4) that the defendant having admittedly purchased to protect herself as mortgagee, she must be held to have done so for the joint benefit of herself and the mortgagor. The defendants set up that the plaintiff's predecessor in title was guilty of laches, which precluded him from succeeding in this action; also, that he is debarred from maintaining this action by virtue of the sections of the Municipal Clauses Act and Municipal Act relating to limitations of actions.

Statement

Ritchie, K.C., for plaintiff.
Mayers, for defendant.

10th September, 1914.

MURPHY, J.: As I understand the decision *Temple* v. *North Vancouver* (1913), 18 B.C. 546; 4 W.W.R. 1369; 6 W.W.R. 70, if the provisions of section 3 of the Land Registry Act Amendment Act, 1901, have been duly carried out, the plaintiff cannot maintain this action on the first branch thereof. Steps were taken under that section and the defendant obtained a certificate of title in consequence. It is objected, first, that there is no proper proof of what was done before the registrar. I think this fails. The originals or certified copies of the papers used before him are filed as exhibits. What better proof could be given? Then, it is objected there was no service of notice on Nelson. The Act empowers a judge to order substitutional service and such an order was made here, and an affidavit is produced, which was used before the registrar, shewing the terms of the order were complied with. It is objected the

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order was improperly obtained. Even if it were, it is good until set aside: *Brigman* v. *McKenzie* (1897), 6 B.C. 56.

Finally, it is said there is no evidence that the registrar satisfied himself that the sale was fairly and openly conducted. As to this, I think the maxim *omnia præsumuntur recte acta* applies, at any rate, to the extent of making out a *prima facie* case. If so, the only ground put forward as shewing that the sale was not fairly and openly conducted is that the collector acted both as auctioneer and as agent for the defendant to buy the property. That appears to be much less objectionable than the method pursued in *Temple* v. *North Vancouver, supra,* yet the sale was there upheld.

As to the contention that the defendant, having admittedly purchased to protect her interest as mortgagee, she must be held to have done so for the joint benefit of the mortgagor and herself, that, I think, is contrary to the decision in *Shaw* v. *Bunny* (1864), 33 Beav. 494; 55 E.R. 460; (1865), 2 De G. J. & S. 468; 46 E.R. 456, when, as here, there is no evidence that the mortgagee had gained any advantage in buying by virtue of her position as such.

Judgment

The action is dismissed.

Action dismissed.

IN RE FALSE CREEK RECLAMATION ACT AND CITY OF VANCOUVER.

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June 23.

IN RE FALSE CREEK AND CITY OF VANCOUVER

Arbitration—Award—Appeal from arbitrator—Appeal to Court of Appeal—Preliminary objections—Insufficiency of notice—Appeal premature—Rule 865—Founded on incorrect principle of law—Basis of compensation—Future values—Setting aside award—Advice of counsel.

When it appears on the face of an award that the arbitrator has misdirected himself as to the law relating to the valuation of lands proposed to be expropriated, the award should be set aside.

Compensation under statutory power should be estimated upon the basis of the market value of the owner's lands as they stood before expropriation was authorized, but not their value to the taker with the assurance that the property is wanted for an authorized purpose.

An award is bad upon its face, and should be set aside, which allows for land not vested in the owners or for rights or interests which do not attach to the lands expropriated and cannot in the future be acquired.

Montgomery v. *Liebenthal* (1898), 1 Q.B. 487, not applied.

Per MCPHILLIPS, J.A.: In arbitration proceedings the advice of counsel should be taken in all proper cases, but preferably with the knowledge and consent of the parties.

Preliminary objections were raised by respondent's counsel that, under rule 865, the appellant must state in his notice of appeal whether the whole or part only of the order appealed from is complained of; also that the appeal was premature in that there had been no final disposition of the matter, as it was still pending before the Court below. It was held (MCPHILLIPS, J.A. dissenting), that when an appellant appeals generally in his notice of appeal, he appeals from the whole order and not from a part; and as to the second objection (MARTIN and MCPHILLIPS, JJ.A. dissenting), that in the circumstances it is open to the Court of Appeal to review the finding of the Court below.

APPEAL from the judgment or order of MORRISON, J., dismissing an application by the Corporation of Vancouver and the Canadian Northern Pacific Railway Company to set aside the award of an arbitrator. The action arose out of certain expropriation proceedings. An arbitrator appointed by the parties gave his award on the 2nd of January, and on the 14th of January notice was given of an application by the owners for the enforcement of the award, whereupon the Cor-

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poration and the Railway Company moved to set it aside. MORRISON, J. directed that the award, in so far as it purported to deal with the adjustment of taxes as revenue, and also as to costs, arbitrator's fees and expenses, be referred back to the arbitrator for reconsideration and amendment. The application to set aside the award was dismissed. The Corporation and the Railway Company appealed from this judgment and also generally from the award.

The appeal was argued at Victoria on the 23rd of June, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Sir C. H. Tupper, K.C. (*Housser,* with him), for respondent, took the preliminary objection that the notice of appeal does not comply with the rules of the Court of Appeal (Order LVIII., r. 1), in that it does not state whether the whole or part only of the judgment or order appealed from is complained of. The rule is that it must be expressly stated whether it is from the whole or part of the judgment that is appealed from. This is a premature appeal, as the subject of the award complained of is still before the Court below, and the reference back to the arbitrator, directed by the judgment, was in the discretion of that Court, and there has been no final disposition of the matter, which is still pending: *Montgomery* v. *Liebenthal* (1898), 1 Q.B. 487; 78 L.T.N.S. 406. There is no appeal until the arbitration has been re-heard and a further award made; the time to appeal is when the award is put in its final shape.

Armour (*Hay,* with him), for appellant: We appeal from the judgment or order; that means the whole order. If we were appealing from a portion of the order we would say so. The order should have been issued as it was pronounced, dismissing the appeal from the award. The award should not have been remitted. The appeal should be heard, as there was misconduct on the part of the arbitrator; the award was bad in form and not final; and the arbitrator assumed to deal with matters that were not submitted to him.

Tupper, in reply: The judge only remitted a portion of the

award and has not finally dealt with it: see *Johnson* v. *Latham* (1850), 19 L.J., Q.B. 329; (1851), 20 L.J., Q.B. 236; *Pedler* v. *Hardy* (1902), 18 T.L.R. 591. It cannot be argued that these parties are *res judicata*.

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MACDONALD, C.J.A.: I would overrule the preliminary objections and hear the appeal. My reasons I have pretty well indicated. The learned trial judge may have been quite regular in what he did, but it is open to this Court to review it, and if we come to the conclusion he was wrong, it is the right of the person complaining of the order to have it set aside.

IRVING, J.A.: I agree.

IRVING, J.A

MARTIN, J.A.: I think the preliminary objection is a good one and should be sustained. In my opinion, the matter has never got beyond the learned judge below and is still in a state of legal suspension, and if we are to proceed now to hear it, we are simply, in effect, preventing him from exercising the discretion to remit which the statute confers upon him by section 13, and not giving him an opportunity of pronouncing a final judgment on the matter as it will appear before him as a whole after it comes back to him from the arbitrator.

MARTIN, J.A

GALLIHER, J.A.: I have already expressed my views, and agree with the Chief Justice.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I agree with my brother MARTIN, and I think if we were only to look at the inconvenience, it is far better for the inconvenience to be in the Court below and not in the Appeal Court. When the award is finally arrived at, it may or may not come to this Court.

MCPHILLIPS, J.A.

Tupper: Might I ask your Lordships if you see fit to deal with the first point as a point of practice in regard to Order LVIII., rule 1, that the notice of motion shall state if it is the whole or part of the order that is appealed from.

Argument

MACDONALD, C.J.A.: I would accede to the contention of

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Mr. *Armour* that when he appeals generally he appeals from the whole order and not from a part.

MARTIN, J.A.: That is my view of it.

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McPHILLIPS, J.A.: In my opinion, it ought to be stated whether the appeal is from the whole order or part thereof. I understand Mr. *Armour* states that he appeals from the whole order.

Objections overruled.

Armour, on the merits: The appeal arises out of an expropriation of lands on False Creek authorized by B.C. Stats. 1911, Cap. 56. The arbitrator's idea as to the rights of the owners of the lots to the foreshore was wrong; he went in the teeth of the agreement of counsel as to what the law is on the question. They have no right to the foreshore whatever; only a right of access, and the award is bad on its face for that reason: see *Gillespie* v. *The King* (1909), 12 Ex. C.R. 406; *In re Lucas and Chesterfield Gas and Water Board* (1909), 1 K.B. 16. On the point of misconduct on the part of the arbitrator in ignoring the agreement between counsel as to the rights of the parties, see *In re False Creek Flats Arbitration* (1912), 17 B.C. 282, where the cases on misconduct are collected. The arbitrator allowed interest and he should not have done so: see *Re Ketcheson and Canadian Northern Ontario R.W. Co.* (1913), 29 O.L.R. 339; *Humphreys* v. *Victoria* (1912), 17 B.C. 258; Redman on Arbitration and Awards, 4th Ed., 196. The arbitrator's fees and expenses are excessive; he sat for 38 hours, and the total charges were $5,250; see *In re Prebble and Robinson* (1892), 2 Q.B. 602; Redman, 4th Ed., 223.

Argument

Sir C. H. Tupper, K.C., for respondent (owner): The arbitrator may note the owners of the lots are riparian proprietors and he may consider that potentiality. The City was vested with the foreshore at the time of the arbitration. It is true that the rights in the land of the property holders stops at high-water mark, but their interests in the foreshore are still there: see *In re Lucas and Chesterfield Gas and Water Board* (1909), 1 K.B. 16 at pp. 21-4; *Cedars Rapids Manufacturing and*

Power Company v. *Lacoste* (1914), A.C. 569; 16 D.L.R. 168; *Wohlenberg* v. *Lageman* (1815), 6 Taunt. 251; 128 E.R. 1031.

On the question of interest, the arbitrator might well do what he did, as the right to interest is a question of fact of which he is the sole judge: see Russell on Arbitration and Award, 9th Ed., 253; *Morgan* v. *Mather* (1792), 2 Ves. 15; *In re Badger* (1819), 2 B. & Ald. 691; *Bailey* v. *Curling* (1851), 20 L.J., Q.B. 235; *Holdsworth* v. *Barsham* (1862), 31 L.J., Q.B. 145 at p. 149. On the question of the arbitrator's allowance for his own fees, it must be taken into account that 14 cases were tried together: see *Re Stephens, Smith & Co. and the Liverpool and London and Globe Insurance Co.* (1892), 36 Sol. Jo. 464; *Gillespie* v. *The King* (1909), 12 Ex. C.R. 406; *In re Lucas and Chesterfield Gas and Water Board* (1909), 1 K.B. 16; *Re Ketcheson and Canadian Northern Ontario R.W. Co.* (1913), 29 O.L.R. 339; *Pedler* v. *Hardy* (1902), 18 T.L.R. 591; *In re Palmer & Co. and Hosken* (1898), 1 Q.B. 131; *In re Prebble and Robinson* (1892), 2 Q.B. 602 at p. 604; Redman, 4th Ed., 250.

Argument

Armour, in reply.

Cur. adv. vult.

3rd November, 1914.

MACDONALD, C.J.A.: False Creek is an arm of the sea reaching from English Bay into the Municipality of the City of Vancouver.

By an Act of the Provincial Legislature the Municipality was given power to reclaim portions of its bed and shores, and as incidental thereto to purchase and expropriate certain lands abutting on the arm, including the lots which are now in question. The property of the Crown in right of both the Dominion and the Province in the bed and shores of the arm adjacent to these lots was, by authority of various statutes, conveyed to the Municipality, to enable it (*inter alia*) to carry out with the Canadian Northern Railway Company and the Canadian Northern Pacific Railway Company, an agreement respecting railway terminals. Having failed to agree on the price to be paid for the said lots, arbitration was resorted to, in pursuance of powers given to the Municipality by one of the statutes

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aforesaid. Mr. Frederick Buscombe was agreed upon as sole arbitrator, and it was further agreed by counsel for each of the lot owners that the evidence with respect to each owner's claim should not be taken separately, but the whole evidence should, to save expense, be taken at once and applied to the different claims as applicable. During the pendency of these proceedings a question of law arose upon which counsel for the Municipality desired the arbitrator to state a case for the opinion of the Court, but before the case was stated, counsel for all parties agreed upon the point of law, and delivered to the arbitrator a letter embodying a statement of it as agreed upon. The question of law had to do with what was called the riparian, but more correctly, the littoral rights of the lot owners. The question of law arose by reason of the lot owners' leading evidence to shew that owners of lots abutting on the sea or other navigable waters in the Province had generally been recognized by the Crown as having the first equity to acquire the foreshore in front of their lots, and also that there had theretofore been negotiations between the lot owners looking to joint action for the reclamation and improvement of False Creek east of the bridge, being the part of the arm in front of their lots, and it appears to have been contended on their behalf that these were matters which the arbitrator should take into account. This contention, counsel for the Municipality opposed, and in the letter above referred to insisted—

> "That the riparian rights of the owners of the various lots in question did not in September, 1912 [the date of notice to treat], include any right to build, dredge or construct any buildings or works as wharves, slips or otherwise below the high water mark.
>
> "We want to be perfectly clear that whatever negotiations there were between the owners of False Creek east of the Main Street Bridge looking to joint action for reclamation and improvement of False Creek east of the bridge did not as a matter of law confer upon the owners any further or other rights than those they originally had as owners of the lots abutting on the creek."

In this statement of the law, counsel for the owners agreed, and this mode of settling the question of law was acquiesced in by the arbitrator, who then proceeded to make his award.

The appellants moved in the Court below to set the award aside on grounds which may be shortly stated as follows:

(1) That the arbitrator assumed to adjust the taxes between the parties—a subject not within the submission; (2) that he exceeded the submission in awarding interest on the sums awarded as compensation, and also in adjusting income derived from the property for the period between the dates of the notices to treat and the date of the award; (3) that he awarded to himself fees greatly in excess of those to which he was entitled under the Arbitration Act, there being no agreement that he should receive higher fees; and (4) that he ignored the said statement of the law and included within the boundaries of the lots parts of the foreshore which were not within their boundaries.

The learned judge whose order is appealed from overruled all these grounds except those relating to taxes, income and fees, and with respect to these items, remitted the award to the arbitrator for reconsideration.

The defendants contend that the award should not have been remitted, but should have been set aside, not only on the grounds which induced the learned judge to remit it, but on all the grounds above stated.

As to the taxes and income, it is, I think, sufficient to say that the affidavits filed on the motion below shew that counsel agreed that taxes and income should be adjusted by the parties between themselves. There appears, therefore, to be no reason why the arbitrator should have meddled with them.

The fees which the arbitrator awarded to himself are admittedly greatly in excess of those allowed by statute, and as there was no agreement that he should receive higher fees, the learned judge was, I think, right in his conclusion that the arbitrator was in error.

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It remains to consider the other grounds of appeal which were overruled. I think the arbitrator was in error in allowing interest. There is no statutory or other authority in law for doing so in a case like this one, nor did the parties agree to interest being awarded.

The remaining question is that raised in the 4th and last ground of appeal. It is based on this paragraph in the award:

"I do not attach much importance to the variation in depth of the lots on the south side of the bridge, for the agreement between the City and the owner of lots 1, 2 and 3, in connection with the widening of Main street, by which he was given a quit claim of 120 feet in depth, practically fixed the depth of this tier of lots at the same line, and there can be little, if any, doubt that the owner of lots 5 and 6 would have made with the

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City an agreement upon terms no less favourable than this neighbour, the owner of lots 1, 2 and 3, had he been prepared to do so, and all these lots are assessed on the same basis by the City."

As I understand the situation with which the arbitrator was dealing, it was this: the Municipality took some 14 feet from the Main Street frontage of lots 1, 2 and 3, and presumably of the other lots in this "tier," for the purpose of widening the street, and gave the owner of lots 1, 2 and 3 a quit-claim deed to sufficient of the foreshore to give his lots a depth, including this foreshore, of 120 feet, presumably their original depth. The arbitrator appears to have thought that because in his opinion the other lot owners might have obtained similar concessions had they asked for them, they were entitled to have their lots valued on the basis of similar concessions though they had never obtained them. He appears to have ignored the real boundaries other than those of lots 1, 2 and 3, and to have given compensation in respect of them as though they had a depth of 120 feet, including foreshore, which they, to his knowledge, had not. In doing this he has gone beyond the submission, and has fallen into error, which must be corrected either by setting aside the award, or by remitting it for consideration, with instructions to him to confine himself to the real boundaries. In what I have just said I am guided entirely by what the arbitrator has himself said, or what are necessary implications from what he has said in the paragraph above quoted. Even if I were permitted to look at it, we have not before us the whole evidence taken before him. I must accept the facts as stated by the arbitrator, where it was open to him to decide what the facts were. I must, therefore, take it that the owner of lots 1, 2 and 3 acquired some right, proprietary or otherwise, in the foreshore, which the City quitted claim to him, beyond the interest which he originally had in that foreshore, and beyond the interest which the other lot owners had in the absence of like deeds. There are, in my opinion, two objections to the arbitrator's conduct with respect to this lengthening of the lots. He has ignored or misunderstood the law as stated in the letter. If the owner of lots 1, 2 and 3 had a proprietary interest, or an interest beyond that which he originally had before the City's quit-claim deed was obtained, then, in recognizing similar

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interests in other lot owners, which they did not possess, he was violating what counsel had agreed should be the limits of the lot owner's rights. Apart from this, and independently of the letter, he was assuming as being within the boundaries of the lots other than 1, 2 and 3, lands, or interests in lands, which were without their boundaries.

The power given to the Court by the Arbitration Act to remit an award instead of setting it aside, was intended to remedy a hardship upon parties to arbitrations which theretofore arose from the want of such power. It is a serious matter to overturn all the costly proceedings of an arbitration if it can, in justice to all parties, be avoided. In this case, the error lastly discussed does not affect lots 1, 2 and 3, but only the balance, or some of the "tier" of lots referred to by the arbitrator. The error is one which may be easily corrected. As to the error in awarding interest and awarding himself excessive fees, these manifestly can be very easily corrected.

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The authorities indicate that awards should now not be set aside if remitting them to the arbitrator would appear to the Court to meet the justice of the case.

Counsel for the appellants very properly said during the argument that dishonesty could not fairly be imputed to the arbitrator. The submission was that the arbitrator had been guilty of legal misconduct, but they did not go beyond that and suggest a want of *bona fides*. In these circumstances, I think I should be violating sound principles controlling the exercise of judicial discretion if I were to set the award aside rather than remit it to the arbitrator.

I would, therefore, sustain the order below, but with the additional instruction to the arbitrator to correct the errors respecting interest and boundaries, and to make his award in the light of what I have said concerning them.

The appellants should have the costs of the appeal.

IRVING, J.A.: As a rule awards ought not to be set aside except on very strong grounds. The parties having selected their tribunal, it is highly undesirable that the Courts should do anything to prevent the decision from being final unless for

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very strong reasons. In *In re False Creek Flats Arbitration* (1912), 17 B.C. 282 at p. 290, I dealt with this at some length. But, nevertheless, I am satisfied that this award cannot stand. There are, in my opinion, many serious errors in it. I agree with the learned judge that the arbitrator's fees are not authorized. That error could be cured by remitting it back. A more serious error is that the arbitrator has made a mistake as to the size of the lots, and as to the rights which pass with them, and has, therefore, acted *ultra vires*. Further, I think the arbitrator has misdirected himself as to the law relating to the valuation, and that this appears on the face of the award. The principle of compensation under statutory powers is that the owner should receive the market value of his land, that is to say, he is compelled to exchange his lands as they stood before the scheme was authorized, not its value to the taker with the assurance that the property is wanted for an authorized purpose. In fixing that compensation, any and every element of value which the lands possess may be taken into consideration in so far as it increases its value to the owner, but an enhanced value may not be given because of the sanctioning by Parliament of the very scheme for the carrying out of which the compensation is being authorized. You would defeat the principle of compulsory purchase by compensation if by reason of the fact that the land in question is known to be wanted for a public purpose the price is to be increased.

The following passages from the very well-expressed award seem to me to indicate where he has entertained a wrong idea as to fixing the compensation:

> "There is to be considered primarily that the owner whose property is being acquired, naturally takes advantage of the necessity of the purchaser to obtain the highest possible price."

If this means, as I think it does, that the Railway Company's acquisition of the land was one of the necessities that the owners could take advantage of, the arbitrator was wrong. It is but fair to the arbitrator to say that later on he cuts this down, and it is but fair to myself to say that I do not wish to criticize his award as a whole by what he says in his opening; but it seems to me that in that opening is to be found the germ of his wrong-going.

Then again, he speaks of the "potential" values of this property. I do not question that the present potential value may be a factor, but the potential values may be too remote at this date to enhance the value of the land, which at present is practically unproductive. I am inclined to think that it is under cover of this vague phrase he has reached a conclusion which the present potential qualities of the place cannot support.

Having found that the lands, except two lots, are not revenue producing, and that the sales made in the vicinity are not supported by the earning power of the lots sold, the arbitrator considers the enormous increases in values (without regard to revenue) which have taken place in other parts of Vancouver. On this enormous increase, and the potential advantages, and the increased size and mistaken attributes of the lands, he fixes the amount of compensation.

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On the ground of economy much may be said in favour of remitting the case to the arbitrator for reconsideration, but I think, having regard to the protest in the letter of the 12th of December, that the Railway Company is entitled, if it desires it, to have the award set aside.

I would, therefore, allow the appeal and set aside the award.

MARTIN, J.A.: By the order of the learned judge appealed from he referred back the award to the arbitrator to be reconsidered and amended in so far as it deals with "the subject of adjustment of taxes or revenue or both, and also in so far as it awards costs and arbitrator's fees and expenses." I think, however, that the adjustment of taxes and revenue were left by agreement of both parties to the decision of the arbitrator. That is the only fair inference I can draw from what occurred, and, therefore, the award should not be interfered with on that ground, as he was warranted in adjudicating.

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As to the arbitrator's fees, I agree that the award cannot stand, because the arbitrator has, by some oversight apparently, but directly contrary to the provisions of the statute (set out in the Tariff in the Schedule to the Arbitration Act), awarded himself $5,250, a sum so greatly in excess of what we are informed the statute authorized, *viz.*: only $175 (*i.e.*, for seven days sitting

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at $25 per day, each "sitting to consist of not less than six hours," as the tariff directs), that if an award is ever to be set aside on such a ground as amounting to misconduct (using the term in its legal sense only), then this is the case where it might be done. In *In re Prebble and Robinson* (1892), 2 Q.B. 602 at p. 604, it is said by Lord Coleridge, C.J., that though whether this amounts to misconduct is "an open question," yet "I am far from saying it might not." I note that the tariff does not make any provision for remuneration for the time occupied in the preparation of the award, which may take a good deal of time, especially in such a case as the present, wherein the arbitrator has evidently bestowed much care thereupon.

As to the interest allowed, I think that the award cannot stand in that respect also. No authority justifying it has been cited to us. If the matter rested here I should be in some doubt as to the course to be adopted, because, as is said in Redman on Arbitrations and Awards, 4th Ed., 279:

> ". . . . It is conceived that no award will now be set aside for any defect which the arbitrator could cure, but that in all such cases it will be remitted to him. Many of such mistakes can now be corrected under the slip section. (Arbitration Act, 1889, s. 7 (*c*).)

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But there is this further element, that I think, with all due deference, the award is, as contended, bad in law on its face, because, so far as I can gather from certain discursive expressions, the arbitrator has made it on a wrong assumption of the riparian rights of the owners and without giving due effect to the statement of those rights which was agreed to between the parties and submitted to him in writing. He seems, so far as I have been able to extract his exact meaning, to have laid much stress upon the fact that in "common practice" the owners of property "abutting upon the water" have the "privilege of applying to the Crown for a grant to extend the property affected out to deep water or to an established pier headline and this right or privilege is, I believe, rarely, if ever, withheld where the rights of others are not interfered with." But the whole point on this head is that the "rights of others" would, in this case, be interfered with because the City of Vancouver is already the owner of the foreshore and bed as grantee from the

Crown, and it is inconceivable that in such circumstances the Crown would give landowners inside their property the privilege mentioned just as though the Crown had not parted with the bed and foreshore. How could the inside owners ever hope to build on the city's bed and foreshore "out to deep water or to an established pier headline," or otherwise, without the City's permission, which not only has not been given, but the City is here in opposition to their claim. Nevertheless he estimates this "riparian right or advantage, or whatever it may be termed, (as) a very important factor in fixing the amounts awarded to the respective owners," but in my opinion, if the rights of the City are properly understood and applied, the so-called "advantage" is of so little, if any, practical value that it ought not to have been seriously regarded, nor can the owners derive any assistance in this relation, if in any, from the use of the words "or interests," on which much stress was laid. There are some observations upon this hope or expectation from the Crown by Mr. Justice Cassels in *The King* v. *Bradburn* (1913), 14 Ex. C.R. 419, at pp. 436-41, which was a case where inland lots had become water lots because of certain river improvements by the Crown, but in a non-tidal river, and, therefore, the circumstances are different. Even in that case he says, p. 437:

"It may be a question whether a hope of this kind is an element that should be taken into account."

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But the case at bar is a much stronger one, because the bed and foreshore had already been granted by the Crown.

There is at least one other matter in the award that is open to serious objection, *viz.*: the assumption that the owners of lots 5 and 6 could have made the same, or as favourable an agreement with the City as the owner of lots 1, 2 and 3, who got a quit-claim deed from the City, and therefore should now be treated on the same basis, though, in fact, they have not got the necessary deeds; but it is unnecessary to consider it, because what has already been noticed is sufficient to warrant the award being set aside.

I express no opinion about the amount of the award because we have nothing to do with that, as it was not attacked on that ground, nor is there any evidence before us on the point.

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GALLIHER, J.A.: I would set aside the award without a reference back.

MCPHILLIPS, J.A.: The appeal is one by the City of Vancouver and the Canadian Northern Pacific Railway Company from the judgment and order of MORRISON, J., who, upon an application made to set aside the award complained of, refused the application, but remitted the award to the arbitrator for reconsideration and amendment as to the subject of the adjustment of taxes or revenue or both, and also as to costs and arbitrator's fees and expenses.

The submission entered into was to a single arbitrator—being the claims of a number of owners of land upon False Creek, also claiming riparian rights. All the claims were heard together—in fact, consolidated for the purpose of the hearing. The award, however, of course, deals in detail with each separate property, the amount in the whole awarded aggregating something over $900,000.

The arbitrator's duty was to proceed to the determination of the value of the lands, rights or interests at the date of the service of the notice, which was the 12th of September, 1912, the amount to be paid by the City of Vancouver for the lands, riparian, littoral or foreshore rights or interests, to be determined by arbitration pursuant to the provisions of the Arbitration Act.

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The City of Vancouver was authorized by statute to proceed to expropriate the lands under and by virtue of the False Creek Reclamation Act (B.C. Stats. 1911, Cap. 56), and the lands in question in this appeal are referred to in paragraph 3 of the articles of agreement between the City of Vancouver and The Canadian Northern Pacific Railway Company, as contained in the Schedule to the False Creek Terminals Act (B.C. Stats. 1913, Cap. 76), being An Act to Ratify a certain Agreement between the City of Vancouver and the Canadian Northern Pacific Railway Company and the Canadian Northern Railway Company.

It may be said that the effect of the legislation was to authorize the conveyance from the Crown to the City of Van-

couver in fee simple, free from all restrictions, all that portion lying east of Westminster Avenue (now Main Street) of the lands covered by waters previously conveyed to the City of Vancouver, with some stated exceptions thereout as set forth in section 2 of the False Creek Terminals Act. It will be seen by the recital to the agreement, as contained in the Schedule to the Act, that the City of Vancouver had obtained grants from both the Dominion of Canada and the Province of British Columbia to the bed of False Creek, lying east of Westminster Avenue, in the City of Vancouver.

It may be said by way of summarizing the facts that it would not appear that any of the lands extended to low-water mark, but that in the case of lots 1, 2 and 3 some additional depth was conveyed by the City from and out of the foreshore, but even with respect to these lots it would not extend to low-water mark—that is, the proprietorship in the lands did not extend beyond high-water mark, save as stated in respect to lots 1, 2 and 3, and even as to these lots, not all of the foreshore, *i.e.*, to low-water mark. Therefore, the facts are that the owners of the lands—all of them—have between them and the sea, the City of Vancouver owning the foreshore. This creates a situation quite unusual and one that calls for serious consideration when the value of the lands is under consideration, if anything is allowed upon the view that there exists any riparian, littoral, or foreshore rights, interests, or rights of access to the sea as referred to in section 5 of the False Creek Reclamation Act.

It would appear that when a question arose as to whether any riparian rights were to be considered by the arbitrator and allowed for, that the solicitors for all parties, without having the matter referred to a judge of the Supreme Court by way of a stated case, agreed in the terms set forth in Messrs. Davis & Co.'s letter of the 12th of December, 1913, to Messrs. Tupper & Co.:

"That the riparian rights of the owners of the various lots in question did not in September, 1912, include any right to build, dredge or construct any buildings or works as wharves, slips or otherwise below the high-water mark.

"We want to be perfectly clear that whatever negotiations there were

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between the owners on False Creek east of the Main Street Bridge looking to joint action for reclamation and improvement of False Creek east of the bridge did not as a matter of law confer upon the owners any further or other rights than those they originally had as owners of the lots abutting on the Creek."

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In my opinion, upon the face of the award, the arbitrator did not proceed rightly, in arriving at the values of the lands, in considering the riparian rights, and not in accordance with the agreement between the solicitors for all parties. In fact, he proceeded by way of absolute departure therefrom, and swept away from consideration the fact that the owners of the lands had between them and the sea the City of Vancouver, *i.e.*, the City of Vancouver had obtained grants from the Crown in the right of the Dominion of Canada and of the Province of British Columbia to the bed of False Creek, and would appear to have valued the lands as if all the owners of the lands were possessed of the right to enjoy the foreshore, as if a lease therefor had issued, and the owners were entitled to build upon, occupy, and use the land covered by water, being lands vested in the City of Vancouver. In the result it means that the course pursued by the arbitrator calls upon the City of Vancouver, in the amount awarded, to pay for land or interests therein not the property of these owners, but the property of the Corporation itself, and as well, for privileges which, by the statement of the arbitrator himself, the City of Vancouver could prevent the owners from obtaining, as note his language appearing in the award:

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"For while the city occupied the position of being able to block or prevent these owners from obtaining their foreshore grant or leases, it manifestly was not their intention so to do prior to the agreement with the Canadian Northern Railway, as the weight of evidence plainly shews; and the right of access to the sea from property so centrally situated is in my opinion valuable and has a potential value beyond the figures awarded herein."

It is plain that the arbitrator has proceeded wrongly, and took into consideration and allowed to the owners values which were not capable of being taken into account, and, therefore, the award is, in this respect, bad on its face. An arbitrator, whilst entitled to value all that which is the property of the owners of the lands and to be expropriated, is not entitled to allow in his award for lands not vested in the owners, or for rights or interests which do not attach to the lands, and cannot in the

immediate or even remote future be acquired, as being advantages that attach to the lands.

In my opinion, that which was present in *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (1914), 16 D.L.R. 168, is absent in the present case, as the City of Vancouver owns the land covered by water being the bed of False Creek. Here we have the arbitrator allowing for land not the property of the owners, and for possible advantages which it must be seen were impossible. Lord Dunedin, at p. 174, said:

"that there was a probability of a purchaser who was looking out for special advantages being content to give this enhanced value in the hope that he would get the other powers and acquire the other rights which were necessary for a realized scheme,"

but in the present case the City of Vancouver was already possessed of the ownership of the foreshore lands and the lands covered by water, being the bed of False Creek. That being the situation, how is it possible to support an award which has been reached by allowing—in the values found—for lands not vested in the owners, incapable of becoming vested in them, and for advantages which the lands did not possess on the 12th of September, 1912, and impossible of being acquired in the future? What the arbitrator was entitled to do in arriving at values is succinctly set forth by Lord Dunedin at p. 171 in the *Cedars Rapids* case, *supra*:

"1. The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. 2. The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined."

It is plain that, bearing in mind these propositions, the arbitrator has palpably erred in allowing values which did not attach to the lands, and is, in this respect, bad in point of law, and for this reason alone, in my opinion, must be set aside.

Then we have the further question of the allowance in the award of taxes, interest and costs. In my opinion, the arbitrator was without jurisdiction in allowing taxes or interest, and the award is bad as to both these items. What was to be determined was the value of the lands on the 12th of September, 1912. The award is bad on its face in allowing and apportioning the costs as is therein set forth, and offends against

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the Schedule in the Arbitration Act dealing with the allowance and disposition of costs, and would appear to be upon an excessive basis even if no tariff existed. In passing, I might state that in an arbitration of the magnitude under consideration it might well have been that there should have been some agreement between the parties, but, apparently, that was not come to.

Counsel for the respondent, with great ability, contended that the award, even if found to be bad on its face and wrong in law in any respect, should be remitted back to the arbitrator; but see *Montgomery* v. *Liebenthal* (1898), 1 Q.B. 487; 78 L.T.N.S. 406. It may be said, though, that this case is an authority for the proposition that even where there has been a mistake in law by the arbitrator, that that would not constitute cause for setting aside the award. It is, therefore, with great hesitancy that I have come to the conclusion that in the present case the award should be set aside. I feel constrained, however, to do so upon the ground that the arbitrator exceeded his jurisdiction in the award made, allowing for properties, rights, interests and advantages that were non-existent, it not being the case of possible inflated values—a matter with which I am not called upon to pass—nor merely a mistake in law—that is, not error confined only to a wrong decision on fact and law, but awarding values unsupportable by any facts and as well erring in law. Whilst it is not misconduct in the sense of any wrong intent, it is misconduct for an arbitrator to proceed in excess of the jurisdiction with which he is clothed and transcend the powers conferred by the statute, in pursuance of which only he is entitled to proceed and arrive at his award, it is misconduct in a legal sense, although devoid of all moral culpability: *In re Hall and Hinds* (1841), 2 Man. & G. 847. In all proper cases the advice of counsel should be taken, and the present case is one in which the arbitrator would have been well to have been so advised: *In re Hare* (1839), 6 Bing. N.C. 158; *Goodman* v. *Sayers* (1820), 2 J. & W. 249; *Rolland* v. *Cassidy* (1888), 57 L.J., P.C. 99 at p. 102. It is preferable, though, that this course should only be followed with the knowledge and consent of the parties, but this is not obligatory.

Upon the whole, I am of the opinion that the award should be

set aside, and it therefore follows that the appeal should be allowed.

Appeal allowed, Macdonald, C.J.A. dissenting.

Solicitors for appellant: *Davis, Marshall, Macneill & Pugh.*
Solicitors for respondent: *Tupper, Kitto & Wightman.*

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Homestead entry—Death of holder—Appointment of administrator—Order authorizing sale under the Intestates Estates Act, R.S.B.C. 1897, Cap. 106—Sale by administrator—Null and void—Statute, construction of—Railway Belt Act, R.S.C. 1906, Cap. 59, Sec. 5—Regulations Affecting Dominion Lands in Railway Belt in British Columbia, Sec. 28.

The holder of a homestead entry in the railway belt died without obtaining a Crown grant or recommendation for patent. The official administrator obtained an order for the administration of the estate and a further order under the Intestate Estates Act, authorizing him to sell deceased's real estate. He then executed an agreement for sale of the homestead to the plaintiff. In an action for specific performance of the agreement:—

Held, that the agreement for sale was null and void under the provisions of section 28 of the Regulations Affecting Dominion Lands in Railway Belt in British Columbia.

American-Abell Engine and Thresher Co. v. *McMillan* (1909), 42 S.C.R. 377, followed.

ACTION for specific performance of an agreement for the sale of land, tried by MURPHY, J. at Revelstoke on the 12th of June, 1914. The evidence disclosed that one Charles John Johnson, in his lifetime, held a homestead entry, dated the 23rd of October, 1906, for the southwest quarter of section 4, township 23, range 6, of the sixth meridian in the District of Yale, British Columbia. He was drowned in August, 1900,

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without having obtained a Crown grant or recommendation for patent for the land. The defendant Albertina Anderson (his sister) was then the only relative of deceased living in the Province, his legal representative being his mother, who lived in Sweden. On the 9th of May, 1901, the defendant A. D. Macintyre, official administrator, obtained an order in the County Court of Yale appointing himself administrator of the goods, chattels and credits of the deceased, and on the following day he applied for, and obtained an order in the Supreme Court, under the Intestate Estates Act, authorizing him to sell the deceased's real estate. The defendant Albertina Anderson and her husband then went to live on the homestead, where they remained four or five years, making some improvements. On the 23rd of April, 1906, the defendant Macintyre executed an agreement for sale of the homestead to the plaintiff. The heirs were not made parties to this agreement, but it recited that the sale was made with their consent, the only evidence touching on this being a letter of the 8th of March, 1906, from Mrs. Anderson to Mr. Macintyre, in which she refers to the price offered and asks for the name of the proposed purchaser, but does not appear to have either affirmed or objected to the sale. The purchase price was $900, $450 to be paid on the signing of the agreement, and the balance within two years. The plaintiff paid $450 to Mr. Macintyre and entered into possession of the property, where he remained for about four and a half years, putting in his whole time in work on the property and spending in cash thereon about $1,500. In the beginning of 1909 the defendant Albertina Anderson took up the matter of obtaining a Crown grant from the department of the interior. A certificate of recommendation for the patent was issued on the 24th of July, 1909, and she obtained the Crown grant on the 13th of September, 1910. This was obtained largely through the assistance of the plaintiff, who supplied the defendant with a supplementary statement in July, 1909, proving that he had done, "as agent for the legal representative," sufficient improvements to enable a patent to issue. After obtaining the Crown grant the defendant wrote a letter to the plaintiff which was not produced at the trial. The evidence of what the letter contained

was the only material point upon which the parties differed, the plaintiff alleging that the defendant promised in this letter to turn the deed over to him upon the final payment being made as provided for under the original agreement; she, on the other hand, denying this. Immediately upon receipt of this letter the plaintiff offered the remaining $450 and interest, as the balance due for the conveyance of the property to him. The defendant refused to carry out the sale and, in May, 1912, re-entered into possession of the property. The action was for specific performance of the agreement of the 23rd of April, 1906, and for a declaration that Albertina Anderson was a trustee of said lands for the plaintiff.

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McCarter, for plaintiff.
Fulton, K.C., and *Briggs,* for defendant.

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MURPHY, J.: This is a case which, however decided, must cause great hardship to one or the other of the parties. Of the two, a decision against the plaintiff would seem to inflict the greater injury, and that on possibly the more innocent party. Yet I feel compelled by the authorities to hold the action must fail. *American-Abell Engine and Thresher Co.* v. *McMillan* (1909), 42 S.C.R. 377, was a decision on language practically identical with section 28 of the Regulations Affecting Dominion Lands in Railway Belt in British Columbia (Canada Gazette, 1890, Vol. 23, p. 1374). That case decided that an agreement such as the one here sued upon is absolutely null and void, and no question of estoppel can be raised to validate it. Then it is contended that, after recommendation for patent, defendant agreed to turn over the property to plaintiff. The original agreement being void, this, to be enforceable, would have to be a new contract. I cannot find any such contract proven. Even granting defendant had said she would turn over the deed, she was willing to do so, as the event shewed, but only at an increased price. From the time she took the matter of getting the deed into her own hands I think she never intended to part with the property for $900, and certainly never made any enforceable agreement to do so.

Judgment

As to the contention that she is liable for damages, assuming

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such an action could succeed (as to which I express no opinion), I am unable to hold that Mr. Macintyre was her agent. I think he was a principal, and merely obtained her consent as a precaution against any possible future attack on himself, based on an assertion of a sale at an undervaluation. As to the equities behind the Crown grant, I think it doubtful that they can be considered, the Crown having decided on conflicting claims: *Farmer* v. *Livingstone* (1883), 8 S.C.R. 140; *Boulton* v. *Jefferey* (1845), 1 E. & A. 111. It is contended that the Crown was not seized of all the facts, and apparently the decision was made without the fact of the order under the Intestate Estates Act having been made being present to the minds of the officials who gave it. There was, however, ample opportunity to recall this to their attention. The plaintiff himself could have no *locus standi* before the department, for the very fact of his having acquired an interest involved, not any rights acquired by him, but, under the regulations, a forfeiture of the entry. Had the department been seized of all the facts such forfeiture might have been the result, but clearly, under the law, it could do nothing to protect the plaintiff. In this connection it is to be remembered that the plaintiff himself was a party—albeit an innocent one—to the deception of the department. It was on his declaration as to improvements that the patent issued. This declaration, on its face, states that it is made as agent for the legal representatives of deceased, and that plaintiff claims the patent for the benefit of the heirs. Both these statements were untrue. I am fully convinced that plaintiff had no idea of what he was doing. He is a foreigner, scarcely able to make himself understood in English, and he simply signed what was put before him, thinking it was a step towards getting title for himself. That fact, however, cannot alter the legal result that he, himself, does not come into Court with clean hands.

Judgment

I must dismiss the action as against Anderson, but, following what was done in the somewhat analogous case of *Cumming* v. *Cumming* (1904), 15 Man. L.R. 640, such dismissal will be without costs.

Action dismissed.

SPADAFORA *ET AL.* v. GRIFFIN & WELCH *ET AL.*

COURT OF APPEAL

1914

Dec. 3.

SPADAFORA *v.* GRIFFIN & WELCH

Contract—Railway construction—Quantity and classification of work subject to final estimate of engineer of one company—Engineer making estimate not employed by said company but by another owned by same parties—Not a compliance with contract.

The Canadian Northern Pacific Railway Company contracted with the Northern Construction Company and Patrick Welsh for the construction of their roadbed between Inkitsaph Creek and Lytton. The Construction Company then subcontracted to Griffin & Welch, who again subcontracted to the plaintiffs. The final contract with the plaintiffs provided that the final estimate of the engineers of the Northern Construction Company as to the quantity and classification of the plaintiffs' work should be binding on the parties. The engineers who made the final estimate were in fact in the employ of the Canadian Northern Pacific Railway Company, and had no connection in any way with the Northern Construction Company. As the work progressed, the plaintiffs were paid from time to time on the estimates of these engineers. In an action for the recovery of the balance due under the contract, it was held by the learned trial judge that the plaintiffs, by their own action, were estopped from setting up that the engineers were not the engineers of the Northern Construction Company, and were bound by their final certificate as to the quantity and classification of the work.

Held, on appeal (reversing the decision of HUNTER, C.J.B.C.), that the plaintiffs are only bound by the estimate of the engineers of the Northern Construction Company, and the engineers who gave the final certificate as to the work not being in the employ of that Company, the plaintiffs were entitled to a new trial.

APPEAL from a decision of HUNTER, C.J.B.C. in an action tried at Vancouver on the 22nd of January, 1914. The facts are that the defendants, the Canadian Northern Pacific Railway Company, entered into a contract with the defendants, the Northern Construction Company and Patrick Welsh, by which the latter agreed to construct and complete the grading and finishing of the Railway Company's right of way on the line from Inkitsaph Creek to Lytton, which contract the Northern Construction Company and Welsh sublet to the defendants, Griffin & Welch. About the 1st of August, 1911, the defend-

Statement

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SPADAFORA v. GRIFFIN & WELCH

ants Griffin & Welch employed the plaintiffs to grade and finish the work under a verbal agreement whereby the plaintiffs were to receive 55 cents per cubic yard for rock work and 21 cents per cubic yard for other material. The plaintiffs commenced work about the 22nd of August, 1911. On the 28th of August Griffin & Welch assigned their contract to the defendants Werdenhoff and Company. On the 26th of September a written agreement, embodying the terms of the verbal arrangement, was signed by Griffin & Welch and the plaintiffs. The plaintiffs completed their work on the 27th of May, 1912, and estimated that they had excavated 122,906 cubic yards, of which 86,034 yards was rock and 63,781 yards other material, and for which they were entitled to $55,061. They had been paid $24,476 during the performance of the work, and they claimed that the balance still due and owing them was $30,585. A clause in the contract between the plaintiffs and the defendants Griffin & Welch provided that it was subject to all the terms of the contract between Griffin & Welch and the Northern Construction Company, under which the estimate of the engineer of the Construction Company was to be accepted as final, both as to the quantity and classification of the material moved.

Statement

The engineers who made the estimates as to the material moved were the defendants White, Nimmo and Clauson. White was the chief engineer of the Railway Company and in general charge. Nimmo was the divisional engineer, the work in question being in his charge; and Clauson was his assistant, and in charge of the work on the ground. All three were in the employ of the Canadian Northern Railway, and not connected in any way with the Northern Construction Company. Nimmo's final estimate was a total removal of 86,993 cubic yards, of which 36,852 cubic yards was rock, and 40,141 cubic yards was other material. The two companies, the Canadian Northern Pacific Railway Company and the Northern Construction Company, were composed of practically the same individuals. The learned trial judge found that the engineers were recognized during the carrying out of the contract, and constantly dealt with by all parties as the authorized engineers of the Northern Construction Company, and, in dismissing the action, held that the plaintiffs

were estopped from setting up that they were not the engineers of the Northern Construction Company. The plaintiffs appealed mainly on the ground that the learned judge erred in holding that White and Nimmo were the engineers of the Northern Construction Company.

The appeal was argued at Vancouver on the 2nd and 3rd of December, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Armour, for defendant the Canadian Northern Pacific Railway Company: As we are in no way connected with the plaintiff's case, I submit we should be dismissed from this appeal.

Killam, for appellants (plaintiffs): Under the contract the decision of the engineer of the Northern Construction Company as to the quantity and quality of the material moved is final, but we say the engineers who did the classifying were not the engineers of the Construction Company, but of the Canadian Northern Pacific Railway Company, and we are, therefore, entitled to attack the classification made by these engineers, as shewn in the certificate, and we should now be paid on a *quantum meruit,* as the Construction Company did not have an engineer on the work.

Stockton, for defendants Griffin & Welch: On the trial, the question of fraud was considered, and not that of whether the engineers were the employees of the Construction Company. The evidence shews the plaintiffs were dealing with Clauson and Nimmo, to whom they looked for instructions as to how they were to carry on their blasting operations.

Argument

R. M. Macdonald, for defendants Werdenhoff & Company: We are not a party to the contract with the plaintiffs and are not under any liability.

Gibson, for defendant Northern Construction Company: The plaintiffs accepted payments under the certificates of these engineers and recognized them as the engineers of the Northern Construction Company. The Northern Construction Company accepted these men as its engineers.

Killam, in reply.

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The judgment of the Court was delivered by

MACDONALD, C.J.A.: We think the Canadian Northern Pacific Railway Company should be dismissed from this appeal, and we can see no reason why they should not have the costs occasioned by their being brought here, the charges of fraud having failed. The plaintiffs, therefore, must pay such costs. We think the learned trial judge was wrong. It seems to us that the plaintiffs were to be bound only by the estimate of the engineer of the Construction Company. The Construction Company, however, had no engineer. There was, therefore, no person qualified to give the certificate which the defendants are relying upon. It is one thing to submit to the decision of an engineer to whose employer's interest it is to secure a fair if not a generous classification, and quite another to submit to the classification of one to whose employer's interest it is to keep down the cost of construction to the lowest possible notch.

A number of other questions arise out of the joining of the several parties, but it seems to us that these questions can be disposed of below if the result of this appeal be an order for a new trial, as we think it must be. The judgment appealed from was pronounced at the close of the plaintiffs' case. The defendants have not been put to their defence—that is to say, they have not been called upon to prove that the classification which the plaintiffs are insisting upon was not a proper classification. In our judgment, therefore, there should be a new trial, with leave to all parties to amend.

Judgment

Mr. *Macdonald* claims that his clients, Werdenhoff & Company, should not have been made parties to the appeal—that when the issue of fraud was disposed of, they were no longer proper or necessary parties. We think this contention is right, and that his client's costs of appeal should be paid by the plaintiffs.

The plaintiffs should have their costs of the appeal against Griffin & Welch and the Northern Construction Company.

As to the costs thrown away by reason of the dismissal of plaintiff's action, which necessitates a new trial, we think these should be paid by the said defendants Griffin & Welch and the Construction Company to the plaintiffs.

As to the other costs of the action, they should abide the result of the new trial.

Appeal allowed and new trial ordered.

Solicitors for appellants: *Killam & Beck.*

Solicitors for the various respondents: *Taylor, Harvey, Grant, Stockton & Smith; Macneill, Bird, Macdonald & Darling; Davis, Marshall, Macneill & Pugh; Bowser, Reid & Wallbridge.*

THE W. H. MALKIN COMPANY, LIMITED v. McGAGHRAN *ET AL.*

Costs—Appeal from order in interlocutory proceeding—Successful appellant—Special indorsement—Order III., r. 6; Order XIV., r. 1.

A successful appellant from a judgment or order in an interlocutory proceeding is as a general rule entitled to the costs of the appeal forthwith after taxation and to the costs below in any event in the cause.

APPEAL from an order of CLEMENT, J. dismissing the defendant McGaghran's application to set aside a judgment obtained against him under Order XIV., rule 1, and further ordering him to pay into Court the amount claimed in the writ of summons or give security therefor to the satisfaction of the district registrar as the only terms on which he should be allowed in to defend. The indorsement on the writ was as follows:

Statement

"The plaintiff's claim is against the defendants for the sum of $2,840.19 for goods supplied by the plaintiff to the defendants, at the defendants' request, and for which accounts have been from time to time rendered, which accounts exceed three folios in length."

The appeal was argued at Vancouver on the 4th of December,

COURT OF APPEAL

1914

Dec. 4.

MALKIN COMPANY, LIMITED v. MCGAGHRAN

1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Griffin, for appellant (defendant): The writ was not specially indorsed within the meaning of Order III., rule 6. The indorsement is wanting in four respects: (1) The nature of the goods sold is not given; (2) no dates are given in general outline of the transactions between the parties; (3) the number of accounts alleged to have been rendered are not given; (4) it is not mentioned when they were rendered or to whom they were delivered. He referred to *MacGill* v. *Duplisea* (1913), 18 B.C. 600; *Beaufort* v. *Ledwith* (1894), 2 I.R. 16; *Walker* v. *Hicks* (1877), 3 Q.B.D. 8; *Parpaite Freres* v. *Dickenson* (1878), 26 W.R. 79.

Argument

Daykin, for respondent (plaintiff): The proceedings on the application for judgment shewed clearly the full particulars of our claim against the defendant. The objections raised by the defendant are all set out in the affidavits used on the application for judgment.

The judgment of the Court was delivered by

MACDONALD, C.J.A.: While we think the appellants are entitled to the costs in this Court, forthwith after taxation, yet costs below, where the proceeding is interlocutory, should, as a rule, be costs in any event in the cause, or in the cause as the case may be, and not be taxable forthwith.

Judgment

The appeal is allowed, with costs, and the judgment is set aside, with costs to the defendants in any event in the cause.

Appeal allowed.

Solicitor for appellant: *Walter E. Haskins.*
Solicitor for respondent: *A. N. Daykin.*

HEWITT *ET AL.* v. THE "SKEENA."

MARTIN, LO. J.A.

1914

Feb. 13.

HEWITT v. THE "SKEENA"

Admiralty law—Practice—Costs—Increased counsel fee—Application for—Rules 222 and 226.

An application for increased counsel fee will be refused; rules 222 and 226 give the Court power to reduce fees but not to increase them.

MOTION for an order for an increased counsel fee at the hearing of the trial of six consolidated claims against the ship "Skeena." Heard by MARTIN, Lo. J.A. at Victoria on the 13th of February, 1914. Statement

Lowe, for defendant: The matter is not specially covered by the Admiralty Tariff of Fees, Table VIII., but item 65 of the Exchequer Tariff provides that "The above fees to counsel may be increased by order of the Court or a judge," and the same practice should obtain on both sides of this Court. Argument

MARTIN, Lo. J.A.: I must dismiss this application because rules 222 and 226 only give me power to reduce fees, not to increase them, but, if I may say so, I do so with regret, because the unfortunate omission from the tariff on this side of the power that is given on the Exchequer side to increase counsel fees prevents, I fear, my being able to do justice to the applicant in this case, as it has also prevented me in others. I should have had no hesitation in increasing this counsel fee, on the principle laid down by me in *Bryce* v. *Canadian Pacific Ry. Co.* (1907), 14 B.C. 155. The highest counsel fee which the registrar is entitled to tax herein, *viz.*: $50, is inadequate for the efficient and time-saving services rendered at the one day's trial of the six consolidated claims against this ship, which were thereby expeditiously and inexpensively adjudicated upon. Judgment

Motion dismissed.

MACDONALD, J.

1914

Nov. 14.

WALSH v. WALSH

WALSH v. WALSH.

Husband and wife—Divorce—Legal cruelty.

The conduct of a husband is insufficient to support a charge of cruelty, where the wife states that she became nervous through his keeping a razor and sharp knife under his pillow, but does not state that she feared acts of violence, or that the weapons were kept by him for that purpose.

Statement

PETITION for divorce heard by MACDONALD, J. at Vancouver on the 14th of October, 1914. The facts are set out fully in the head-note and reasons for judgment.

Hulme, for petitioner.

The respondent was not represented.

14th November, 1914.

Judgment

MACDONALD, J.: The petitioner alleges adultery and cruelty as grounds for divorce. I find the charge of adultery proved, and the question is whether the evidence shews legal cruelty.

The respondent cannot be found guilty of legal cruelty towards the petitioner unless he has either inflicted bodily injury upon her or so conducted himself as to cause actual injury to her mental or bodily health, and thus have rendered future cohabitation more or less dangerous. There is no allegation of personal violence, and it is not necessary that such should exist in order to constitute a ground for divorce. It is contended, however, that the evidence is sufficient to prove that the conduct of the respondent was such that the petitioner might reasonably apprehend bodily injury, and her mental health was affected. The evidence in support of this contention is that the petitioner found beneath the pillow of the respondent, in the bed they both occupied, a razor and a sharp knife, and on asking him what it was for, he said to protect himself. She then inquired: "What do you want to protect yourself for?" and his reply was: "I thought you might do me some harm while I was

sleeping." She was then asked by her counsel what effect this discovery had upon her, and her answer was: "Well, it made me very nervous. I made him take another room after that." This seems to have ended the matter. The petitioner frankly admitted that her husband had "never laid hands on her" in any way in a violent manner. She does not even state that she apprehended that he would do so or that the weapons referred to were kept by him for that purpose. Accepting her statement that she became nervous through his actions, this would not be sufficient. I do not think the petitioner's safety was compromised, nor any fears for it entertained by her. There is no evidence, in my opinion, to support the allegation of legal cruelty. Petition is dismissed. Judgment

Petition dismissed.

NEWBERRY v. BROWN.

Contract—Sale of land—Description of one of parties—"Client of A."—Not sufficient to comply with Statute of Frauds.

The description of one of the parties to a contract for the sale of land as "client of A." is not such that his identity cannot fairly be disputed, and non-compliance with the Statute of Frauds is therefore a good defence to an action for specific performance of the contract.

Rathom v. *Calwell* (1911), 16 B.C. 201, followed.

ACTION tried by MURPHY, J. at Vancouver on the 16th of December, 1914, for specific performance of a contract for the sale of land. The defence was non-compliance with the Statute of Frauds. The documents relied upon by the plaintiff as a sufficient compliance with the statutes are as follows: Statement

MURPHY, J.

1914

Dec. 17.

NEWBERRY v. BROWN

"Vancouver, B.C., May 21, 1914.

"P. N. Anderson, Esq.,
"430 Howe St.,
"Vancouver, B.C.

"Dear Sir:—

"As your client and as owner of lot 18, block 36, district lot 541, City of Vancouver, with building thereon known as the Cadillac Hotel, subject to encumbrances amounting to twenty-nine thousand five hundred dollars ($29,500) I accept the offer of J. M. Brown to exchange for the above property lot 19, block 57, district lot 196, City of Vancouver, subject to encumbrances amounting to six thousand dollars ($6,000) together with the sum of twelve thousand dollars ($12,000) in cash as set forth in his agreement dated the 21st day of May, 1914.

"I shall expect Mr. Brown to complete the exchange at once.

"Yours truly,

"(Sgd.) F. M. Newberry."

"I, John M. Brown of Vancouver do hereby make the following offer to client of P. N. Anderson—

"I will exchange my property at and described as follows: Lot 19, block 57, district lot 196, City of Vancouver, subject to a mortgage of $6,000 due in November, 1914, at eight per cent. interest together with the sum of twelve thousand dollars ($12,000) in cash for the following property, namely: Lot 18, block 36, district lot 541, with building thereon known as the Cadillac Hotel, number 553 Hamilton street, at the price of fifty thousand five hundred dollars ($50,500) subject to the following encumbrances amounting to twenty-nine thousand five hundred dollars ($29,500) being first mortgage of $25,000 at seven per cent. due February, 1917, and second mortgage of $4,500 due $500 every three months at seven per cent., which I agree to assume. All adjustments of interest, taxes, and insurance, et cetera, to be made to June 1st, 1914, on both sides.

Statement

"Dated this 21st day of May, 1914.

"(Sgd.) J. M. Brown."

It appeared from the evidence that P. N. Anderson, mentioned in both documents, was the agent of both the plaintiff and the defendant, and carried on negotiations between them for some time; that Brown and Newberry did meet each other and discussed the sale; that the letter signed by Brown was so signed in order that it might be submitted to Newberry and that Newberry signed the acceptance, which was communicated through Anderson to Brown.

F. L. Gwillim (*McKay,* with him), for plaintiff.
D. A. McDonald (*Bourne,* with him), for defendant.

17th December, 1914.

Judgment

MURPHY, J.: In my opinion, the only document that can be

looked at on the question of compliance with the Statute of Frauds is defendant's offer of the 21st of May, 1914, inasmuch as it contains no reference to any other document, and is the only document before me signed by defendant. If that be so, the question narrows itself down to this: Does the phrase, "client of P. N. Anderson," sufficiently describe the plaintiff so that his identity cannot fairly be disputed? To my mind, it clearly does not, and that view has been fortified by a perusal of the cases cited to me on the argument.

MURPHY, J.
1914
Dec. 17.
NEWBERRY v. BROWN

Andrews v. *Calori* (1907), 38 S.C.R. 588, seems the strongest case in favour of plaintiffs, but, just as it was held in *Rathom* v. *Calwell* (1911), 16 B.C. 201, that the further *indicia* which sufficed to take the receipt in the *Calori* case out of the category of the equivocal were wanting, so I find them wanting here. The action is dismissed, with costs.

Judgment

Action dismissed.

WICKWIRE & WICKWIRE v. PASSAGE & TOMLIN *ET AL.*

MACDONALD, J.
1914
Dec. 22.
WICKWIRE v. PASSAGE & TOMLIN

Promissory note—Order of indorsement—Indorsement for accommodation—Extension of time for payment—Indorser for accommodation not notified—Liability of.

The rule as to the liabilities *inter se* of successive indorsers of a bill or note, in the absence of all evidence to the contrary, is that a prior indorser must indemnify a subsequent one.

If the holder of a promissory note grants an extension of time for payment at maturity, without obtaining the assent of the accommodation indorsers to the extension, or reserving his rights against them as sureties, they are relieved from liability.

ACTION by the holders of a promissory note against the makers and indorsers thereof, for $2,000, tried by MACDONALD, J. at Vancouver on the 15th of December, 1914.

Statement

MACDONALD, J.

1914

Dec. 22.

WICKWIRE v. PASSAGE & TOMLIN

Judgment

R. M. Macdonald, for plaintiffs.
O'Dell, for defendants.

22nd December, 1914.

MACDONALD, J.: On the 26th of March, 1914, the defendants Passage & Tomlin, being indebted to the defendant Claughton, made their promissory note in his favour for $2,000. Defendant Claughton indorsed the note, and then, in order to negotiate the same, obtained the indorsement of the defendants Sprott and the Western Canada Trust Co. Such indorsements were for the accommodation of the defendant Claughton. Plaintiffs, without the knowledge that such last-mentioned parties had thus indorsed for accommodation, discounted the note at the request and for the benefit of Claughton. It was his duty towards those who had thus accommodated him to pay the note at maturity. He failed to perform this obligation, and the note was dishonoured on the 29th of June, 1914, and duly protested. All defendants thus at the time became liable to pay the note to the plaintiffs, as holders, in due course. The question is: Were any of them subsequently relieved from liability? Defendant Claughton immediately negotiated with the plaintiffs and obtained an extension of time for payment. Exhibit 2 shews that he paid interest up to the maturity of the note, and also a discount or bonus of 2 per cent. per month for an extension until the 10th of July, when it was agreed that a payment of $1,000 should be made. Plaintiffs granted this extension without even reserving their rights as against the other parties who were then liable on the note. This tied the plaintiffs' hands and had the same effect as if they had accepted a renewal note from Claughton without obtaining the assent of the other indorsers. Judgment was entered at the trial against the defendants Passage & Tomlin and Claughton, but the other defendants contend that the acts of the plaintiffs have relieved them from liability. Plaintiffs submit that the order in which the indorsers appear on the note should not govern, as indorsement includes "delivery"—that plaintiffs, dealing with the defendant Claughton in the negotiation and subsequent extension, were entitled to assume that defendant Sprott and the Western Canada Trust Co. were not sureties for defendant Claughton, but could be held

liable by him in the event of his being called upon to pay the note—that they could consider defendant Claughton as creating the last legal obligation. I do not consider this position tenable. Each indorsement is presumed—until the contrary is proved—to have been made in the order in which they appear on the note. They are also liable *prima facie* in the order in which they indorse. Plaintiffs, thus affected by such legal position, postponed payment of the note, and by their actions debarred themselves from proceeding thereon for an appreciable time. Their right of action as against the indorsers other than Claughton was destroyed in the meantime. Plaintiffs ignored the right that the indorsers had, to look at any time for indemnity to defendant Claughton, for whose accommodation they had indorsed. In these circumstances, as the plaintiffs did not take the precaution to obtain the assent of these accommodation indorsers to the extension, or reserve their rights against them as sureties, the result is, in my opinion, they are relieved from liability.

Judgment

The action is dismissed as against the defendants Sprott and Western Canada Trust Co., Ltd., with costs.

Action dismissed.

JACKSON v. IRWIN & BILLINGS COMPANY, LIMITED.

Vendor and purchaser—Sale of land—Conveyance—Voidability—Election—Finality.

A purchaser who elects to affirm a voidable contract for the sale of land with full knowledge of all the facts is precluded from afterwards setting up a right for rescission thereof.

Clough v. *London and North Western Railway Co.* (1871), L.R. 7 Ex. 26, adopted.

ACTION tried by MURPHY, J. at Vancouver on the 23rd of October, 1914, for rescission of a contract for the sale of land.

Statement

MURPHY, J.

1914

Dec. 17.

JACKSON v. IRWIN & BILLINGS CO., LTD.

Statement

The plaintiff had purchased from the defendant Company 87 acres of land at $19 per acre. He then spent considerable money in improvements, including the erection of a large barn, and sold five acres to a third party. For the purpose of making the conveyance of the five acres he had the property surveyed, and found there were only 25 acres instead of 87, and the five acres sold and all the improvements made by him were not within his boundaries. Upon discovering the mistake, the plaintiff took action against the defendant Company for damages for breach of contract. While the action was pending the defendant Company offered to rescind the contract, which offer the plaintiff could not accept. The plaintiff succeeded on the trial, but the judgment in his favour was reversed by the Court of Appeal (18 B.C. 225). The plaintiff then brought this action for rescission.

M. A. Macdonald, for plaintiff.
Abbott, for defendant.

17th December, 1914.

MURPHY, J.: Even granting that plaintiff had a right to rescind after he had got in the title to the parcel of land agreed to be sold, he, then having full knowledge of all the facts, elected to maintain his judgment and carried the matter to determination in the Court of Appeal, where the litigation resulted adversely to him. He could only do this on the basis of affirming the contract. Having once, with full knowledge, elected to affirm the contract, such election is determined for ever: *Clough* v. *London and North Western Railway Co.* (1871), L.R. 7 Ex. 26 at p. 34. The action is dismissed.

Judgment

Action dismissed.

HALLREN v. HOLDEN.

COURT OF APPEAL

1914

Nov. 3.

HALLREN v. HOLDEN

Pleading—Aggravation of damages—Malice in libel action—Facts before and after publication—Effect of re-pleading matters struck out by former order unreversed.

In order to shew malice in a libel action the plaintiff may plead all facts which he intends to rely upon in aggravation of damages and which are relevant thereto, whether they arose before or after publication, but the words and conduct relied on must be reasonably proximate in time and character to the main offence.

Where an order has been made to strike out certain allegations from which no appeal was taken, such allegations should not be inserted in an amended pleading, even in the case of an order having been made in the meantime by the Court of Appeal giving leave to plead any matters which may be properly pleaded in aggravation of damages.

APPEAL by plaintiff from an order of MORRISON, J. at chambers in Vancouver, on the 16th of May, 1914, striking out certain pleadings in a libel action framed in aggravation of damages. In the initial steps in the action the defendant applied for and obtained an order striking out a pleading in aggravation of damages, the order giving the plaintiff leave to deliver an amended statement of claim. The plaintiff did not appeal from this order but delivered an amended pleading, omitting the paragraph struck out, but including a further paragraph framed in aggravation of damages. The defendant then moved to strike out this paragraph. The application was dismissed but defendant appealed, the Court of Appeal striking the paragraph out, but allowing the plaintiff to amend her pleadings, shewing any matters which could properly be shewn in aggravation of damages. The amended pleadings being delivered, an application was made to strike them out, which was done. Plaintiff appealed.

Statement

The appeal was argued at Victoria on the 12th of June, 1914, before MACDONALD, C.J.A., IRVING, GALLIHER and MCPHILLIPS, JJ.A.

COURT OF APPEAL

1914

NOV. 3.

HALLREN v. HOLDEN

R. M. Macdonald, for appellant (plaintiff): The Court of Appeal, by their former judgment, allowed the plaintiff to plead any matters that should be properly allowed in aggravation of damages. The learned judge below struck out the paragraph complained of, giving no reasons. The Court can consider anything to shew the attitude of the defendant's mind, but the Court will not now anticipate what the evidence will be on the new trial: see *Pearson* v. *Lemaitre* (1843), 5 M. & G. 700; *Praed* v. *Graham* (1889), 24 Q.B.D. 53; *Hunt* v. *Algar* (1833), 6 Car. & P. 245; *Mead* v. *Daubigny* (1792), Peake, N.P. 168. The plaintiff may give evidence of any words used by the defendant to shew the spirit and temper by which he was actuated, and accordingly plead the surrounding circumstances: see *Lee* v. *Huson* (1793), Peake, N.P. 223; *Macleod* v. *Wakley* (1828), 3 Car. & P. 311; *Anderson* v. *Calvert* (1908), 24 T.L.R. 399.

S. S. Taylor, K.C., for respondent (defendant): As to what circumstances attending the publication may be given in evidence, see Odgers on Libel and Slander, 5th Ed., 389; *Finnerty* v. *Tipper* (1809), 2 Camp. 72; *May* v. *Brown* (1824), 3 B. & C. 113. All matters pleaded must be relevant to the matter at issue in a libel case as well as any other: see *Hemmings* v. *Gasson* (1858), 4 Jur. N.S. 834. The other question is that of *res judicata*: We moved to strike out before GREGORY, J.; they were struck out and the plaintiff did not appeal, and they cannot now, by amendment, again plead the same matters.

Argument

Macdonald, in reply: The allegations now in question are not the same as those struck out. We had liberty to raise any question properly pleaded in aggravation of damages: see Odgers on Pleading, 7th Ed., 103; Odgers on Libel and Slander, 5th Ed., 390.

Cur. adv. vult.

3rd November, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: In an earlier statement of claim in this action, which is one of libel, the plaintiff, in aggravation of damages, pleaded the following paragraph:

"5. The defendant subsequently, by divers threats and other means attempted to drive the plaintiff from the City of Vancouver, and caused

her to be ejected from the Hotel Dunsmuir, in the City of Vancouver, and also attempted to have her removed from the Hotel Vancouver, and upon the plaintiff leasing a suite of apartments in Holly Lodge, Vancouver, the defendant hired detectives for the purpose of harassing and embarrassing the plaintiff, and for the purpose of espionage."

From the context of the statement of claim in which this appears, it is manifest that "subsequently" means subsequently to the divorce and prior to the publication of the libel. This paragraph was, on application of the defendant, struck out by order of a judge, and leave was given to deliver an amended statement of claim. No reasons were given by the learned judge—at least, none were brought to our attention. The plaintiff did not appeal, but delivered an amended statement of claim, which omitted the allegations so struck out, but contained the following paragraph:

"8. The defendant both before and after the publication of the said false statement shewed that he was actuated by express malice against the plaintiff in publishing the matter complained of. Particulars of the facts and circumstances shewing such express malice will be furnished to the defendant, if demanded, and evidence thereof will be adduced upon the trial hereof in aggravation of damages."

Defendant moved to strike this out, but the application was dismissed, and from the order of dismissal an appeal was taken to this Court, which, on the 14th of April, we allowed, but gave leave to amend the statement of claim by pleading "any matters which may be properly pleaded in aggravation of damages." Pursuant to such leave, plaintiff amended by setting up a new paragraph 8, sub-paragraphs (a), (b), (c) and (d) of which are repetitions in an amplified form of the allegations contained in said paragraph 5. The other sub-paragraphs are as follows:

MACDONALD, C.J.A.

"(e) The defendant compelled the plaintiff's children to convey messages over the telephone to the plaintiff, while he (the defendant) was standing over them threatening them and ordering them to convey messages to the plaintiff indicating that the children had lost faith in her virtue and integrity and were heartbroken in consequence, and requested his daughter Helen to write insulting letters to the plaintiff.

"(f) The defendant called upon the plaintiff's mother and falsely told her that the plaintiff was living shamelessly with Hallren.

"(g) The plaintiff further relies upon the conduct of the defendant in the present case as shewn in his pleadings and in the manner his defence was conducted on the first trial herein."

This new paragraph 8 was struck out by order of a judge at

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the instance of the defendant, and from that order this appeal was taken.

The propriety of pleading all facts relied on by the plaintiff in aggravation of damages was considered by the Court of Appeal in England in *Millington* v. *Loring* (1880), 6 Q.B.D. 190, where a very strong Court reversed a Divisional Court and held that such facts were "material facts," and should be pleaded pursuant to Order XIX., r. 4, of which our Order XIX., r. 4, is a copy. It was further stated in that case that even if the allegations objected to were not within that rule, it was not improper to plead them. *Millington* v. *Loring* has been criticized in Odgers on Pleading, 7th Ed., 103-4, where it is suggested that it had been in effect overruled by *Wood* v. *Earl of Durham* (1888), 21 Q.B.D. 501; and *Wood* v. *Cox* (1888), 4 T.L.R. 550. The learned text writer erroneously attributes the decision in *Millington* v. *Loring* to a Divisional Court, whereas it was that of the Court of Appeal. It could, therefore, not have been overruled by the decision of a judge, as was that in *Wood* v. *Earl of Durham, supra,* or of a Divisional Court, as was that in *Wood* v. *Cox, supra.* Whatever view one may take of the soundness of the decision in *Millington* v. *Loring,* the fact remains that it is the most authoritative case on the subject. The cases above referred to as overruling *Millington* v. *Loring* do not, in my opinion, really conflict with it. They have to do with allegations in statements of defence, and not in statements of claim, and were influenced by Rules of Court specially relating to statements of defence.

MACDONALD, C.J.A.

This brings me to the point already decided in the former appeal that the plaintiff should plead all facts which he intends to rely upon in aggravation of damages, and which are relevant thereto. The defendant's case is that as to said sub-paragraphs (a), (b), (c) and (d) they cannot now be pleaded because of the order striking them out of the earlier statement of claim. Secondly, as to the whole paragraph, that the matters alleged are not relevant to the question of damages, as not being closely enough connected with the alleged libel. In my opinion, said paragraphs (a), (b), (c) and (d) cannot now be pleaded. I do not decide upon the relevancy of the allegations contained

therein. I think the order striking them out precluded their insertion in an amended pleading. Apart from estoppel or *res judicata* (as to which I express no opinion), I think it would be a mistake to disregard such orders which, if erroneous, the party dissatisfied had not had rectified at the proper time and in the proper manner.

It was urged by plaintiff's counsel that our order of the 14th of April gave leave to plead all material facts affecting damages, but it will be observed that that order was confined to matters which might be properly pleaded and, therefore, did not authorize the inclusion of allegations which had theretofore been finally rejected by order of a judge unreversed. Sub-paragraph (g) was properly struck out. The remaining question is as to whether or not sub-paragraphs (e) and (f) contain allegations relevant to the damages claimed in the action. If believed, they shew that defendant was making slanderous statements concerning the plaintiff of a nature similar to those complained of in the libel. The issue of malice goes to the defendant's state of mind at the time he published the alleged libel, and his conduct, as set forth in said sub-paragraphs, would lead to the fair inference that the malice then exhibited continued and influenced him in publishing the libel. No doubt, care must be taken not to go too far afield, and words and conduct relied on as proof of malice must be reasonably proximate in time and character to the main offence, but I think it can be said that the allegations in these two sub-paragraphs, read in connection with the rest of the statement of claim, fulfil these conditions. It is true that nearly all of the reported cases have to do with words and conduct which had direct reference to the libel complained of, and which were subsequently to the publication, but in none of them is it suggested that only matters subsequently to publication can be relevant.

MACDONALD, C.J.A.

In *Saunders* v. *Mills* (1829), 6 Bing. 213, evidence of matters before publication of the libel was admitted in mitigation of damages, and in *Anderson* v. *Calvert* (1908), 24 T.L.R. 399, there is at least the *dicta* of the judges who decided it, that circumstances tending to prove malice could be given in evidence, whether they arose before or after the publication of the libel.

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I would allow the appeal and reverse the order appealed from except as to said sub-paragraphs (a), (b), (c), (d) and (g), which, for the reasons above mentioned, I think were improperly pleaded. As the appellant has succeeded upon a substantial part of her appeal, she should have the costs.

IRVING, J.A.: I would allow the appeal.

The statement of claim delivered on the 11th of May, 1914, seems to me to be in accordance with the judgment of this Court delivered on the 14th of April, 1914, and is right in form: Odgers on Pleading, 7th Ed., 103.

If sanction were given Mr. *Taylor's* argument that as he has not pleaded privilege malice would be presumed, and, therefore, proof of malice is not necessary because these allegations are not relevant to any issue and, therefore, should be struck out, would possibly have the effect of depriving the plaintiff of her right to press for vindictive damages. It has been established for years that circumstances going to shew the spirit and intention of the defendant cannot be excluded: see *Pearson* v. *Lemaitre* (1843), 5 M. & G. 700; 12 L.J., C.P. 253.

The jury, in considering the damages for the slander, is justified in taking into consideration all the facts—prior as well as subsequently to the slander—going to shew malice. It would be proper for the judge at the trial to warn the jury that though it was open to give punitive damages for malice, it was not open to them to give damages for a separate and independent cause of action: *Anderson* v. *Calvert* (1908), 24 T.L.R. 399.

IRVING, J.A.

As to the argument that it is too late to appeal in view of the previous order, I do not think the amended statement of claim as it now stands is the same as that dealt with by GREGORY, J. on the 27th of November, 1913. Nor do I think that the order of GREGORY, J. of the 27th of November, 1913, can be regarded as a final order, or, having regard to its general terms, an order deciding the rights of the parties so as to amount to a *res judicata*—unless appealed against. Amendments to pleadings should be allowed freely. It is true some interlocutory orders are regarded as final, but the Court has a free hand in matters of procedure: *e.g.*, *Prestney* v. *Corporation of Colchester* (1883), 24 Ch. D. 376.

GALLIHER, J.A.: If the doctrine of *res judicata* applied, I should consider sub-paragraphs (a), (b), (c) and (d) of paragraph 8 of the amended statement of claim of the 5th of May, 1914, as pleading in an amplified form the matter contained in paragraph 5 of the statement of claim of the 17th of November, 1913, which was ordered struck out by GREGORY, J., and which order was not appealed from, but I am of opinion that the doctrine does not apply.

By an order of this Court dated the 14th of April, 1914, the plaintiff was permitted to amend her statement of claim by pleading any matters which might be properly pleaded in aggravation of damages. Paragraph 8 of the amended statement of claim of the 5th of May, 1914, is in pursuance of this order, and it remains only for us to decide if the order of MORRISON, J., dated the 16th of May, 1914, striking out paragraph 8 is well founded.

In *Pearson* v. *Lemaitre* (1843), 12 L.J., C.P. 253 at p. 256 the Court laid down the following rule:

"Either party may, with a view to damages, give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of defamatory matter, but if the evidence given for that purpose establishes another cause of action, the jury should be cautioned against giving any damages in respect of it."

The evidence admitted there were two letters written subsequently to the publication of the libel complained of, and reiterating the statements contained in the libel complained of. This has been followed in *Anderson* v. *Calvert* (1908), 24 T.L.R. 399, the Master of the Rolls stating at p. 400:

GALLIHER, J.A.

"Circumstances going to prove malice could not be excluded, whether those circumstances were before or after the publication of the libel. . . . But the jury ought not to treat these prior or subsequent circumstances as giving a separate and independent right to damages."

Applying these principles, would the plaintiff be entitled to give evidence of the acts complained of in paragraph 8? The libel complained of is that the defendant caused to be published that a statement was made by a witness named Champion in a previous trial imputing unchastity to the plaintiff, whereas no such statement had been made by this witness. The course of conduct pursued by the defendant, if the allegations in sub-paragraphs (a), (b), (c) and (d) of paragraph 8 are true,

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while very reprehensible, and tending to establish a system of persecution, is not, as I view it, admissible in evidence to shew malice in the mind of the defendant in causing to be published the libel complained of, and should not be pleaded. It seems to me, evidence must be relevant to the issue of libel from which damages flow. The issue here is as to the truth or falsity of the statement which the defendant caused to be published as to the evidence given by Champion, and I fail to see how evidence of the matters alleged in these sub-paragraphs is relevant to that issue. The allegations in sub-paragraphs (e) and (f) are, I think, properly pleaded, containing, as they do, matter relevant to the imputations complained of in the matter published. Sub-paragraph (g) is not a proper plea, and should be struck out.

GALLIHER, J.A.

The order of MORRISON, J. should be varied accordingly.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. agreed with MACDONALD, C.J.A.

Appeal allowed in part.

Solicitors for appellant: *MacNeill, Bird, Macdonald & Darling.*

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

J. COUGHLAN & SONS v. JOHN CARVER & COMPANY.

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COUGHLAN & SONS v. JOHN CARVER & CO.

Mechanic's lien—Supplying material to contractor—Fashioned at factory to meet requirements—Material man—Sub-contractor—R.S.B.C. 1911, Cap. 154, Secs. 2; 6, Subsec. (1); and 19, Subsec. (2).

A person who accepts an order from a contractor for structural steel to be used in the construction of a building, fashions it at his factory to meet specified requirements, and delivers it so made ready at the building site, but takes no part in the construction thereof, is a "material man" only; his status is not affected by the fact that he expended labour on the material before delivery. He is bound, therefore, to give the notice prescribed by section 6, subsection (1), of the Mechanics' Lien Act, and, in order to preserve his lien, to file his claim within 31 days after the last delivery of material, as prescribed by section 19, subsection (2), of said Act.

Irvin v. *Victoria Home Construction and Investment Co.* (1913), 18 B.C. 318, distinguished.

APPEAL by defendant from a decision of GRANT, Co. J. at Vancouver on the 23rd of April, 1914, in an action claiming a lien under the Mechanics' Lien Act for material supplied by the plaintiffs as sub-contractors. The last material furnished by them was delivered on the 19th of December, 1913; the principal contractors finished their work on the 26th of January, 1914, and the lien was filed on the 20th of February, 1914. The trial judge was of the opinion that as the principal contractors finished their work on the 26th of January, therefore the sub-contractors had 31 days from that date to file their lien, and that, accordingly, the lien was filed in time. He gave judgment *in personam* for $715.20.

Statement

The appeal was argued at Victoria on the 8th of June, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Armour, for appellant (defendant): The question is whether the lien was filed in time under the Mechanics' Lien Act. The claim is for a balance due on steel supplied the defendant. The plaintiffs did no work; they are material men only, and

Argument

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supplied the steel as sub-contractors. The last delivery of material was on the 24th of November, 1913, and the lien was filed on the 20th of February, 1914. The main contract was not completed until the 26th of January. The learned trial judge erroneously decided that the time should count from the completion of the main contract. Being a material man only, he is governed by sections 2 and 19, subsection (2) of the Act; they must be read together: see *Rosio et al.* v. *Beech et al.* (1913), 18 B.C. 73; *Dempster* v. *Wright* (1900), 21 C.L.T. 88; Wallace on Mechanics' Liens, 2nd Ed., 265.

Argument

Mayers, for respondents (plaintiffs): The question is the construction of subsections (1) and (2) of section 19 of the Mechanics' Lien Act. We say the meaning of the words "completion of the contract" refers to the whole contract, and not the last delivery by the plaintiff.

Armour, in reply.

Cur. adv. vult.

5th November, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: This is an action for the enforcement of a mechanic's lien. Two questions were presented at bar for our consideration, first, were the respondents (plaintiffs) persons supplying materials merely, and, therefore, not only bound to give the notice prescribed by the proviso to section 6 of the Mechanics' Lien Act, which they gave, but also bound, if they would preserve the lien, to file their claim within 31 days after the last delivery of materials, as prescribed by section 19 (2); and secondly, if not, had they 31 days from the completion of the main contract, or only 31 days from the completion of their own contract within which to file their claim?

In the view I take of the first question it becomes unnecessary to consider the second.

The respondents accepted an order from the contractors for steel beams, angles, channels and plates to be used by the contractors in the erection of the building. The different members were to be fashioned to meet specified requirements and were to be made ready to be placed and fastened together when required in construction. All that the respondents had to do was to be done at their factory, and nothing was to be done by

them on or about the building itself. The material so made ready was to be delivered at the building site, where the respondents' connection with it ended. Their submission was that they were not mere "material men," to use the popular and convenient designation for those supplying material only, but were sub-contractors for work and material; that the fact that they had to expend labour on the material before delivery distinguishes their status from that of "material men," such, for instance, as merchants who supply hardware from their stock in trade to a contractor. The distinction is too refined to be admissible. We held in *Irvin* v. *Victoria Home Construction and Investment Co.* (1913), 18 B.C. 318, that persons who contract with the principal contractors to do a portion of the work on the building itself, supplying the material with which to do it, are not mere material men, but are sub-contractors in the sense in which that term was employed in the Mechanics' Lien Act prior to the amendment giving a lien for materials, and hence, were not required to give the notice prescribed by section 6, from which it follows that such persons would be within section 19 (1) and not section 19 (2) in respect of the time limited for the continuance of their liens. It is such sub-contractors that the plaintiffs claim to be, but so to hold, I should have to decide that they are persons who have done "work or service or caused work or service to be done upon" the building within the meaning of section 6 (1) of the Act. I might as reasonably hold that if locks of a special design were ordered from a manufacturer, he could claim, not merely as a material man, but as a person who had done or caused work to be done on the building.

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The definition of "sub-contractor" in the interpretation clause of the Act is wide enough to include the material man, but the Act contemplates different classes of sub-contractors, with different rights and obligations affecting their status as lien holders. A sub-contractor for the supplying of material only cannot acquire a lien unless he complies with the provisions of section 6, and cannot maintain it after 31 days from the last delivery of his material unless he comply with section 19 (2). A person who sub-contracts for a portion of the work of construction,

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including the materials to be used therein, is not, as we have already held in the case above referred to, and in other cases, required to give such notice, and is entitled to the time prescribed in section 19 (1) within which to file a claim which would keep his lien in good standing.

I would allow the appeal and dismiss the action.

IRVING, J.A.: I concur in the judgment of the learned Chief Justice.

MARTIN, J.A.: This appeal raises the question as to whether or no a sub-contractor who "furnishes" materials alone (which is all that he did here, because the fact that he manufactured them specially before "furnishing or placing" them clearly does not extend his lien to cover work done on the building by others with said materials after they got there), is to have only "thirty-one days after the furnishing or placing of the last materials so furnished or placed," under subsection (2) of section 19, instead of "thirty-one days after the completion of the contract," under subsection (1), the contention being that the contract here means the main contract. The plaintiffs clearly come within the definition of "sub-contractor" in section 2, as they did not contract with, and were not employed directly by the owner or his agent, but contracted with the contractor "to place or furnish material" on the work. So, it is conceded that the language is in terms wide enough to embrace the plaintiffs and bring them under subsection (1), and it only remains to be seen if there is any limitation that could legally be placed upon that language, either from other sections in the Act or judicial decisions, so as to exclude them. In the first place, I do not doubt that the "contract" mentioned in said subsection (1) is the original and main contract. That view is supported by analagous reasoning on the words "completion of the work" in *Coughlan* v. *National Construction Co.; McLean* v. *Loo Gee Wing* (1909), 14 B.C. 339; and by the closer decision of *Dempster* v. *Wright* (1900), 21 C.L.T. 88, which, though given on a differently-worded statute, in one respect, is, nevertheless, in point generally. In the second place, though the matter is not free from doubt, in view of the very plausible submissions made by Mr. *Mayers,* yet

MARTIN, J.A.

I am of opinion that, considering the history of the Act in question, subsection (2) (appearing for the first time in the Act of 1910) was intended to cover only the case of a material man who was not a sub-contractor, and that the case of sub-contractors is provided for in subsection (1). Before the Act of 1900, Cap. 20, Sec. 7, the material man had no lien, though the sub-contractor had one for work done, and his time for filing it was governed by the Act of 1897, R.S.B.C., Cap. 132, Sec. 8, and I cannot resist the conclusion that the new provision, covering the new case of the time given the material man, was intended to apply to him only, even though by the terms of the existing definition of "sub-contractor" the latter partook also of the nature of the new material man, and had his lien correspondingly extended to include materials. Therefore, in this respect of time, he still differs from the material man, though in other respects and under other sections his right may be in the same category, *e.g.*, under the proviso in section 6, where he supplies materials only: *Fitzgerald* v. *Williamson* (1913), 18 B.C. 322.

MARTIN, J.A.

It follows that the appeal should be allowed.

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

The plaintiffs, in my opinion, are material men, and not sub-contractors. They undertook to deliver, and did deliver, certain structural steel, to be used in the building in question. This they assembled at their own works, according to plans and specifications, and delivered on the ground, but did not work it into the building. As material men, their lien was out of time: see subsection (2) of section 19, Cap. 154, R.S.B.C. 1911.

GALLIHER, J.A.

MCPHILLIPS, J.A.: This is an appeal from a decision of GRANT, Co. J. in a mechanic's lien action, the judgment being the upholding of a mechanic's lien for materials supplied in the erection of a building in the City of Vancouver. The lien allowed was in amount $715.

J. Coughlan & Sons, the plaintiffs in the action (respondents), supplied certain structural steel in the construction of the building, supplying the same under an order from the American Can Company, Limited.

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The letter confirming the receipt of the order is exhibit 2, and is said to be steel work for the American Can Company factory. It is not made clear that the American Can Company, Limited, are really the proprietors of the factory, title to the land being vested in the Canadian Pacific Railway Company, but this may, perhaps, be assumed. The evidence does shew that the principal contractors—the contractors for the construction of the building—were John Carver & Co.

The required statutory notice was given that the plaintiffs would claim a lien for materials. The trial to a very large extent proceeded upon admissions.

The last of the materials would appear to have been furnished on the 24th of November, 1913, or at least, it is not contended that any materials were furnished at any later date.

In my opinion, this appeal, upon the facts admitted and the evidence adduced at the trial, must be determined upon the footing that the plaintiffs were material men, not being the lien of a contractor or sub-contractor.

It will be observed that the notice advising that a lien would be claimed reads in part, "which said material was ordered by Carver & Carver, Contractors, Vancouver," yet, as already pointed out, it is manifest that the order was given by the American Can Company, Limited.

MCPHILLIPS, J.A.

The contractors, John Carver & Co., would appear to have fully completed their contract in the construction of the building by the 26th of January, 1914. The lien was not filed until the 20th of February, 1914. The lien, not being filed within 31 days of the furnishing of the last materials, *i.e.*, within 31 days after the 24th of November, 1913, in my opinion, was too late.

The Mechanics' Lien Act must be read as a whole, and the intention of the Legislature, in my opinion, is plain, and that is, that the furnishing of materials is separately dealt with when it is the furnishing of materials simply, and not the furnishing of materials connected with a contract or sub-contract which in its terms may involve the supplying of materials, the rendering of services, the payment of wages, and generally, all that it is usual and customary to provide in the carrying out of the whole

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work. I am not prepared as at present advised, however, to hold that even were the plaintiffs in the position of sub-contractors within the meaning of the Mechanics' Lien Act that the lien was filed in time, only being filed within 31 days after the completion of the contract by John Carver & Co. However, in view of the way I look at the facts of the case, it is unnecessary to decide the point.

McCormick v. *Bullivant* (1877), 25 Gr. 273; and *Hall* v. *Hogg* (1890), 20 Ont. 13, are authorities which appear to me to sustain the opinion at which I have arrived, coupled with the construction which, in my opinion, should be placed upon the Mechanics' Lien Act.

MCPHILLIPS, J.A.

It follows that, in my view, the appeal should be allowed and the mechanic's lien set aside, with costs to the appellant both here and below.

Appeal allowed.

Solicitors for appellant: *Davis, Marshall, Macneill & Pugh.*
Solicitors for respondents: *Bodwell, Lawson & Lane.*

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KNOWLES v. ELLISON

Trespass—Spreading of fire—Damage to adjoining property—Common-law liability—Forest Fires Act, R.S.B.C. 1911, Cap. 91—Limitations of actions—Master and servant—Instructions of master—Scope of employment.

Where A, without negligence, sets a fire upon his land and the fire, being unwatched, spreads to the land of B, and there does damage, A is liable in trespass to B.

Farm labourers hired to do anything that might require to be done upon ordinary well-wooded farms or ranches within the Province, are acting within the scope of their employment in setting out fires, even if such setting out at the particular season of the year was contrary to the express orders of the employer, who would accordingly be liable at common law to neighbours whose lands are injured by the fire.

Statement

ACTIONS for damages for loss occasioned by fire, which was set by the defendant's workmen on his property, and spread to the property of the plaintiffs, tried by CLEMENT, J. at Vernon on the 31st of October, 1914. The facts are fully set out in the reasons for judgment.

A. D. Macintyre, for plaintiffs.
Maclean, K.C., for defendant.

27th November, 1914.

Judgment

CLEMENT, J.: These two actions were tried before me at Vernon on the 31st ultimo, and I then provisionally assessed the damages suffered by the respective plaintiffs, reserving the question as to defendant's liability upon the facts as I should find them. Upon further consideration, I find the facts as follows:

The fire which gave rise to these actions had its origin upon the defendant's land, being set out by his workmen in the early part of May, 1909. The defendant's land was admittedly within a "fire district" to which the Forest Fires Act (now R.S.B.C. 1911, Cap. 91) would apply; consequently, the setting out of the fire by the defendant's workmen was in clear contra-

vention of the statute, as no permit had been obtained under the Act. Apart from this breach of the statute, I am unable to find that the fire was negligently started. By the next day it had pretty well died down, but in the middle of the day a wind storm, not abnormal or of unprecedented violence, swept up the valley, with the result that the fire begun by defendant's workmen, and over which they were keeping no watch, spread to adjoining properties and much damage was done, the plaintiffs in these two actions being among the sufferers. They did not, however, bring their action within the three months limited by the statute. The damage was done on the 3rd of May, 1909, and these actions were not begun until the 2nd of November of that year. The only other fact upon which it is necessary to find is whether or not the defendant's workmen were acting within the scope of their employment in setting out the fire in question. I find that they were. Notwithstanding the evidence of the defendant, it seems clear to me that these workmen were ordinary farm labourers, hired to do anything that might require to be done upon the defendant's lands. Only a short time before, Blondin, one of these workmen, had attempted to burn a clearing for a cabin at the defendant's express direction and under his personal supervision. That attempt was abandoned owing to the spot selected proving too wet and green. But that episode satisfies me that it was within the scope of the employment of these workmen to set out the fire in question, even if its setting out at this particular season were, as defendant said, contrary to his express orders. Upon this question I am entitled to make use of my own knowledge of conditions upon ordinary well-wooded farms or ranches in this Province: see *Citizens' Life Assurance Company* v. *Brown* (1904), A.C. 423; 73 L.J., P.C. 102; and, using that knowledge, I have no hesitation in finding as I have done. Lord Macnaghten, in a recent case in the House of Lords—*Lloyd* v. *Grace, Smith & Co.* (1912), A.C. 716 at p. 736; 81 L.J., K.B. 1140 at p. 1148—says that the phrases "acting within his authority," "acting in the course of his employment," and "acting within the scope of his agency," speaking broadly, mean one and the same thing. He adds: "Whichever expression is used it must be construed

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liberally." The setting out of the fire in question was in the supposed interest of the defendant, to burn away a lot of fallen timber and debris upon a sparsely wooded point or triangle of land which jutted out between two of the defendant's meadows. *Lloyd* v. *Grace, Smith & Co.* (*ubi supra*), shews, however, that this is no longer a necessary separate inquiry, and that the general proposition, upon which must rest the defendant's liability in a case of this kind, is that the principal is liable for the act of the agent in the course of the master's business, and no sensible distinction can be drawn between the case of fraud and the case of any other tort. The phrase "in the course of the master's business" means the same thing as the other phrases above referred to.

In an earlier case, *Derby* v. *Ellison,* arising out of this same fire, the trial took place in the County Court of Yale, before SWANSON, Co. J., who gave judgment for the plaintiff upon the ground of negligence on the part of the defendant's servants in taking no steps to prevent the fire from spreading to adjoining lands. There was no evidence before him that the defendant's lands were within a fire district, and there was, therefore, no case of breach of a statute to be considered. He thought no case of *vis major* made out. An appeal was taken to the Court of Appeal. but the judgments there are unreported.* I have been furnished with a copy of the judgments of Mr. Justice IRVING and Mr. Justice GALLIHER, and it was stated to me that the Chief Justice of the Court concurred in the dismissal of the appeal, giving oral reasons. Mr. Justice GALLIHER agreed with the learned trial judge that no evidence had been given that the defendant's lands were within a fire district and that no admission of that fact could be taken from the pleadings. Mr. Justice IRVING treated the fact as admitted, but was of opinion that the fact that the servant's act was a breach of a statute did not free the defendant from liability if the act were otherwise within the scope of their employment. He cited *Dyer* v. *Munday* (1895), 1 Q.B. 742, in support of his view. *Lloyd* v. *Grace, Smith & Co., (ubi supra)*, might now also be cited. To my mind, the

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*See (1912), 20 W.L.R. 794.

defendant's contention on this point is quite untenable, but even if I were disposed to think otherwise, I should certainly consider myself bound by the opinion expressed by Mr. Justice IRVING. Mr. *Maclean* cited before me *Wilson* v. *Rankin* (1865), 34 L.J., Q.B. 62, as an authority in favour of the contrary view, but that case, when examined, has, in my opinion, no bearing here. The plaintiff there sued upon a policy of insurance upon cargo. The defendant pleaded that part of the cargo had been stowed by the ship's master upon deck contrary to a statutory prohibition, without alleging knowledge of that fact upon the part of the plaintiff, the shipowner. The Court held that such knowledge was necessary in order to avoid the policy, and that it could not as a matter of legal intendment be imputed to the plaintiff in the case of such an illegal and unauthorized act as that of which the ship's master had been guilty. The ship, it was found, had not been made any the less seaworthy by the illegal stowage. No question, therefore, of damage to a third party arose at all in the case, and, in my opinion, it has no application here; and, as already intimated, the cases which do bear directly upon the question arising here are clear, as Mr. Justice IRVING, indeed, shews. *Vis major* was not argued before me.

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Upon the facts, then, as I find them, the question is simply this: If A, without negligence, sets fire upon his land, and such fire, being unwatched, spreads to the land of B and there does damage, is A liable? The statutory negligence cannot be set up, as these actions were not brought within the time limited by the statute; and so, the question squarely arises as I have put it. It seems to me to be the same question which arose in *Crewe* v. *Mottershaw* (1902), 9 B.C. 246, and which was determined by the Chief Justice in favour of the plaintiff, who had suffered by the fire. As it is there put, it may be proper to call it negligence to omit any reasonable precaution; or to say that the duty (not observed here) is to take all possible precautions to prevent the fire from spreading: *sic utere tuo ut alienum non lædas*. In my opinion, the action is really one of trespass. I so read *Jones* v. *The Festiniog Railway Company* (1868), 37 L.J., Q.B. 214; and I so held in *Woolbridge* v.

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Paterson Timber Co. in January, 1912 (not reported). See also *Black* v. *Christchurch Finance Co.* (1893), 63 L.J., P.C. 32; and the judgment of Idington, J. in *Laidlaw* v. *Crowsnest Southern Ry. Co.* (1909), 42 S.C.R. 355.

There will, therefore, be judgment for the respective plaintiffs, with costs on the Supreme Court scale.

Judgment accordingly.

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FRASER v. COLUMBIA VALLEY LANDS, LIMITED.

Vendor and purchaser—Sale of land—Agreement for sale—Form of conveyance—Non-existence of registered plan—Transfer by metes and bounds—Right of purchaser to rescission.

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Where under an agreement of sale the vendor agrees to deliver a clear title and the land is described as lot 1, "according to a plan to be registered," it was held that, there being no registered plan, the purchaser is bound to accept a conveyance containing a description of the land by metes and bounds.

Where a vendor is unable to transfer a property for which the purchaser has paid, the proper course for the purchaser is to notify the vendor that unless a transfer is produced within a reasonable time an action will be brought for rescission of the contract and recovery of the moneys paid.

Statement

ACTION tried by MACDONALD, J. at Vancouver on the 19th of November, 1914, for rescission of an agreement for the purchase of lot 1, according to a plan to be registered of part of a subdivision of district lot 7892, Kootenay District, and for return of money paid thereunder, or, in the alternative, for specific performance of the agreement. The facts are set out fully in the reasons for judgment.

Ritchie, K.C. (*Gibson,* with him), for plaintiff.

MacInnes, for defendant.

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MACDONALD, J.: Plaintiff, on the 11th of July, 1908, purchased a parcel of land from the Nakusp Fruit Lands, Limited, under an agreement for sale. The description of the property in the agreement of sale is as follows:

"Lot number one according to a plan to be registered of part of a subdivision of district lot 7892, Kootenay District, containing 12.50 acres, more or less."

The whole price was $1,080. He made the down payment of $270. The Nakusp Fruit Lands, Limited, had purchased a large parcel of land from the defendant Company and then subdivided it for the purpose of sale. Default having occurred, it released all its claims upon such property to the defendant Company, who assumed the benefits and obligations of any agreements for sale that had been entered into by the Nakusp Fruit Lands, Limited. Defendant Company sought the benefit of the agreement for sale with the plaintiff, and in 1909 recognized him as a purchaser. The Company pressed for payment and proposed to plaintiff that if interest were paid, to extend time of payment of principal until the following year. The evidence of the plaintiff in this connection is supported by letters and by a receipt given by the defendant Company, under 16th August, 1909, for $48.50, being interest to July, 1909. Plaintiff negotiated with the defendant Company for a reduction in price, on account of insufficiency of first-class land, and on the strength of a letter received from the agent, F. A. Courier, who had made the sale, obtained a concession in price, so that only $560 remained to be paid in order to entitle the plaintiff to a conveyance. It was contended that this reduction in price was given not only in consideration of the deficiency of first-class land, but was also based upon the inability of the defendant Company to give title at the time, and that it was agreed that the time should be extended for furnishing title. I accept the evidence of the plaintiff as to the sole ground for reduction being as stated by him. S. V. Roberts, secretary of defendant Company, was called as a witness on behalf of the defendant, and he did not support the evidence in this respect given by Hugo Carstens, president of defendant Company, on his examination at Winnipeg. I am satisfied that the entire arrange-

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ment arrived at between the parties is outlined in the letter from Roberts to the plaintiff, dated the 5th of May, 1910. I quote this letter at length.

"Dear Sir:—

"In reference to conversation with you some time ago I have now obtained authority to make you the following proposition, if you will in writing accept the following within one week of this date, that is, for the sum of five hundred and sixty dollars ($560.00), which includes principal, overdue interest and taxes on lot 1, block 7892, Whatshan Valley, we will deliver you clear title for the aforesaid lot. This is giving you a reduction of about three hundred dollars interest and principal, and considering the location we think that you are obtaining a snap."

Plaintiff became aware that the defendant Company could not execute a deed to the property according to the description of the agreement, but could convey by means of metes and bounds, but such mode of conveyance is not referred to in the letter. Subsequently plaintiff came to Vancouver, B.C., and seems to have had the impression, according to his letter of the 10th of July, 1911, to the president of the defendant Company, that a deed for lot 1, block 7892, would be registered in the registry office, and wrote inquiring as to whether this event had taken place, and that he was ready to make payment. He states he did not receive any reply to this letter. His troubles then began, and he retained Messrs. Wade, Whealler, McQuarrie & Martin to act for him in the matter. On the 21st of July, 1911, defendant Company, by letter of that date, stated that it would have the necessary papers drawn and forwarded without delay with reference to lot 1, block 7892. This undertaking was not carried out. In July, 1912, plaintiff employed Messrs. Haney & Hill, solicitors in Vancouver, to act for him, and, presumably, delivered to them all his papers in connection with the matter. They did not adhere to the provisions of the agreement for sale whereby the deed was to be prepared by the solicitors for defendant "at the expense of the purchaser," but prepared a conveyance themselves, following the description in the agreement for sale. This deed was enclosed to the defendant Company on the 17th of July, 1912, such solicitors stating that they were advised by the land registry office that "the lot is registered in the Company's name clear of all encumbrances," so the deed only required to be executed in order to close the

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matter. Defendant Company acknowledged receipt of the deed on the 23rd of July, 1912, stating that the deed could not be executed until the return of its president, when it would be forwarded at once. The deed was properly executed by the Company and, with some slight change in the description, forwarded with draft attached. Plaintiff's solicitors having been placed in funds for that purpose, retired the draft and then sought to register the conveyance. They were met with the difficulty that there was no certificate of title in the land registry office, but, on this being overcome, they then found it impossible to register the conveyance on account of there being no plan registered, so that the description in the conveyance was defective. Correspondence then ensued, and the Company offered various excuses for the plan not being registered. The plaintiff was not, however, able to obtain registration of his conveyance. It does not seem to have occurred to his then solicitors to have sought a conveyance by metes and bounds, nor did the defendant Company suggest such a course being pursued. There was a duty cast upon the defendant, after having received the purchase price, to take such steps as would enable the plaintiff to have his title registered, especially in view of the undertaking contained in the letter of the 5th of May, 1910. Their solicitors had inquired on the 30th of October, 1912, as to the registration of the plan, and on the 8th of November, 1912, the president wrote such solicitors, taking the ground that the solicitors for the plaintiff had accepted the conveyance and retired the draft for the amount due under the agreement for sale, and presumed, therefore, that they could register such conveyance. He seemed satisfied to retain the purchase price and leave the plaintiff to worry about his title. The matter remained in abeyance until the 19th of February, 1913, when the defendant Company inquired of its solicitors whether, in order to satisfy the demand of the plaintiff's solicitors, the lot could not be described by metes and bounds, as the Company is not now able to decide on a plan, and would not want to register the old plan." Still, the Company did not offer to give the plaintiff a conveyance in this manner, and, having sold in the meantime to one Beaton, the property became encumbered with mechanics' liens. This

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was explained to the plaintiff in a letter of the defendant Company dated the 6th of January, 1914, in reply to his letters of the 8th of December, 1913, and the 2nd of January, 1914. Plaintiff then engaged another firm of solicitors—Bowser, Reid & Wallbridge—and they wrote the defendant Company on the 27th of January, 1914, stating that the deed received by the plaintiff was useless, as there was no plan registered, and they demanded payment of the money with interest, on the ground that defendant "had no title to the property" and the deed could not be registered. Defendant replied on the 16th of February, stating that the Company had a clear title to the property, and the plaintiff knew when he accepted transfer thereof that the plan had not been registered, and that it would now be necessary to have a new survey made, which would be done during the spring, and that information would be given when the plan had been registered. This was not satisfactory, and on the 16th of February, 1914, plaintiff's solicitors stated that in default of repayment of the money, suit would be entered to recover same. This action was then brought (1) for rescission of the agreement and return of the moneys paid, or (2) in the alternative, for specific performance. It appears that at the time when the conveyance was given it could have described the property by metes and bounds, and that a clear title could have thus vested in the plaintiff. Subsequently this could not have been accomplished until the mechanics' liens were removed, but at the trial such a conveyance was proposed, though not formally tendered. Plaintiff refused to accept the conveyance, taking the ground that the property was of a speculative character, and it was too late now to force him to take title. Defendant, while setting up various grounds of a more or less technical nature in its statement of defence, did not make the offer as to giving the conveyance in the manner suggested at the trial. Plaintiff contended that the letters of his solicitors amounted to a rescission of the contract, and that he was entitled to recover the moneys paid, with interest, expenses and costs. It was urged that a conveyance by metes and bounds was not a compliance with the agreement for sale, and that a conveyance should be according to a registered plan. I cannot see any

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virtue in the description being thus confined. I assume that the plaintiff purchased the property in good faith as fruit lands, and if by any mode of conveyance he obtained title, he had accomplished the end desired. In *Laycock* v. *Fowler* (1910), 15 W.L.R. 441, the agreement provided that if the plan could not be registered, then the vendor should convey the actual land, describing it by metes and bounds, and this seems to have been there suggested as a satisfactory solution of the difficulty. That case turned on the failure of the plaintiff to obtain title, and not on the form of the conveyance. I think both parties herein agreed and understood as to the parcel of land intended to be sold, and reference to the plan might, as to any other document, be used, in case there had been any dispute, to determine the description or designation of such property: see *Ferguson* v. *Winsor* (1885), 10 Ont. 13, reversed in 11 Ont. 88, but not on this point; also *Kenny* v. *Caldwell* (1894), 21 A.R. 110; (1895), 24 S.C.R. 699. As the piece of land in question was at the corner of the district lot, it could easily have been described, and there would have been the surveyor's stakes on the ground to assist in a proper description. As to the vendor not being confined to the specific description contained in an agreement for sale, see *Springer* v. *Anderson* (1914), 7 W.W.R. 529.

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Plaintiff contends that, in the circumstances, he was entitled to a rescission of the contract, either by the letters referred to demanding payment, or by commencement of this action. He relies on *Fortier* v. *Shirley* (1883), 2 Man. L.R. 269, and *Gregory* v. *Ferrie* (1910), 14 W.L.R. 219, but both these cases dealt with the inability of the vendor to give title and the extent of the notice demanding that such title be produced, and do not relate to the form of conveyance. *In re Ryan* (1914), 19 B.C. 165, decides that where the plan of a subdivision has been rejected, the registrar is bound to register a conveyance of the parcel of land intended to be described according to such plan, if the conveyance describe the property by metes and bounds and has a sketch plan attached. This being the state of the law, in my opinion, if defendant, after being called upon to give a conveyance by metes and

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bounds, had refused to do so, then, in view of the time that had already elapsed, this would have amounted to a rescission of the contract, and the plaintiff would be entitled to recover payment of the moneys. Plaintiff, however, took a different course, and claimed that there was a want of title in the defendant, and for that reason the contract should be rescinded. I think the course indicated in *Hatten* v. *Russell* (1888), 38 Ch. D. 334 at p. 346, should have been pursued, and that the plaintiff should have said to the defendant: You have received the purchase price and agreed to give a conveyance, and unless same be given within a reasonable time the contract is repudiated and action will be taken to recover the moneys paid.

Some sections of the Land Registry Act were referred to in the pleadings and argument, but abandoned. No reference was made to section 104 having any bearing upon the rights or liabilities of the parties.

It is further submitted that, in view of the time that had elapsed and the expense and trouble to which the plaintiff had been put, he is entitled to recover the purchase price. He certainly has suffered inconvenience and been put to a great deal of trouble and expense. Defendant Company has treated him in a casual manner, but his legal position was, I believe, as indicated. If I am right that the defendant could compel the plaintiff to accept a conveyance by metes and bounds, then the difficulty in the conveyance drawn by the plaintiff's solicitors "was quite easy to remedy, and it was not likely that any considerable time would be taken up in remedying it." While the plaintiff was thus, to an extent, in error, the defendant continued up to the time of trial in its total disregard of the plaintiff's rights, and the duty was cast upon it of enabling the plaintiff to become a registered owner of the property. If it desired to relieve itself from liability, it should have executed a conveyance with proper sketch plan attached, and tendered it to the plaintiff. It would thus appear that it was only by this action, brought to trial, that the defendant was forced to realize its obligation. If it should now deliver a proper conveyance, it should still be liable for costs through its fault and neglect.

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It should implement its offer, made through counsel at the

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trial, within a reasonable time. The defendant Company is required, on or before the 11th of January, 1915, to execute and deliver to the plaintiff a conveyance capable of registration and free from all encumbrances. In default of such conveyance being so delivered, the plaintiff is entitled to recover the moneys paid, together with interest and expenses. Plaintiff is entitled to his costs of action.

Judgment for plaintiff.

STEWART IRON WORKS COMPANY v. BRITISH COLUMBIA IRON, WIRE AND FENCE COMPANY.

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Nov. 26.

STEWART IRON WORKS CO. v. B.C. IRON, WIRE AND FENCE CO.

Practice—Evidence—Plaintiff resident abroad—Commission—Application for by plaintiff—Grounds in support of—Sufficiency of.

Where a plaintiff has selected British Columbia as the place where the action should be brought, it is his duty *prima facie* to bring his witnesses to this Province or to shew that it would not be in the interest of justice that he should be compelled to do so.

Where a plaintiff seeks to have a material witness examined abroad and the nature of the case is such that it is important he should be examined here, the party asking must shew that he cannot bring him to this Province to be examined on the trial.

The principal officer of a plaintiff company, who is a material witness, cannot be examined on the plaintiff's behalf under cover of a general leave given by an order for a commission to examine "other persons."

Per IRVING, J.A. (dissenting): Where a travelling salesman who is a resident of the United States, and a necessary witness, is about to leave the plaintiff company's employ, and would not be under its control on the date of the trial, the inference may be drawn that unless his evidence is secured before he left the plaintiff's employ it could not be obtained at all.

Statement

APPEAL from an order of MURPHY, J., upon the application of the plaintiff for a commission to Covington, in the State of

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Statement

Kentucky, U.S.A., to examine one Samuel Joseph and other witnesses. The plaintiff Company manufacture jail and prison equipment in Cincinnati, in the State of Ohio, U.S.A., and the action arose through a contract whereby the defendant Company, who carried on business in Vancouver, agreed to sell exclusively in British Columbia and Alberta the plaintiff's goods. The plaintiff claimed damages for breach of contract, for the wrongful use of certain plans and specifications supplied the defendant, for the wrongful use of information obtained from the plaintiff, for their neglect in not selling the plaintiff's goods in connection with Burnaby and Vancouver jails, which were in the course of erection when the contract was made, and for the return of a model of cell fronts and locking devices withheld by the defendant.

The plaintiff based his application on the following grounds: (1) That Samuel Joseph, of Covington, Kentucky, was a necessary and material witness; (2) that he was a travelling salesman of the plaintiff and his evidence was required in regard to the negotiations between the plaintiff and defendant as to their contract, as to the shipment of the model in question to the defendant, and as to the proof of certain material correspondence; (3) that his contract of employment with the plaintiff Company was about to expire, and, being out of the plaintiff's employ when the trial was to take place, he would no longer be under its control, and his business taking him to all parts of the country, it would be difficult to keep in touch with him; (4) the expense of travelling between Covington and Vancouver, the place of trial. The grounds for the application for the examination of other witnesses were that some other officers of the plaintiff Company might be required in regard to letters written to the defendant, as to the extent of damages suffered by the plaintiff, and as to the cost of the model retained by the defendant. The order was granted, including the right to examine such witnesses as may be produced on the plaintiff's behalf. Under this order, R. C. Stewart, the president of the plaintiff Company, was examined. The defendant appealed on the ground that the evidence in support of the application was not sufficient to warrant the Court below in granting the commission to a plaintiff.

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STEWART IRON WORKS CO. v. B.C. IRON, WIRE AND FENCE CO.

The appeal was argued at Vancouver on the 26th of November, 1914, before MACDONALD, C.J.A., IRVING, MARTIN and MCPHILLIPS, JJ.A.

Arnold, for appellant (defendant): The order should not have been made, as, first, there was insufficient evidence, and second, the learned judge went on a wrong principle, as there is nothing to shew that the witness could not be brought here for the trial; he is a salesman in the employ of the plaintiff Company. There must be some reason shewn why he cannot be brought to the trial: *Armour* v. *Walker* (1883), 25 Ch. D. 673 at p. 677. Some effort must be made to bring the witness: *Lawson* v. *Vacuum Brake Company* (1884), 27 Ch. D. 137 at p. 142; *Langen* v. *Tate* (1883), 24 Ch. D. 522. There is more leniency in the case of a defendant who resides abroad: see *New* v. *Burns* (1894), 64 L.J., Q.B. 104; *Ross* v. *Woodford* (1894), 1 Ch. 38. On the question of the Court of Appeal interfering with the discretion of the judge below, see *Berdan* v. *Greenwood* (1880), 20 Ch. D. 764 (n).

Gwillim, for respondent (plaintiff): The cases referred to were so decided because there was some point of fact from which it was in the interest of justice that the witness should be before the Court, and they all involve the questions of fraud and deceit. In this case the witness is not an interested party. He is now in the employ of the plaintiff Company, but will not be when the trial takes place, and will then be out of the plaintiff's control, and being a salesman, the chances of locating him when the trial takes place are very uncertain. In addition, the expense of bringing him to Vancouver should be considered. On the question of general convenience, see *Cranstoun* v. *Bird* (1896), 5 B.C. 140; *Carbonneau* v. *Letourneau* (1906), 3 W.L.R. 219; *Cleveland* v. *Asam* (1908), 8 W.L.R. 970.

Argument

Arnold, in reply: The cases cited by the appellant are where the defendant has applied for a commission; they do not apply where the plaintiff moves: see *Emanuel and Another* v. *Soltykoff* (1892), 8 T.L.R. 331; *Macaulay* v. *Glass* (1902), 47 Sol. Jo. 71.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would allow the appeal. I do not

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think there is sufficient evidence to shew that the witnesses to be examined on commission cannot be brought here. The fact that the plaintiff has chosen to bring his action in this Province is of importance. He has selected British Columbia as the place where the action should be brought, and it is his duty, *prima facie,* to bring his witnesses here, or to shew that it would not be in the interests of justice that he should be compelled to do so—in other words, that it would be in the interests of justice that the evidence of Joseph and the others should be taken on commission. I think he has failed to prove that.

As to the examination of Stewart himself under the commission, I think it was, at least, ill-advised. He is the plaintiff's principal officer, and a material witness whose testimony should be given in open Court, yet he was examined under cover of the general leave given to examine "other persons." The order, and the proceedings thereunder, should be set aside.

MACDONALD, C.J.A.

IRVING, J.A.: It seems to me there is only one point to determine, namely, whether the affidavit filed by the applicant is sufficient evidence that the commission was necessary to secure Joseph's evidence. The defect relied upon by the defendants is, that the affidavit does not state that Joseph had been asked to come to the trial in October and had refused to come, or shew in some way that he (Joseph) was unwilling to come here. The affidavit of Stewart, who is the president of the Company which carries on business at Covington, Kentucky, U.S.A., states that Joseph is a necessary and material witness, that Joseph's contract of employment with the Company runs out on the 1st of August—that is, ten weeks before the day fixed for trial. He then says the Company cannot secure his attendance at the trial unless agreeable to him. Now, I think, from these dates, we can draw the inference that unless Joseph's evidence was secured before he leaves the defendant's employment, there will not be a chance to get it at all, or if he should not leave their employment in August, it is impossible for any one to say where he would be in October, because his employment is that of a travelling salesman. I do not think it necessary, in affidavit to obtain a commission, to state that you

IRVING, J.A.

applied to the proposed witness and that he did refuse, and it surely cannot be necessary to ask a man who is resident out of the jurisdiction, in June, if he will come to British Columbia and give evidence in October when he is leaving your employment in August. We must consider business exigencies. I would have made the same order, on the evidence produced, as the learned judge in the Court below made.

MARTIN, J.A.: I agree that the appeal should be allowed. According to the material before us in the affidavits, both of the president of the Company and of the solicitor, it appears that the witness is one whose evidence is necessary to prove certain facts of a controversial nature in several respects, and I think that the affidavits should have shewn such facts as would have enabled the learned judge below, and also ourselves, to have drawn the inference that there was reasonable ground why the witness could not attend before the Court and be examined in the usual way. That is what I consider is the defect in this affidavit. The latest case on the subject is *Macaulay* v. *Glass* (1902), 47 Sol. Jo. 71, which I have already referred to.

MARTIN, J.A.

While there is a disinclination to interfere with the discretion of the learned judge below in cases of this kind, yet it is clear this Court will do so where there has been a misapprehension in an important part of the case.

MCPHILLIPS, J.A.: I agree the appeal should be allowed.

In my opinion the evidence fails to establish that which is a well-established practice and governed by numerous decisions, that, upon the granting of a commission to take evidence abroad, especially when on motion of the plaintiff, there has to be such evidence before the judge as would enable him to arrive at a conclusion that it is in the furtherance of justice. Now, in my opinion, with all respect to the learned judge in the Court below, there was no evidence before him which would enable him to rightly determine that question. Therefore, I find there is no evidence here that would entitle us to find that in the interests of justice any such order should have been made. I might further intimate that it seems to me the examination of the president of this Company under this order was an

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utilization of the order beyond what was contemplated. I am not saying at whose advice it was done, but certainly, it is strange to think that under this order the president of this Company was examined.

Appeal allowed, Irving, J.A. dissenting.

Solicitor for appellant: *C. S. Arnold.*
Solicitors for respondent: *Gwillim, Crisp & Mackay.*

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Nov. 19.

JOHNSTON v. CARLIN

JOHNSTON v. CARLIN *ET AL.*

Company law—Directors—Illegal application of funds—Right of shareholder to sue—Must apply to company to proceed to recover.

The defendant Company, formed for the purpose, agreed in writing (in two agreements similar in terms) to purchase the undertakings and assets of the British Columbia Sand and Gravel Company and the Victoria Contracting Company, the consideration for the old Companies being shares in the newly-formed Company. There was no reference in the agreements as to the defendant Company assuming the debts and liabilities of the former Companies. The defendant Carlin was a shareholder and director in all three Companies; and the defendant Thompson was a shareholder and director of the Victoria Contracting Company and of the defendant Company. Prior to the amalgamation the defendants Carlin and Thompson, with three other directors (who collectively owned a majority of the stock in the defendant Company when formed), had indorsed notes to secure the indebtedness of the Victoria Contracting Company in the sum of about $68,000, and the British Columbia Sand and Gravel Company, of which the defendant Carlin had been president, had obtained an option for the purchase of a property known as the Keating Estate, in Esquimalt district, upon which it had made a payment of $1,000. Immediately after the amalgamation the defendant Company made a further payment upon the Keating Estate of $9,000, by a promissory note made by the Company and indorsed by the defendants Carlin and Thompson. Subsequently, at a meeting of the directors of the defendant Company, it was arranged that the defendants Carlin and Thompson should advance

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\$10,000 in order to retire the \$9,000 note and repay the British Columbia Sand and Gravel Company the \$1,000 originally paid on the Keating Estate. The defendant Company thereupon assigned all its interest in the Keating Estate to the defendants Carlin and Thompson as security for their advance. Later the defendants Carlin and Thompson, without notice to the defendant Company, sold a portion of the Keating Estate for about \$57,000. The directors of the defendant Company at the same time paid, with the assets of the Company, about \$68,000 of the former debts of the Victoria Contracting Company. The plaintiff brought action on behalf of himself and the other shareholders in said Company against the Producers Rock and Gravel Company and Carlin and Thompson, claiming that the property standing in the name of the defendant directors should be declared to be the property of the defendant Company, and that the directors had improperly paid out moneys from the defendant Company's treasury on account of the debts of another company when the defendant Company was not responsible for the liabilities of said Company. The learned trial judge dismissed the action.

Held, on appeal, *per* IRVING and GALLIHER, JJ.A., that the shareholders holding a majority of the stock issued, having been indorsers of the notes securing the indebtedness of the Victoria Contracting Company, and they having carried a resolution indorsing the action of paying said Company's indebtedness the day before the trial of this action, it was not necessary for the plaintiff to make a formal request in meeting assembled to enable him to obtain a status to bring this action in his own name.

Per MARTIN and MCPHILLIPS, JJ.A.: That the plaintiff must first apply to the defendant Company to proceed to recover the moneys alleged to be lost before he can bring this action in his own name.

The Court being equally divided, the appeal was dismissed.

APPEAL by the plaintiff from a decision of GREGORY, J. in an action tried at Victoria on the 25th of June, 1913.

Statement

W. J. Taylor, K.C., and *Martin, K.C.*, for plaintiff.
McDiarmid, for defendants.

30th January, 1914.

GREGORY, J.: The defendant Company, by agreement in writing, purchased the "assets and undertakings" of the B.C. Sand and Gravel Company and of the Victoria Contracting Company, and in carrying out those agreements according to the real intent of the parties to them, the defendant Company paid the liabilities of those Companies. This action is brought by the plaintiff on behalf of himself and all other the shareholders

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of the defendant Company and to compel the repayment of the money so expended. At the trial, plaintiff's counsel stated that he did not ask for any order against the individual defendants, but asked for a declaration against the defendant Company that the moneys so paid out were improperly expended.

The moneys were actually paid out, without any specific instructions by the directors, by the officers of the Company, in carrying out what both parties to the contract believed to be its terms.

The defendant Company was formed, and the agreement entered into, for the purpose of carrying out a scheme for the amalgamation of the B.C. Sand and Gravel Company and the Victoria Contracting Company, the plan for which had been proposed by a Mr. Stuart Mannell, employed for that purpose, and the plaintiff was at the time a shareholder in the Sand and Gravel Company. There is a strong resemblance of the personnel of those in control of all three Companies.

The plaintiff's contention is that as there is no specific mention in the agreements of the assumption by the defendant Company of the liabilities of the other Company, their payment was not warranted by the terms of the agreements themselves, and was therefore illegal, and a fraud upon the shareholders of the defendant Company, and it is in this sense only that the plaintiff alleges any fraud in the transaction, and I understand his counsel, at the conclusion of the trial, to withdraw all other charges of fraud, if any.

GREGORY, J.

On the evidence before me, I have no hesitation whatever in finding that there was no wrong or fraudulent intention of any kind on the part of any of the defendants, either in the scheme of amalgamation or in carrying it out; and that all parties and persons interested in it, except possibly the plaintiff, knew and intended that the liabilities of the dissolving companies were to be assumed and paid by the defendant Company. As to the plaintiff's knowledge of this I make no finding. He says he did not, but it is difficult to understand how, as a business man, with the material before him, he did not, and he certainly did know it when he actually received his shares in the defendant Company.

Assuming that there is no authority for the payment of the liabilities, under the strict interpretation of the agreements, it seems to me that the plaintiff falls within the principle of *Foss* v. *Harbottle* (1843), 2 Hare 461; and *Mozley* v. *Alston* (1847), 1 Ph. 790, which, with the later English cases, are discussed by MARTIN, J. in *Rose* v. *B.C. Refining Co.* (1911), 16 B.C. 215 at p. 227, and cannot bring this action in his own name, at least, before asking the Company itself to proceed to recover the moneys alleged to be lost to it. There is no fraud on the part of the defendants. The agreements entered into were *intra vires* of the Company, and if, under their legal form, the defendant Company should attempt to avoid payment of these liabilities, it would be guilty of a fraud upon the other Companies, and the agreements would be reformed by the Courts at the instigation of those Companies upon it being made to appear, as is now the proved and admitted fact, that if the agreements do not include the payment of the liabilities, it was intended by both parties to them that they should.

In the case of an agreement between two individuals, there is nothing that I know of to prevent them from ignoring any mutual mistake, and carrying it out as honest men according to their real intention. Is the position any different in the case of two companies?

GREGORY, J.

The attempt of the plaintiff to bring the case within *Burland* v. *Earle* (1902), A.C. 83; *Menier* v. *Hooper's Telegraph Works* (1874), 9 Chy. App. 350; and *Atwool* v. *Merryweather* (1867), L.R. 5 Eq. 464 (n), I think, fails. In *Burland* v. *Earle,* Lord Davey says at p. 93:

> "The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company."

There is no fraud here; the directors acted *bona fide* throughout, both in settling the terms upon which the other Companies should be absorbed, and in carrying out those contracts. That there was authority to purchase or absorb those companies has not been questioned.

The only suggestion that there was fraud, or that this act of paying the liabilities was *ultra vires,* is based on the form of

GREGORY, J. contract, and the omission from the contracts of any clause authorizing the payment of "the liabilities."

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In *Menier* v. *Hooper's Telegraph Works, supra,* there was direct fraud: see James, L.J. at p. 353, where he says:

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"They [the defendants] have dealt with them [the shares] in consideration of their obtaining for themselves certain advantages."

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Atwool v. *Merryweather, supra,* was a clear case of fraud and collusion, and there had been a previous bill filed in the name of the company, and the majority had used their power to have the bill taken off the file.

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At the trial I expressed the opinion that there might be ground for refusing to give the defendants their costs, but on consideration, I have concluded that there is no sufficient ground for doing it.

GREGORY, J.

There will be judgment for the defendants, with costs.

The appeal was argued at Vancouver on the 18th and 19th of November, 1914, before IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

W. J. Taylor, K.C., for appellant (plaintiff): There are two issues in question: First, that certain property in the name of the defendant directors should be declared to be held in trust for the defendant Company; second, that the Company having improperly paid out moneys from its treasury on account of debts of other companies, it should be declared by the Court that this money was improperly paid, and a reference should be had to find the amount. The plaintiff obtained shares in the Company on the understanding that there were no liabilities, and the agreements under which the old Companies were absorbed in the defendant Company contained nothing as to their liabilities. The general rule is that an action cannot be brought on behalf of a company except by authority of the directors: see *West End Hotels Syndicate (Limited)* v. *Bayer* (1912), 29 T.L.R. 92, but in this case the majority of the shareholders had authorized an act that was a fraud on the Company. The principle is that the Court will not interfere in the internal management of a company as long as they act within their powers, but when they go beyond their powers they are guilty

Argument

of a fraudulent act. *Rose* v. *B.C. Refining Co.* (1911), 16 B.C. 215, can be distinguished, as in the present case the shareholders holding a majority of the stock passed a resolution approving of the payment of the liabilities of the old companies. *Menier* v. *Hooper's Telegraph Works* (1874), 9 Chy. App. 350, is in point. Carlin and Thompson are trying to get away with the Keating Estate that was held by them as security for certain advances.

Bodwell, K.C., for respondents (defendants): They are out of Court on two points: the plaintiff did not obtain the consent of the Company to bring this action (see *Burland* v. *Earle* (1902), A.C. 83; *Foss* v. *Harbottle* (1843), 2 Hare 461; *Mozley* v. *Alston* (1847), 1 Ph. 790), and the Company was not asked to bring the action. The shareholders were justified in doing what they did, under their articles of association: see *Russell* v. *The Wakefield Waterworks Company* (1875), 44 L.J., Ch. 496; L.R. 20 Eq. 474.

Argument

Taylor, in reply.

19th November, 1914.

IRVING, J.A.: There can be no mistake about what the general principle is, that *prima facie,* the action should be brought by the Company itself, but there are certain exceptions. *Menier* v. *Hooper's Telegraph Works* (1874), 9 Chy. App. 350, is one; *Rose* v. *B.C. Refining Co.* (1911), 16 B.C. 215, is another. These exceptions are where the persons against whom relief is sought do themselves hold the majority of the shares of the company. Now, in this case, the people who are concerned are Carlin, who holds 447 shares; Thomson, who holds 194 shares; Mitchell, who holds 379 shares; Jones, who holds 419 shares, and Canavan, who holds 154 shares, making about 1,600 shares out of the 2,561 shares issued. These five men were the indorsers on the notes, and they were responsible, in part at any rate, for the liabilities of the contracting Company. The plaintiff points out that these shareholders, the day before the trial, carried a resolution, in which they expressed the opinion that they had a right to do what they were doing (and I refer to the last part of the resolution), and they would only seek the Court's assistance in opposition to the plaintiff's contention.

IRVING, J.A.

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It does not seem to me necessary that a formal request should be made in meeting assembled to enable a shareholder to obtain a status to bring an action in his own name. It is not necessary, in my opinion, that there should be a meeting and that he should suggest that they had been guilty of an *ultra vires* act and a formal vote taken on the matter. In *Russell* v. *The Wakefield Waterworks Company* (1875), L.R. 20 Eq. 474, this very case is covered. There, Lord Chelmsford, M.R., after dealing with the general rule, speaks of a case where the incorporators, who formed a minority, may bring an action to get possession of the money illegally appropriated. He says at p. 482:

"It is not necessary that the corporation should absolutely refuse by a vote at a general meeting, if it can be shewn either that the wrong-doer [that is, the person *prima facie* presumed to be the wrong-doer] had command of the majority of the votes, so that it would be absurd to call the meeting; or if it can be shewn that there has been a general meeting substantially approving of what has been done; or, if it can be shewn from the acts of the corporation as a corporation, distinguished from the acts of the directors of it, that they approved of what had been done, and have allowed a long time to elapse without interfering."

IRVING, J.A.

I think all three of those conditions are present in this case. So that it was evident the shareholders did not intend, and were not willing, to sue. In these cases the individual incorporators are permitted to maintain a suit.

So, for these reasons, I think plaintiff can maintain this action.

MARTIN, J.A.: As to the general rule, I have nothing to add to my judgment in *Rose* v. *B.C. Refining Co.* (1911), 16 B.C. 215, where the leading authorities are cited, and applying that case to the facts of this, I am unable to say that an attempt to get the approval of the Company would have proved futile, and I think the opportunity should have been given the shareholders to pass on the matter.

MARTIN, J.A.

For these reasons, I think the plaintiff cannot maintain the action.

GALLIHER, J.A.: I agree with my brother IRVING, that the plaintiff can maintain this action.

GALLIHER, J.A.

Until I read the judgment in *Rose* v. *B.C. Refining Co.*, I

was rather of the opinion that the Chief Justice was practically as explicit as my brother MARTIN is in his judgment here; but on a closer scanning of that case I find that it is not so—that the Chief Justice has mentioned the very exception in that case that I think is applicable here, and he states that the applicants are very far short of proving this, and that, therefore, the action fails. So, that is only a decision of the majority of this Court, in so far as it can be applied to the facts of the case. The facts, as they appear in the case at bar, are, to my mind, quite different, and I can add nothing, I think, that would be useful to what has been said by my learned brother.

MCPHILLIPS, J.A.: I agree with my brother MARTIN, that the appeal should be dismissed.

In my opinion, it is essential that it should be shewn that the transaction attacked is tainted with fraud. There must be, as suggested a moment ago by my brother GALLIHER, a case where there is a wrong-doer. It is not permissible for a shareholder of a company to merely say: "This is a resolution that I do not agree with." That power is in the shareholders, and the duty of the directors and officers is to discharge the business of the company. In *Burland* v. *Earle* (1902), A.C. 83, referred to by the learned trial judge, at p. 93, it is shortly stated in a quotation from that case:

"The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company."

Now, in this case, the learned trial judge has held that there was no fraud, and it would appear to be perfectly plain that the contract was not beyond the powers of the Company, and plainly within its express terms. The powers of the Company are referred to under the subsection (n) of section 2 in the memorandum of association. I would, therefore, on the whole, consider that a proper disposition of the appeal would be to dismiss it.

Appeal dismissed,
Irving and Galliher, JJ.A. dissenting.

Solicitors for appellant: *Eberts & Taylor.*
Solicitors for respondents: *Elliott, Maclean & Shandley.*

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ASTLEY v. GARNETT

ASTLEY v. GARNETT AND STIRLING.

Principal and agent—Sale of coal leases—Services of agent—Efficient cause of sale—Right to commission—Findings of jury—Perverse verdict.

A gave B authority, as agent, to sell his coal leases. B communicated with C, telling him that the leases were for sale, with the names of the owners, but did not advise A of his conversation with C as a possible purchaser. B then, without having any further conversation with C, obtained an option on the property from A, and left the Province with a view of obtaining a purchaser in another market. About a month later B notified A of his failure to find a purchaser, and six days later A sold the leases to C. In an action by B for commission for his services in effecting the sale, the jury found in his favour.

Held, on appeal (MARTIN, J.A. dissenting), that B was not entitled to commission, as by merely bringing the attention of the purchaser to the leases he was not the efficient cause of the sale, and the verdict of the jury in favour of C, in such circumstances, was perverse.

Per MCPHILLIPS, J.A.: If there is not evidence sufficient to go to the jury upon which a jury could reasonably find a verdict against the defendant, the case should not be submitted to the jury, and whether the jury disagree or render a verdict, judgment may be entered for the defendant by the judge or the Court of Appeal.

Statement

APPEAL by defendants from a decision of MACDONALD, J. and the verdict of a jury, on the 29th of May, 1914, at Vancouver, in an action for commission on the sale of certain coal leases. In negotiating for a sale of the properties, plaintiff, as agent, obtained from defendant Stirling a price at $25,000, but no sale was effected. Later plaintiff, while in Toronto, obtained an option on the leases, which was renewed. On the expiry of the option, plaintiff wrote defendants that the negotiations in Toronto were off. While the option was in force the defendants were approached by another party, and on the expiry of the option a sale was made to this party for $30,000. Plaintiff sued for a commission on this sale on the ground that he had introduced the parties under the first arrangement by advising the purchasers that the property was for sale and who the owners were, also by telling one of the defendants the names of the

prospective purchasers. There was a conflict of evidence as to this. The jury found for the plaintiff in 10 per cent. of the purchase price. Defendants appealed.

The appeal was argued at Victoria on the 25th of June, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Mayers, for appellants: The defendants are appealing on the following grounds: 1st, the verdict is absolutely perverse; 2nd, the learned judge wrongly rejected certain evidence; 3rd, the trial judge wrongly held that the plaintiff had authority to effect a sale. We say the verdict was perverse because (1) the plaintiff contradicted himself frequently in his story; (2) that his story is contradicted by two witnesses. If the plaintiff's story were true, the defendants would have had to pay $5,000 more than they did, and the verdict was given in the teeth of the learned judge's direction: see *Harris* v. *Dunsmuir* (1897), 6 B.C. 505. The facts are that Johnston, to whom the property was eventually sold, asked the plaintiff to get a price on the property, which he did. Shortly after plaintiff left for Toronto, and this was all he did, not even letting the defendants know that Johnston was inquiring as to the price of the property. The plaintiff had an option to sell in Toronto, but on June 10th, 1910, wrote that he could not make a sale. On June 16th the sale in question took place through an agent named Frampton, to whom a commission was paid. The only way to get over the evidence of Johnston and Donald, who purchased, is not only by shewing that it was untrue, but that they entered into a conspiracy to defraud the plaintiff of his commission.

Argument

On the question of the rejection of evidence, the letters from Johnston to Frampton, and from Frampton to L. V. Garnett, and the letters in reply, should have been allowed in, as they are of the *res gestæ* of the action: see Phipson on Evidence, 5th Ed., 44; *Milne* v. *Leisler* (1862), 7 H. & N. 786; *Skinner & Co.* v. *Shew & Co.* (1894), 2 Ch. 581; *Fellowes and Another* v. *Williamson* (1829), M. & M. 306. Astley was claiming he had a general authority, but that is not the case. He abandoned any right to sell that he had before the

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sale to Johnston. A mere introduction without a prior arrangement is not sufficient upon which to claim a commission: see *Bridgman* v. *Hepburn* (1908), 13 B.C. 389.

Armour, for respondent: Astley told Johnston that Garnett was the owner of the properties, that the price was so much, and that he (Astley) had the selling of the property. Johnston denies this, but the jury believed Astley and gave him a verdict. He referred to *Toronto Railway* v. *King* (1908), A.C. 260 at p. 270; *Fraser* v. *Drew* (1900), 30 S.C.R. 241; *Reiffenstein* v. *Dey* (1912), 28 O.L.R. 491.

The rejection of the letters referred to does not affect the case. The question is: Did Astley introduce the purchaser? As to the authority of Astley, the first employment is not necessarily at an end on account of the subsequent option. It was not given him as a purchaser, but as an agent, to shew his authority for disposing of the properties. The introduction must be an efficient cause of the sale. On the question of commission, see *Lee* v. *O'Brien and Cameron* (1910), 15 B.C. 326; *Nightingale* v. *Parsons* (1914), 2 K.B. 621; *Millar, Son, and Co.* v. *Radford* (1903), 19 T.L.R. 575 at p. 576; *Tucker* v. *Massey* (1913), 18 B.C. 250.

Argument

Mayers, in reply: As to weight of evidence, see *Jones* v. *Spencer* (1898), 77 L.T.N.S. 536; *Webster* v. *Friedeberg* (1886), 17 Q.B.D. 736.

Cur. adv. vult.

3rd November, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appellants were holders of coal leases for which they authorized respondent to find a purchaser, agreeing to pay him a commission. After some efforts to do so which resulted in nothing, the respondent brought the leases to the attention of one Donald and his associates. This was in April, 1909. He then applied to Garnett, the husband of the appellant Mrs. Garnett, who acted for her throughout the transaction, for prices and terms, and was by Garnett referred to the appellant Stirling—the co-owner with Mrs. Garnett. Garnett informed the respondent that he would agree to whatever he might arrange with Stirling. Stirling gave a written

authority to sell the leases at the price and on the terms therein set forth. Nothing was therein mentioned about commission, but appellants do not dispute that respondent would have been entitled to a commission had he procured a purchaser.

Shortly after bringing the leases to the attention of Donald, namely, in May, 1909, the respondent left British Columbia to reside at Toronto, and thereafter appears to have had no communications with Donald and his associates concerning the leases. While in Toronto he endeavoured to obtain a purchaser there for the leases, to which he had the consent of Garnett. He failed to make the contemplated sale at Toronto, and notified Garnett of this failure. Thereupon the appellants, in June, 1910, gave an option of purchase of the leases to Donald. The option was in due course exercised and the sale concluded. The option and sale was brought about through the agency of one Frampton, to whom appellants agreed to pay the commission. On hearing of this sale, the respondent wrote Garnett, claiming that it had been brought about by his bringing the leases to the attention of Donald, and he, therefore, claimed the commission.

There is a good deal of conflict of evidence on some phases of the case, but on what to my mind is the deciding point, there is no conflict. I will assume in the respondent's favour that the sale which was finally effected was the result of his negotiations with Donald, although, if I were sitting as a judge of the facts, I should not, perhaps, come to that conclusion. The appellants have shewn that they made the sale through Frampton; that they had no knowledge that the respondent had previously negotiated with Donald. The respondent frankly states that he had never disclosed the identity of Donald to Garnett, but claims that he had done so to Stirling. He thinks he must have told Stirling verbally but is unable to swear to it. But he relies upon a letter which he says he wrote to Stirling on the eve of his departure from Victoria, by which he informed Stirling of his negotiations with Donald, or Donald's then associates. He says he left the letter with the hall porter of the Union Club with instructions to give it to Stirling, or to mail it—he is not clear which. Stirling denied the receipt of

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the letter, or that he was ever made aware of the identity of respondent's clients, and the hall porter was not called to testify as to what he had done with the letter. In these circumstances the respondent cannot, in my opinion, possibly hold his judgment. The outstanding undisputed facts then are that when the appellants made the sale through their agent Frampton, they did so in good faith, and without even a suspicion that they were selling to a person with whom the respondent had previously negotiated.

It does not help the respondent to say that he told Donald, or his associate Johnston, who the owners of the leases were; that is clearly beside the mark. If it were material, I should not interfere with the jury's findings, notwithstanding that Johnston has denied it, as belief or disbelief of that testimony was a matter essentially for the jury.

MACDONALD, C.J.A.

Other grounds of appeal were taken, but in view of the conclusion I have come to as above set forth, it becomes unnecessary to consider them.

I would allow the appeal and dismiss the action, with costs.

IRVING, J.A.: Two points have been raised before us. The first is as to the jury's finding—the right to recover is founded on the service rendered—that service must be the efficient cause of the sale. If the jury had properly understood that question, it was not possible for them to have found for the plaintiff. The sale took place on the 16th of June, 1910, to Johnston, through an agent named Frampton. The plaintiff claims that he had introduced the matter to Johnston in April, 1909. That fact is not disputed. But Johnston says that he then had no intention of buying the property, and that it was not until September, 1909, when his engineer advised the purchase of the property for the more convenient working of his adjoining mine, that he determined to buy the defendants' property.

IRVING, J.A.

It is possible that Astley's services were a *sine qua non,* but they certainly were not the efficient cause of the sale.

Garnett and Stirling, who had the matter in hand for Mrs. Garnett, swear that the plaintiff did not make them aware that Johnston was a possible purchaser.

In *Metropolitan Railway Co.* v. *Wright* (1886), 11 App. Cas. 152, the principles on which new trials against evidence ought to be granted were considered by the Court of Appeal and the House of Lords. That case has been followed in many cases, and was followed in the Privy Council in *Cox* v. *English, Scottish, and Australian Bank* (1905), A.C. 168, where it was said that the principle could not be better stated than it was by Lord Selborne in the Court of Appeal in the following terms (p. 170):

"'It is not enough that the judge who tried the case might have come to a different conclusion on the evidence than the jury, or 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 unreasonable, and almost perverse, that the jury, when instructed and assisted properly by the judge, should return such a verdict.'"

IRVING, J.A.

The rule is plain. The application of it is sometimes unfortunate. To my mind this verdict was perverse and should be set aside.

On the second point, the learned judge, in my opinion, improperly excluded evidence which the defendants had a right to put before the jury as tending to support their case: Stephen on Evidence, 4th Ed., pp. 153-4; *Varrelmann* v. *Phœnix* (1894), 3 B.C. 135.

I would allow the appeal and enter judgment for the defendants, or, in the event of the Court being against that view, the defendants are at least entitled to a new trial.

MARTIN, J.A.

MARTIN, J.A.: Apart from the question of the refusal to admit certain letters in evidence, which I think, in the circumstances, was a proper ruling, this case comes down to one of fact, and it was contended that the verdict of the jury was not one which reasonable men could find, and we were pressed to give effect to the remarks of the learned trial judge, who, after the verdict was returned in favour of the plaintiff, made this observation:

"The Court: It might as well be noted in the proceedings, so that the jury will hear, that the verdict returned is not one with which I can agree."

With all due deference, I confess I am unable to see why these almost minatory remarks should have been addressed to

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the jury. The learned judge had, during the course of his charge to them, expressed himself strongly in favour of the defendants (a course which our experience teaches us very often leads to one result), but at the same time he told them no less than six times in the course of his charge that there were contradictions, etc., that they would have to consider, ending up by saying:

"I think you clearly understand the issues. I hope you do, at least. I tried to make them clear to you. This is a matter for your decision alone, and I trust that anything I have said will not incline you to disregard your own views of the evidence.

"In conclusion, like all cases where a party is seeking to recover commission from the opposite side, the onus of proof will lie with the plaintiff."

MARTIN, J.A.

Since the facts were such that the issues had thus to be left to the decision of the jury (and no objection was taken to this course, or to the charge), I can see no other course open to us than to accept that decision, because, if there are facts to go to the jury, as there were here, in my opinion, on the accepted issues, they alone can decide them: *Scott* v. *Fernie* (1904), 11 B.C. 91.

The appeal, therefore, should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: I have weighed the evidence very carefully, and, in my opinion, it falls short of establishing that the plaintiff was instrumental in bringing about the sale of the coal lands in question, or contributed thereto.

I would allow the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I concur in the reasons for judgment of the Chief Justice, and merely add some further conclusions with respect to some of the points pressed by counsel.

Mr. *Armour,* counsel for the respondent, very ably contended that the verdict of the jury and the judgment entered thereon was sustainable upon the ground that there was evidence to go to the jury and that the jury rightly passed upon the question of credibility, and that the case was not one to be disturbed upon appeal, and cited, among other cases, *Toronto Railway* v. *King* (1908), 77 L.J., P.C. 77, as a controlling decision. It is true that their Lordships of the Privy Council have said that the findings of the jury will not be set aside or a new trial ordered

simply on the ground that such findings are not such as a Court of Appeal might have arrived at, but the decision was based upon the premise that there was evidence to go to the jury, which, in my opinion, was not the situation in the present case, and the case should have been withdrawn from the jury when that application was very properly made at the close of the plaintiff's case. Then, with respect to *Fraser* v. *Drew* (1900), 30 S.C.R. 241, that is an authority which takes the inquiry really no further, as the decision there was, that where a case has been properly submitted to the jury and their findings upon the facts are such as might be the conclusions of reasonable men, a new trial will not be granted on the ground that the jury misapprehended or misunderstood the evidence, notwithstanding that the trial judge was dissatisfied with the verdict. In the present case, while I am of the opinion that the case should not have been submitted to the jury, I am further of the opinion, upon the whole case, that the verdict of the jury was not, upon the facts before them, the conclusion of reasonable men, *viz.*: a verdict for the plaintiff for 10 per cent. commission on $24,000, when the outstanding facts of the case, to my mind, are incontrovertible that the sale was made in absolute good faith through Frampton, without there being anything whatever in existence which would entitle the plaintiff to claim any commission upon the sale from the defendants.

MCPHILLIPS, J.A.

Counsel for the respondent also cited *Reiffenstein* v. *Dey* (1912), 28 O.L.R. 491. In that case several trials had been had with a jury. A new trial was directed upon the ground that there was no evidence whatever to warrant the finding of the jury that the plaintiffs were guilty of contributory negligence, and in the result it was directed that there should be a new trial, and striking out the direction of the Divisional Court that the new trial should be had before a judge without a jury. I agree with Meredith, C.J.O., wherein he states, referring to the class of action—being one of negligence for personal injuries sustained—at p. 498:

"A jury is an eminently proper tribunal for the trial of the matters that are in issue between the parties."

But in the present case I cannot say that it was one that was best tried by a judge with a jury. I would prefer to say that

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it was more fitting that it should have been tried by a judge without a jury, and unquestionably, had it been so tried, the learned trial judge would not have found, as the jury did, for the plaintiff. The verdict cannot be said to be other than perverse, and further, when of the opinion that there is no evidence capable of being adduced fitting in its nature to be submitted to a jury of reasonable men, one is constrained to say that the present case is not one that calls for the direction that a new trial be had between the parties. I had occasion in *MacKenzie* v. *B.C. Electric Ry. Co.* (1914), 19 B.C. 1, to deal with the question: When should a new trial not be directed? My view of the law then was—and I am of the same opinion still—that if there is not evidence sufficient to go to the jury upon which a jury could reasonably find a verdict against the defendant, the case should not be submitted to the jury (and with all respect, in my opinion, the learned trial judge erred in the present case in not withdrawing the case from the jury), and whether the jury disagree or render a verdict, judgment may be entered for the defendant by the judge or the Court of Appeal. (Also see *Skeate* v. *Slaters, Limited* (1914), 30 T.L.R. 290.)

I would, therefore, allow the appeal, the appellants to have the costs here and below.

Appeal allowed, Martin, J.A. dissenting.

Solicitors for appellants: *Bodwell, Lawson & Lane.*

Solicitors for respondent: *Abbott, Hart-McHarg, Duncan & Rennie.*

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Sale of goods—Motor-truck—Capacity of—Breach of warranty.

The defendant sold a motor-truck to the plaintiff, whose purchasing agent had no knowledge of motor-trucks, on the representation that it was a "three-ton Mack truck" and that it was rated as such, when the truck was in fact classified by the manufacturer as a two-ton truck. The action was dismissed by the trial judge.

Held, on appeal, reversing the decision of GREGORY, J. (IRVING and GALLIHER, JJ.A. dissenting), that the plaintiff should succeed on a breach of warranty, as the issue was not whether a new truck would carry three-ton loads for a period of several months, but whether it was, according to the judgment of those skilled in the manufacture of trucks, capable of maintaining a three-ton standard for the period which could be considered the life of the truck.

APPEAL by plaintiff from a decision of GREGORY, J. at the trial at Victoria on the 16th and 17th of April, 1914. The action was one for breach of warranty and for fraudulent misrepresentation in the sale of a motor-truck. The allegation was that the plaintiff purchased a three-ton truck, but that only a two-ton truck was delivered. On plaintiff discovering that the truck was a two-ton truck, it declined to make any further payments on the purchase price, and defendant took possession of the truck. The trial judge was of opinion that, on the evidence, the plaintiff had not made out a case, and dismissed the action. Plaintiff appealed. Statement

The appeal was argued at Victoria on the 16th of June, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Higgins, for appellant (plaintiff): This is an action for breach of warranty, on the ground that defendant supplied us with a two-ton motor-truck when we had ordered a three-ton truck. The truck provided was a Mack truck that was rated Argument

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by the manufacturers as a two-ton standard truck. After we had used the truck for some time it broke down and would not do the work of a three-ton truck. The rating of a machine is put upon it by the manufacturer, and the inspector at the factory produced his measurements shewing it was a two-ton truck.

Harold B. Robertson, for respondent: We admit the manager of the defendant Company said it was a three-ton truck, but we did not guarantee a three-ton standard truck, and we say the truck was what it was warranted to be, *i.e.,* capable of carrying three tons. In fact, the truck is 1,000 pounds heavier than the standard two-ton trucks. The repairs were necessary owing to the inexperience of the plaintiff's driver. In any case, he is only entitled to damages for breach of warranty, and has no right to ask us to take back the truck. In fact, the truck carried over three tons to Saanich for ten months. On the question of acceptance, see *Wallis, Son & Wells* v. *Pratt & Haynes* (1911), A.C. 394.

Argument

Higgins, in reply.

Cur. adv. vult.

3rd November, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The action is for breach of warranty on the sale to the plaintiff, by the defendant, of a three-ton Mack motor-truck, that is to say, a truck of sufficient strength to carry loads of three tons. The car in question was manufactured by the Mack Brothers Motor Company, Ltd., of Allentown, Pa., and was shipped from the factory in December, 1911, to one Cummings, a dealer in motor-trucks at Vancouver, who sold it to the defendant, who in turn sold it to the plaintiff for a three-ton truck. The plaintiff used it for several months, carrying at least some loads of three tons, but having made default in the payment of part of the purchase price, the truck was taken possession of by the defendant under a lien note, and is still retained by them as security for the unpaid price. After it was taken away, the plaintiff claims to have discovered that the truck was not a three-ton Mack truck but a two-ton Mack truck, and this action was brought for damages for breach of warranty. The only satisfactory evidence in the case is that of Yeager, the inspector and measurer of cars at the

works of the manufacturer. His evidence is clear and concise, and is strengthened by the original record kept at the factory, shewing the detailed measurements of this car and its rated carrying capacity. His evidence is that the truck in question, which is clearly identified by number, was rated at the factory as a two-ton truck, and the record aforesaid clearly bears that out. It is conceded by defendant that the truck was not the three-ton Mack truck known to the trade, and this fact was not disclosed to the plaintiff, who had no experience of motor-trucks. Cummings, who was examined on commission as a witness for the defendant, told a story to the effect that this car was manufactured at his suggestion by the Mack Company specially to meet the competition of other manufacturers who were selling three-ton trucks of lighter weight and lower price than the standard three-ton Mack truck. His claim is that this truck, while not so strong as the three-ton standard Mack truck, is stronger than the two-ton Mack truck, having been strengthened in certain particulars to give it a greater carrying strength. Cummings claims to have had correspondence with J. B. Mack, of the said Company, concerning this alleged new type of car, but was unable to produce the correspondence. No attempt was made to examine Mack to ascertain the truth of that story, nor were Yeager and Bennett, who were examined at Allentown aforesaid, asked any questions by defendant's counsel about this alleged new type of truck. The whole story depends upon Cummings's uncorroborated evidence.

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We are asked to accept that story, which, if true, could easily have been satisfactorily verified, against the evidence of the manufacturer's inspector, and the manufacturer's record that this was rated a two-ton truck, and against the expert opinion of that inspector and of Bennett that it could not properly be rated a three-ton truck. There is also the evidence of Turpin, a local witness, experienced in repairing trucks, that this one could not be classed as a three-ton truck. It strikes me as a very singular thing that if Cummings's story be true, the authoritative and conclusive evidence of the manufacturer, or the manufacturer's officers or employees, was not obtained to put the matter at rest. This was vital to the defence.

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The defendant's counsel relied a good deal upon what was called a "helper" spring, as an additional source of strength, but it is to be noted that Yeager treats that spring as part of the equipment of a two-ton truck, as shewn in the specifications of such a truck.

To sustain the defence I should have to reject the most credible and satisfactory evidence in the case. I should have to say that Yeager's measurements, which he swears he personally made and recorded in the original record produced from the custody of his employers were inaccurate, and that a new type of truck was being manufactured by his employers of which he, the inspector and measurer, knew nothing.

The defendant puts its defence upon this: That whether the truck was a three-ton standard Mack truck or not, it actually had the carrying capacity of a three-ton truck; that there was no recognized standard in the trade, and hence, the issue was the efficiency of this truck when put to service requiring the carrying of three-ton loads. Accepting that for the moment as being the true issue between the parties, what is the best evidence of capacity? Is it not in the rating of the manufacturer, who has had experience to guide him, and to whose interest it was to ascertain the true standard of strength and efficiency necessary or desirable to obtain the best results, not overlooking the question of durability, particularly when such rating is backed up by the evidence of men of experience in the manufacture of such trucks? A new truck might well withstand for months the strain of loads beyond its rated capacity. The fact that the truck in question carried three-ton loads for several months without breaking down in those parts which distinguish a two-ton from a three-ton truck does not, in my opinion, establish a true test. The issue was not whether a new truck would carry three-ton loads for a period of several months without breaking down, but whether it was, according to the judgment of those skilled in the manufacture of trucks, capable of doing and maintaining that for the period which could be considered the life of the truck.

Accepting, as I do, Yeager's evidence and the records at the factory, strengthened by the evidence of Bennett and Turpin,

I cannot escape from the conclusion that there was a breach of the warranty sued on in this case, and that the plaintiff is entitled to damages. I have not overlooked the fact that in coming to this conclusion I must differ from the finding of the learned trial judge, but the learned judge himself expressed great doubt as to which view he should take of the facts, and besides, the evidence supporting my own view is almost entirely that of witnesses who were not before the learned judge, but whose evidence was taken on commission.

I have not overlooked the signed testimonial which the defendant procured from the plaintiff, dated about two months after the sale of the truck and expressing the plaintiff's satisfaction with it. At first sight this document appeared to me to greatly weaken the plaintiff's case, but read in connection with the testimony of the plaintiff's officer who gave it, and bearing in mind the fact that he did not then know the true rating of the truck, I cannot treat that testimonial as at all fatal to the plaintiff's case. It has a greater bearing upon the amount of damages claimed than upon the cause of action.

MACDONALD, C.J.A.

As the action was dismissed, it must, in my opinion, go back for a new trial for the purpose of ascertaining the damages to which the plaintiff is entitled, and for adjustment of the accounts between the parties.

IRVING, J.A.: I would dismiss this appeal.

The defendant sold a specially made truck, which proved itself capable of carrying three tons for many months without complaints. At the time of the sale neither party saw the Mack catalogue or spoke about a standard Mack truck, nor was the defendant representing that it was anything but a truck of a certain carrying capacity.

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The plaintiff was advised in the purchase by a Mr. Cameron, who, after examination, thought the truck was suitable for the work the plaintiff intended to apply it to.

The doctrine of *caveat emptor* applies in a case of this kind.

MARTIN, J.A.: It is admitted that the defendant Company sold to the plaintiff Company the truck in question on the representation that it was a "three-ton Mack truck," and so rated.

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The plaintiff, Jas. A. Raymur, who conducted the purchase, knew practically nothing about trucks, and was not desirous of getting one of any particular make so long as it was a three-ton truck. I take it that any properly-built truck, rated by any reputable manufacturer as a three-ton truck, would have been all that he was entitled to expect. But the difficulty arises from the fact that the truck which was sold to him was not rated or classified by its own maker as a three-ton truck, but only a two-ton. This is established beyond question by the evidence of Yeager and Bennett. The truth is that the truck in question is of a special and intermediate type, manufactured so as to meet certain competition, and while it differs from, and in certain respects contains more than a two-ton Mack truck, yet, as Bennett puts it, these differences and additions are not sufficient to lift it "from the two-ton class into the three-ton class." That is the point in a nutshell. It is really no answer to say that there is no standard type of three-ton truck generally recognized by the trade, because the point is that, in the absence of any such standard, if a vendor picks out a specified truck of the make of any particular firm and sells it as such, the duty is cast upon him of seeing that the article sold answers his representation. When asked, generally, for a three-ton truck, he has the right to select a truck made and classified as such by any reputable firm which will fairly do the work of a three-ton truck for the period that can be reasonably expected of it, but, as the privilege of selection lies in him, so also does the responsibility for seeing that it is true to its rating. I cannot, with all deference to other opinions, take the view that the absence of a general trade standard helps or excuses the defendant on the facts herein. Simply because the special truck in question carried a three-ton load for a short period does not entitle it to be fairly called a three-ton truck any more than because a light horse can haul a heavy load for a short time he is entitled to be called a draught horse. In the proper construction of all buildings, machinery, plant, etc., a considerable margin of strength and durability is allowed over and above the actual requirements, but this margin or reserve, which is present in a true rating or classification, is absent when an attempt is made

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to construct a lighter and inferior machine in such a way that it will temporarily do work above its true class, with the inevitable result that it rapidly wears down to its real capacity, and less, owing to undue stress and strain. That is what, in my opinion, happened in this case. I am, therefore, satisfied that, from any point of view, the truck in question cannot fairly be said to be a three-ton truck, and it is difficult to see how this Court can be expected to say it is when its own makers said it was not when they sent it out of their factory, and it had not been altered when it was sold to the plaintiff.

As to the letter of recommendation of the truck given by the plaintiff, on which stress was laid by the defendant, it can be truly explained by the fact that at the time when it was given, the inexperience of the writer prevented his knowing the truth, but one would have thought that his ignorance would have made him hesitate before advising others. The explanation that he did give is not creditable to him, even if it is believed.

MARTIN, J.A.

It follows that the appeal should be allowed.

GALLIHER, J.A.: The remarks of the learned trial judge as to the witnesses and the evidence (and this case is largely one of evidence) leave us as free to consider the evidence as was the trial judge.

The case is not free from doubt, but I think the appellant should not succeed for the reasons which I will briefly outline.

The appellant went to the respondent to purchase a three-ton truck. The respondent had a truck made by the Mack Company, which it guaranteed to be a three-ton truck. It happened to be the Mack make, but the appellant was not looking for a Mack truck specially, so that I think we may conclude that as between both parties what was required and was guaranteed was that it was a three-ton truck, and that was the understanding. Among other sizes, the Mack Company manufactured what they classed as standard two-ton and standard three-ton trucks. The evidence shews clearly that this was neither one nor the other. Great reliance was placed on the evidence of the inspector, Yeager, who classed it at the factory as a two-ton truck, but he admits it is not a standard two-ton truck.

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Chassis 1664, the truck in question, does not come up to the standard Mack three-ton requirements, while in weight, size of axles, spokes and tires, it exceeds the standard two-ton Mack, and is also provided with an extra spring, called a "helper" spring. It may very well be that Yeager, finding it did not meet the requirements of a three-ton Mack, classed it as a two-ton, no intermediate size being of record. I refer to this merely as to the question of classification, apart from whether it is a two or three-ton truck.

In my opinion we should approach the determination of this case upon the ground of whether this truck was or was not a truck capable of doing the work for which the appellant required it, and carrying safely a three-ton load, and not whether it was classed as a two-ton or three-ton truck. That was, I think, what was in the minds of both parties when the deal was made and the guarantee given.

Evidence was given on behalf of the respondent by one Cummings, that the truck in question was a specially designed truck, to meet competition with other companies who were manufacturing three-ton trucks lighter than the three-ton standard Mack, but this evidence I regard as too indefinite to assist us much in coming to a conclusion.

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The evidence is that what goes to make up the difference between a two and a three-ton truck is size of axles, tires, wheels, spokes and springs, and we find that in Chassis 1664 these are greater than in two-ton trucks, and I might remark just here that these parts would be the parts affected by overloading, and that so far as the evidence goes, these appear even now to be in good condition.

The breakages and defects of which the appellant complained at any time previous to the dispute in question were of the kind incidental to the running of a truck of any capacity. During the ten months in which the appellant operated the truck, while complaints were made as to the matters lastly above referred to, no complaints were made as to the carrying capacity of the truck. Considering the fact that this truck was left heavily loaded overnight on at least one occasion, and that it was operated at times by drivers with little or no experience, and

in view of the condition of the parts likely to be affected if it was not capable of carrying a three-ton load, I conclude that the truck was fitted for the work for which it was required and guaranteed. Moreover, it was not until after the notes given in part payment for the truck were overdue, and plaintiffs were, after several promises, pressed for payment, that we find the appellant taking the stand it now is. Further, on the 15th of November, 1912, two months after the truck was purchased, and knowing that the letter was to be used as a recommendation to a prospective purchaser, the appellant gave the following letter to the respondent:

"Dear Sirs,

"I purchased a Mack 3-ton truck from you on September 10th, 1912, and since that time I have driven this truck approximately 4,000 miles without a day's holdup since I started. I have experienced the very best of satisfaction, and would be glad to recommend your truck to any prospective purchaser. I might say that the service has been exceedingly good, and I have been able to secure a mechanic at all hours any time an adjustment was necessary."

Raymur's explanation of this letter is that it was brought into him by an officer of the Wood Motor Company, and that he signed it after glancing at it, but had he read it carefully, he would not have signed it.

I have only this to say—that while this explanation may be true, I attach very little weight to it, as a person who so recklessly pledges his word without knowing what he is pledging it to is not entitled to have the Court detract much from the face value of the document.

McPHILLIPS, J.A.: I entirely agree with the judgment of the Chief Justice. As to the facts of this case, it appears to me clear that the defendant did not deliver to the plaintiff that which was agreed to be purchased, namely, one three-ton Mack truck; in fact, this is conceded, and must be conceded upon the evidence adduced at the trial, but it is attempted to be set up, nevertheless, that the contract was fully complied with by the delivery of a truck having the carrying capacity of a three-ton truck, that there was no recognized three-ton standard Mack truck, and that which was supplied fully met all requirements by way of warranty. The Chief Justice has analyzed the evi-

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dence, and there really remains little further to be said, other than to shortly point out that, in my opinion, the defendant absolutely breaks down in the attempt to establish compliance with the contract of sale when the evidence of Raymur, and the evidence of J. M. Wood, the manager of the defendant Company, is considered, and the contract of sale is read. The evidence, in its salient features, is as follows:

"Raymur, in chief: I told Mr. Wood I was in the market for a three-ton truck, and he said: 'That is a three-ton Mack Truck out there, with a rated carrying capacity of three tons.' I asked him if he would guarantee it for that. He said: 'Yes.'"

"J. M. Wood, cross-examination: There is no question about it that you agreed to sell Raymur a three-ton Mack Truck? Yes. No. We represented it to be a three-ton truck."

In view of this evidence it is well to scan the terms of the contract itself, and, presumptively, that which was agreed was rightly set out in the lien note or contract entered into by the plaintiff with the defendant, and we find it reading in part as follows:

"Please deliver to me one three (3) ton Mack Truck No. 1664 (hereinafter called the 'said goods'), for which I agree to pay the sum of $4,800.00 payable as follows . . . ."

This lien note or contract was acted on, and is the evidence of the agreement between the parties, and the defendant claims complete performance therewith. How impossible this is, when it is conclusively proved that the truck which the defendant delivered to the plaintiff, identified by number, was only a two-ton truck, and so rated at the factory.

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Mr. *Robertson,* counsel for the defendant (respondent), very ably marshalled the evidence, and laid great stress upon the testimonial given by the plaintiff's manager to the defendant's manager, which reads as follows: [already set out.]

Unquestionably this testimonial cannot be overlooked, and the Chief Justice has dealt with it in his judgment. I have only one further remark to make in reference to it, and that is that it is to be noted that the plaintiff was still of the opinion—erroneous in fact—that "a Mack three-ton truck" had been delivered. In view of this, can the testimonial be held to in any way affect the plaintiff, when apprised of the defendant's breach of contract and warranty? In my opinion, whilst at first sight

formidable, this testimonial may be readily passed over, and not be considered as embarrassing the real matters in issue.

The present case is somewhat similar to that of the *Bristol Tramways and Carriage Co.* v. *Fiat Motors, Lim.* (1910), 79 L.J., K.B. 1107. (Also see *Alabastine Co. of Paris Limited* v. *Canada Producer and Gas Engine Co. Limited* (1914), 17 D.L.R. 813.) There it was a sale of a 24/40 h.p. Fiat motor omnibus and six 24/40 h.p. Fiat motor chassis. It was made known, as in the present case, the particular purpose for which the goods were required, and I think it may be well said in this case, as in that, that the plaintiff relied upon the defendant's skill and judgment in the matter. Had the plaintiff in the present case been supplied with the identical article contracted for, *viz.*: one three-ton Mack truck, possibly it might be said the contract would have been fully complied with, the defendant then being enabled to rely upon section 22 of the Sale of Goods Act (Cap. 203, R.S.B.C. 1911), that where the sale is of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose; but the article contracted for was never supplied. In *Bristol Tramways and Carriage Co.* v. *Fiat Motors, Lim., supra,* the facts as proved shewed that "a Fiat motor omnibus or chassis meant an article sold by the Fiat Motors, Ltd., but the design and structure were matters of uncertainty. The goods as delivered were not fit to perform the particular purpose for which they were required"; and the action was one to recover damages for breach of contract, and it was held "that the defendants had committed a breach of the condition that the goods should be reasonably fit for the particular purpose implied by subsection (1) of section 14 of the Sale of Goods Act, 1893 [subsection (1) of section 22, Sale of Goods Act, R.S.B.C. 1911], and that the defendants could not rely on the proviso which excepts 'the case of a contract for sale of a specified article under its patent or other trade name.'" Mr. Justice Lawrance tried the case without a jury, and it was apparently admitted that there was no express contract of warranty, but the judge expressly found that there was reliance upon the seller's skill to supply goods free from defects; that the goods were of a description it was

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the seller's business to supply; that even an examination by the plaintiff's manager was not such as to enable discovery of defects; that the goods were for the intended purpose and at different times broke down and became useless; that great loss and expense in repairs ensued; that the defects which occasioned losses and expenses were not due to mismanagement or want of skill in the plaintiff's servants. The judgment of Lawrance, J. was appealed from, but was sustained by the Court of Appeal. Cozens-Hardy, M.R. at pp. 1109-10 said:

"I think, therefore, that on the findings of fact by the learned judge there was an implied condition that the goods should be reasonably fit for the purpose. I also think that the case may be brought within sub-section (2)—namely, that there was an implied condition that the goods should be of merchantable quality. In the face of Mr. Preen's report of October 25, 1907, which comes from the defendants' custody, I cannot doubt that the goods sold were not of merchantable quality within the fair meaning of those words, and I see no reason to doubt the finding of the learned judge that the slight inspection by the representatives of the plaintiffs of one of the complete omnibuses was not of such a nature as sufficed to disclose the defects."

It would appear to me that the present case is, if anything, a stronger case, and entitles the plaintiff Company to an assessment of the damages sustained by it.

Now, as to what damages may be assessed: The Sale of Goods Act is to be looked at to determine this question, and in this connection it is instructive to note the language of Cozens-Hardy, M.R. in the *Bristol Tramways* case, *supra,* at p. 1109, where he said:

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"I rather deprecate the citation of earlier decisions such as *Chanter* v. *Hopkins* (1838), 8 L.J., Ex. 14; 4 M. & W. 399; or *Shepherd* v. *Pybus* (1842), 11 L.J., C.P. 101; 3 Man. & G. 868. The object and intent of the statute of 1893 was no doubt simply to codify the unwritten law applicable to the sale of goods; but in so far as there is an express statutory enactment, that alone must be looked at and must govern the rights of the parties, even though the section may to some extent have altered the prior common law."

Turning, then, to the Sale of Goods Act, it will be seen that sections 67 and 68 deal with the damages that may be inquired into. In this case it is to be remembered that the plaintiff is not in possession of the goods, same being taken possession of by the defendant, under the provisions of the lien note or contract, for default of payment.

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In my opinion, the whole judgment of the learned trial judge must be set aside—that is, both the dismissal of the action and the allowance of the counterclaim—and a new trial be had between the parties to assess the damages to which the plaintiff may be held to be entitled to in the action, the appellant to have the costs both here and in the Court below.

Appeal allowed,
Irving and Galliher, JJ.A. dissenting.

Solicitor for appellant: *Frank Higgins.*

Solicitors for respondent: *Barnard, Robertson, Heisterman & Tait.*

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Criminal law—Stated case—Carnal knowledge of girl under 18 years by owner upon his own premises—Criminal Code, Sec. 217—Scope of.

Federal statutes—Desirability of uniformity of decisions in different Provinces.

The accused was charged with an offence against section 217 of the Criminal Code, which provides that "every one who, being the owner or occupier of any premises, ... induces or knowingly suffers any girl under the age of 18 years to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man, or generally, is guilty of an indictable offence. . . . ." There was no evidence that the accused had induced a girl within the prescribed age to be in the premises for the purpose of being carnally known by any man other than himself.

Held, that the object of the section is to forbid the use of premises as assignation houses to which girls may be induced to resort, and it is not an offence, within the section, for the owner of the premises to induce a girl within the prescribed age to be therein for the purpose of himself having connection with her.

Rex v. *Sam Sing* (1910), 22 O.L.R. 613, followed.

The practice of the Court of Appeal is to follow the decisions of other like Courts of Canada on Federal statutes, particularly criminal, with the intention of harmonizing the decisions and securing uniformity of application thereof throughout Canada.

CRIMINAL APPEAL by way of case stated from MCINNES, Co. J. under section 1014 of the Criminal Code. One Sam Jon, Statement

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a Chinaman, was tried on a charge laid under section 217 of the Criminal Code. The charge was as follows:

"That he, being the occupier of certain premises, did knowingly and unlawfully suffer a girl under the age of eighteen years to be upon the premises for the purpose of being unlawfully and carnally known by a man."

On the trial, although there was evidence that the accused had induced a girl under eighteen years of age to go upon the premises and that he, there, had carnal knowledge of her, no evidence whatever was adduced to prove that the accused induced or suffered the girl to be in the premises for the purpose of being carnally known by some man other than himself.

The question reserved was as follows:

Statement

"Was it necessary for the prosecution to prove that the accused suffered the girl to be in the premises for the purpose of being carnally known by some man other than himself?"

The accused was sentenced by the trial judge to imprisonment for a term of two years.

The appeal was argued at Vancouver on the 3rd of November, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

A. S. Johnston, for appellant (prisoner), relied on the case of *Rex* v. *Sam Sing* (1910), 22 O.L.R. 613. This is a case precisely in point and should, I submit, be followed by this Court, as, although a decision of the Court of Appeal of another Province, it is on a question arising from a Dominion statute.

W. M. McKay, for the Crown, referred to *Reg.* v. *Williams* (1898), 62 J.P. 310, following *Reg.* v. *Jones* (1896), 1 Q.B. 4; and *Rex* v. *Karn* (1909), 20 O.L.R. 91.

Johnston, in reply.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appeal should be allowed. I agree in the construction placed upon the section under discussion by the majority of the judges of the Ontario Court of Appeal in *Rex* v. *Sam Sing* (1910), 22 O.L.R. 613. But even if I were in doubt I should feel impelled, in construing a Dominion statute, to follow the decision of a Court of like jurisdiction in another Province. We are, it is true, not bound by such a decision, but unless I were convinced beyond reasonable doubt

that a decision of a Court of Appeal in another Province was erroneous, I should follow it, not only from considerations of judicial comity, but as well to the end that uniformity of decision should prevail as far as possible in respect of laws which are common to all parts of Canada.

IRVING, J.A.: I agree with the decision of the majority of the Court of Appeal of Ontario.

MARTIN, J.A.: The practice of this Court of Criminal Appeal (Criminal Code, Sec. 2 (7)), as at present constituted, and formerly as the Full Court, has been to follow the decisions of other like Courts of Canada on Federal statutes, particularly criminal, with the intention of harmonizing the decisions and securing uniformity of application thereof throughout Canada, and I think we should continue in that wise course unless some very strong ground to the contrary be shewn. The reasons in law for convicting or acquitting a man on a charge brought on a particular section of the code should be the same all over Canada.

MARTIN, J.A.

GALLIHER, J.A.: I think I have expressed the same view as has been expressed in other cases: it is desirable, compatible with the interests of justice, that decisions in criminal matters throughout Canada should be as uniform as possible.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I agree, and merely wish to add that we have nothing whatever to do but interpret the statute, not make law, or go in advance of Parliament. While what has happened is certainly most deplorable immorality, it is not crime—either at common law or by statute. We cannot make a crime that which is not a crime, and I think, following the Ontario decision—with which I am in entire agreement—the conviction must be quashed. It is well that there should be uniformity of opinion in the construction of the Criminal Code, not divergence of opinion, as, otherwise, the spectacle might happen of a person being deprived of his liberty in one Province and allowed to go free in another.

MCPHILLIPS, J.A.

Conviction quashed.

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COZOFF v. WELCH.

Arbitration and award—Right of appeal after award—Review of finding of facts—Order remitting to arbitrator—Workmen's Compensation Act, R.S.B.C. 1911, Cap. 244, Sch. 1, Sec. 4.

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Where parties to an arbitration under the Workmen's Compensation Act neglect to ask the arbitrator to state a special case for the opinion of the Court, the award should not, in the absence of misconduct, be remitted to the arbitrator or set aside.

In re Lewis and Grand Trunk Railway Co. (1913), 18 B.C. 329, followed.

APPEAL by defendant from a decision of MORRISON, J., referring back to the arbitrator (MCINNES, Co. J.) an award made by him to assess compensation under the Workmen's Compensation Act. The claimant asked for compensation, alleging that he strained himself whilst in the defendant's service, with the result that a hernia developed, rendering him unfit for work. The learned arbitrator declined to award compensation, holding that he was not satisfied that the hernia was not present at the time of the alleged straining. An appeal was taken to MORRISON, J., who came to a different conclusion, with the result already stated. Defendant appealed from this order to the Court of Appeal.

Statement

The appeal was argued at Victoria on the 16th of June, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Ritchie, K.C., for appellant: This was an arbitration under the Workmen's Compensation Act. The complaint was that the workman was injured in lifting a stone. The arbitrator concluded that he was not satisfied that it was the lifting of the stone that caused the injury. We submit the Arbitration Act does not apply, as there is no question of law to decide, and there is no evidence of misconduct on the part of the arbitrator: see *British Columbia Sugar Refining Co.* v. *Granick* (1910), 44 S.C.R. 105. If you get before an arbitrator you can only go further by a stated case under the Workmen's Compensation

Argument

Act: see *Basanta* v. *Canadian Pacific Ry. Co.* (1911), 16 B.C. 304; *In re Lewis and Grand Trunk Railway Co.* (1913), 18 B.C. 329; *Disourdi* v. *Sullivan Group Mining Co.* (1909), 14 B.C. 241; *Gibson* v. *Wormald & Walker, Limited* (1904), 2 K.B. 40; *Lee* v. *Crow's Nest* (1905), 11 B.C. 323.

A. Alexander, for respondent: There was absolutely no evidence to justify the arbitrator's finding. Where there is no evidence, there is a question of law: see *Disourdi* v. *Sullivan Group Mining Co.* (1909), 14 B.C. 241; *Euman* v. *Dalziel & Co.* (1912), 6 B.W.C.C. 900; *Chisholm* v. *Centre Star* (1906), 12 B.C. 16; *Fenton* v. *Thorley & Co., Limited* (1903), A.C. 443; *Hensey* v. *White* (1900), 1 Q.B. 481.

Argument

Ritchie, in reply, referred to *In re King and Duveen* (1913), 2 K.B. 32; *Dinn* v. *Blake* (1875), L.R. 10 C.P. 388; *Montgomery* v. *Liebenthal* (1898), 1 Q.B. 487; 78 L.T.N.S. 406; Redman on Arbitrations and Awards, 4th Ed., 253, 258.

Cur. adv. vult.

3rd November, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would allow the appeal.

IRVING, J.A.

IRVING, J.A.: The learned arbitrator made his award dismissing the claim on these facts, *viz.*: that on the 22nd of October, 1913, the claimant was already suffering from hernia, and that the strain, if any, of lifting some rock on that day only advanced it a stage. The case put forward was that the lifting had then caused an internal rupture and hernia.

The claimant's advisers, being of opinion that if the employee is a man who has a defect, such, for instance, as a weakness in an artery, that defect is no defence against a claim for compensation for an accident which takes place in your service and produced an incapacity (*Noden* v. *Galloways, Limited* (1912), 1 K.B. 46 at p. 51, following *Clover, Clayton & Co., Limited* v. *Hughes* (1910), A.C. 242), took an appeal from the dismissal of the claim to a judge of the Supreme Court, and MORRISON, J., having read the evidence, came to the conclusion that there was no evidence of any pre-existing hernia, or any condition which would support the contention that a hernia had existed, and that it was thereby aggravated by the strain

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which, according to the only evidence given, the claimant had suffered. He therefore sent the case back to the arbitrator to assess the compensation to which he thought the plaintiff entitled.

By the 4th section of the Second Schedule it is enacted that an arbitrator may, if he thinks fit, submit any question of law to a judge of the Supreme Court. That method seems to be the only method of having an award under the Act reviewed, and the remedy is confined to questions of law. The question of a general right of appeal under section 4 was negatived in *British Columbia Sugar Refining Co.* v. *Granick* (1910), 44 S.C.R. 105, and in *In re Lewis and Grand Trunk Railway Co.* (1913), 18 B.C. 329, this Court held that where an arbitrator having once made his award could not state a case.

The learned judge, in my opinion, had no jurisdiction to make an order remitting the case back to the arbitrator on the ground that he made a mistake in the facts.

The claimants, however, contend that the award on its face was bad, and that, therefore, it should be set aside, as was done in the case of *Disourdi* v. *Sullivan Group Mining Co.* (1909), 14 B.C. 241. In that case the arbitrator had given a lump sum for compensation instead of a number of weekly payments such as is by the First Schedule contemplated. He had made an award which he had no authority to make. In this case it is

IRVING, J.A.

claimed that the award is bad on its face, for, if the construction contended for by the claimant is put on the language used by the arbitrator, facts have been found which entitle the claimant to compensation. The language of the arbitrator is guarded. It is not clear that he misdirected himself in any way.

The plaintiff failed to satisfy the arbitrator, (1) that he had ruptured himself in the defendant's service, or (2) that there had been a strain. The arbitrator's language is not to be construed into a finding that there was in fact a strain which had advanced the hernia. That condition of affairs is now the basis of the claimant's appeal, but that was not contended for at the hearing. He said:

"I never had any trouble there before." "I never felt a bulging pain down in the lower part of the abdomen. . . . . I used to be always healthy, I never had any pain at all in the bowels or abdomen."

The arbitrator might very well say, having regard to the claim and the evidence: "Here is a man with a hernia—that is established by the doctor's evidence; but I think it is an old hernia, not sustained in the defendant's service, and the claimant is falsely representing that it was." The award must be read having regard to the claim made and the evidence given. The claimant now wishes us to read it as if the claim had been made for a strain sustained on a pre-existing hernia.

Where parties have an opportunity to ask the arbitrator to state his award in the form of a special case and neglect to do so, the award should not, in the absence of misconduct, be set aside, so as to enable him to obtain the opinion of the Court on a point of law not open at the hearing. The matter is at an end. The arbitrator is *functus.* In *Tabernacle Permanent Building Society* v. *Knight* (1892), A.C. 298, the rapidly-prepared award had not been executed until after the application to the Court had been made. In *Armstrong* v. *St. Eugene Mining Co.* (1908), 13 B.C. 385, the first, or supposed, award was held not an award and, therefore, the arbitrator was not *functus.*

IRVING, J.A.

I would allow the appeal and set aside the order of MORRISON, J.

MARTIN, J.A.: In the case of *In re Lewis and Grand Trunk Railway Co.* (1913), 18 B.C. 329, which is not referred to by the learned judge appealed from, we decided that an arbitrator under the Workmen's Compensation Act who has made his award is *functus officio,* and cannot submit a question of law to a judge of the Supreme Court under section 4 of the Second Schedule, and attention was drawn to certain differences between our Act and the English Act, the learned Chief Justice saying, pp. 331-2:

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"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 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

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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."

See also the remarks of my brother GALLIHER. The observation on the power of a judge to remit to the arbitrator under the English Act refers, I assume, to section (17) of its Second Schedule, relating to the application of the Act to Scotland and empowering the Court of Session in Scotland to remit a case to the sheriff, and requiring the sheriff to state a case on a question of law on the application of either party.

That decision was an expansion of our prior decision in *Basanta* v. *Canadian Pacific Ry. Co.* (1911), 16 B.C. 304, wherein we decided that the only way to review the decision of the arbitrator as to the application of the Act to the employment under the present subsection (3) of section 6 (formerly subsection (3) of section 2 of the Act of 1902) "is by means of a case submitted by him under section 4 of the Second Schedule," which provides that he "may, if he thinks fit, submit any question of law . . . ." He has no power to submit a question of

MARTIN, J.A.

fact, and as he has not "thought fit" to submit a question of law in this case, that is an end of this matter, because it is not suggested that either as to law or fact he has exceeded his jurisdiction, and, therefore, the doubtful decision of the old Full Court in *Disourdi* v. *Sullivan Group Mining Co.* (1909), 14 B.C. 241, assuming it to be one that we ought to follow, need occasion no difficulty, because it can and ought to be strictly confined to what it decided, *viz.*: that when it appears on the face of the award that the arbitrator has exceeded his jurisdiction, then an application may be made under the Arbitration Act to set it aside.

I think, therefore, that the learned judge of the Supreme Court appealed to had, in the circumstances herein, no jurisdiction to review or remit the award to the arbitrator, in the absence of the submission of a question of law, and, consequently, the award should stand and this appeal should be allowed.

GALLIHER, J.A.

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

This case is governed by *In re Lewis and Grand Trunk Rail-*

way Co. (1913), 18 B.C. 329, and I have nothing to add to my remarks in that case.

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McPHILLIPS, J.A.: This appeal is one brought from the order made by MORRISON, J., setting aside the award made by McINNES, Co. J., sitting as arbitrator under the provisions of the Workmen's Compensation Act (Cap. 244, R.S.B.C. 1911), and directing that the matter be remitted for consideration by the arbitrator, with directions to assess compensation to the applicant. The appeal is taken upon many grounds, but the argument really was centred upon what must be the determining question, and that is: Was there any jurisdiction, upon the facts of the present case, to set aside the award and remit the matter back with a direction to assess compensation? To arrive at an answer to this question it becomes necessary, in my opinion, to give attention to the Arbitration Act as well as the Workmen's Compensation Act.

Upon the assumption that the Arbitration Act applies to references under the Workmen's Compensation Act—and that is my opinion, authority for which opinion may be found in *Zelma Gold-Mining Co.* v. *Hoskins* (1894), 64 L.J., P.C. 45; and *Tabernacle Permanent Building Society* v. *Knight* (1892), A.C. 298, where its application was considered with reference to the Companies Act and the Building Societies Act respectively; also see the cases lately decided in this Court, *viz.*: *In re North Vancouver and Loutet* (1914), [19 B.C. 157]; 16 D.L.R. 395; and *In re Jackson and North Vancouver* (1914), [19 B.C. 147]; 16 D.L.R. 400—the question is: Was the award one that could be set aside or remitted back to the arbitrator, considering the provisions of not only the Arbitration Act but the Workmen's Compensation Act, as both Acts must be taken together?

MCPHILLIPS, J.A.

First—viewing the application of the Arbitration Act—the award cannot be said to come within the grounds that are capable of being invoked, namely: (1) that the award is bad on the face of it; (2) that there has been misconduct on the part of the arbitrator; (3) that there has been an admitted mistake, and the arbitrator asks that the matter may be

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remitted; and (4) where additional evidence has been discovered after the making of the award.

In my opinion, there was a course open to the applicant before the arbitrator which was not pursued, and that was to invoke sections 13 and 22 of the Arbitration Act, whereby the matters referred might have been remitted for reconsideration, or the arbitrator might have been directed to state a special case for the opinion of the Court. Neither of the above courses having been adopted, in my opinion it is now too late, the award being made.

In *Montgomery* v. *Liebenthal* (1898), 78 L.T.N.S. 406, sections 10 and 19 of the Arbitration Act, 1889 (52 & 53 Vict., c. 49), were considered exactly similar in terms to sections 13 and 22 of the Arbitration Act (Cap. 11, R.S.B.C. 1911), and it was held, that an arbitrator cannot be directed by the Court to state a special case for the opinion of the Court, under section 10 of the Arbitration Act, 1889, when no request or application to state a case has been made before the award has been made and the arbitration concluded; and it was further held that an award will not be remitted for the reconsideration of an arbitrator upon the sole ground that the arbitrator has made a mistake in law. Smith, L.J., considering section 19, said at p. 408:

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"My view of section 19 is that it gives the Court jurisdiction to order a special case to be stated when an application to state a case is made during the pendency of the arbitration, and that the section does not apply when the application is first made after the arbitration has been concluded and the arbitrators are *functi officio*. . . . . It is then contended that, if the arbitrators cannot be ordered to state a special case, the matter can be sent back to them for reconsideration, under section 10. I think that counsel for the respondents has correctly stated the law under that section. It was so laid down in *Re Keighley, Maxted and Co. and Durant and Co.* (68 L.T.R. 61; (1893), 1 Q.B. 405). I for my part have always understood the general rule to be that the parties took their arbitrators for better or for worse, both as to decisions of fact and decisions of law. That is clearly the law."

Second—considering the provisions of the Workmen's Compensation Act and appeal from the award—this matter was considered by this Court in *Basanta* v. *Canadian Pacific Ry. Co.* (1911), 16 B.C. 304, and my brother MARTIN at p. 307 said:

"This appeal must, I think, be allowed because, quite apart from any-

thing that may be said about the Arbitration Act, subsection 3 of section 2 of the Workmen's Compensation Act expressly confers upon the arbitrator jurisdiction to settle 'any question as to whether the employment is one to which this Act applies,' and the only way to review the arbitrator's finding thereon is by means of a case submitted under section 4 of the Second Schedule."

Then we have *In re Lewis and Grand Trunk Railway Co.* (1913), 18 B.C. 329, where it was held by this Court that 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 to the Workmen's Compensation Act.

In *British Columbia Sugar Refining Co.* v. *Granick* (1910), 44 S.C.R. 105, Duff, J., considering the provisions of the Workmen's Compensation Act, and especially section 4 of the Second Schedule, at pp. 121-2 said:

"In the absence of something indicating a contrary intention the Legislature must be taken to have intended that the claimant's statutory right should be vindicated in the manner prescribed as well in respect of appeals as of proceedings in the first instance.

"This view finds in my judgment some confirmation when we consider that the frame of the statute indisputably shews that a most important feature of the scheme adopted was this limited character of the right of appeal given by article 4. The Legislature intended obviously to provide a speedy and inexpensive means of dealing with claims under the Act. The importance of instituting some such procedure for determining the claims of the persons—usually of very limited resources—for whose benefit the scheme was designed, can hardly be exaggerated; and the last thing a Legislature with such objects in view would be likely to sanction is a general right of appeal on facts as well as on law—with all that such a right of appeal implies in a controversy between litigants of large resources and adversaries with means inadequate to sustaining the burden of a protracted contest."

MCPHILLIPS, J.A.

It will be seen that upon the facts of the present case the award is not open to attack under the provisions of the Arbitration Act, nor under the provisions of the Workmen's Compensation Act.

With all respect to the learned judge from whose decision this appeal is taken, *Disourdi* v. *Sullivan Group Mining Co.* (1909), 14 B.C. 241, does not constitute any authority in the present case, as the award there under consideration was bad on its face.

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It follows, in my opinion, that the appeal must be allowed.

Appeal allowed.

Solicitors for appellant: *Bowser, Reid & Wallbridge.*
Solicitors for respondent: *Alexander & Sears.*

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June 12.

PICHON v. THE "ALLIANCE No. 2"

PICHON v. THE "ALLIANCE No. 2."

Admiralty law—Ship—Necessaries—Fishing-tackle.

Fishing-stores or fishing-tackle such as hooks, gaffs, nippers, and knives, used in a fishing-boat are "necessaries" for which the ship is liable.

ACTION for the price of fishing-stores furnished to the fishing-schooner "Alliance No. 2." Heard by MARTIN, Lo. J.A. at Victoria on the 12th of June, 1914.

Patton, for plaintiff.
F. C. Elliott, for the ship.

Judgment

MARTIN, Lo. J.A.: This is a claim for fishing-tackle, such as hooks, gaffs, nippers, and knives, used by the fishing-schooner "Alliance No. 2" in her business as a halibut-fishing boat, which it is alleged come within the term "necessaries," lately considered by me in the case of the *Victoria Machinery Depot Co.* v. *The Canada and The Triumph* (1913), 18 B.C. 515, wherein the leading authorities are collected. After a further consideration of them and others, cited chiefly in Roscoe's Admiralty Practice, 3rd Ed., 266, I have reached the conclusion that these fishing-stores, as they are properly called, are just as much necessaries as are sailing-stores, to a vessel engaged in that occupation. In the case of the whaler *Dundee* (1823), 1 Hag. Adm. 109; (1827), 2 Hag. Adm. 137, the fishing-stores she

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had on board, *viz.*: "boats, fishing-tackle, such as harpoons, lines and rockets, casks and various other implements, independently of her sailing-stores were held to be appurtenances" within the meaning of the 53 Geo. 3, c. 159, and there is no distinction, for the purposes of the present case, between necessaries and appurtenances, because, unless she were provided with them she could not properly sail for the fishing grounds. The subject is considered by Lord Stowell at pp. 126-7 with his customary lucidity, and he summarizes it in saying that—

"A ship may have a particular employment assigned to her, which may give a specialty to the apparatus that is necessary for that employment. A ship built for the reception of galley slaves must have such a peculiar apparatus. Whether a whaler is originally built with any peculiarity of construction for that service is more than I know; but this is clear, that unless she has various appurtenances not wanted in other ships, as well as a crew peculiarly trained, she had better stay at home, than resort to the Arctic regions, where alone her function can be exercised."

Judgment

I hold, therefore, that these fishing-stores are necessaries to this fishing-vessel, and judgment will be entered for the amount already agreed upon.

Judgment accordingly.

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April 7.

FORDHAM v. HALL

FORDHAM v. HALL *ET UX.*

Deed—Mortgage—Mistake—Rectification—Not executed in pursuance of previous written agreement—Statute of Frauds.

Where there is no previous agreement in writing parol evidence is admissible to shew what the agreement really was in an action to rectify a mistake in a written instrument.

It is no defence to an action for rectification to plead that the antecedent contract was one which the Statute of Frauds requires to be in writing and that it was made by word of mouth only.

APPEAL from the decision of HUNTER, C.J.B.C. on the trial of the action at Vancouver on the 5th of December, 1913, on a claim for the rectification of a mortgage. The defendant, Alfred Hall, was the registered owner of the property in question, and the allegation was that the defendants applied to the plaintiff for a loan by way of second mortgage; that by mistake the defendant Bertha Fulton Hall (wife of the co-defendant) was misdescribed as mortgagor, and Alfred Hall, therefore, gave only his personal covenant. Default was made in payment of interest. The mortgage instrument was executed by an attorney in fact, on behalf of the defendant Bertha Fulton Hall, and she denied his authority to execute the instrument. The trial judge ordered that the instrument be rectified, and defendants appealed.

Statement

The appeal was argued at Victoria on the 19th and 20th of January, 1914, before MACDONALD, C.J.A., IRVING, GALLIHER and MCPHILLIPS, JJ.A.

Martin, K.C., for appellants: Even if proved fully that there was the bargain, and that the document had to be rectified to make the document agree with the bargain, the rule is that a document necessary under the Statute of Frauds to the proof of a contract cannot be rectified by oral evidence. When the evidence of the contract is in the document and there is a mistake in the document, it must be shewn there was an enforceable agreement before the document was signed; a new

Argument

bargain for the parties cannot be made: see *Mackenzie* v. *Coulson* (1869), L.R. 8 Eq. 368; Kerr on Fraud and Mistake, 4th Ed., 496. The statute says there must be a written document that contains the terms of the contract, therefore, the plaintiff cannot ask for rectification of a mortgage and then enforce it: see *Woollam* v. *Hearn* (1802), 7 Ves. 211*b*; 2 Wh. & T. L. C., 8th Ed., 517; *Olley* v. *Fisher* (1886), 34 Ch. D. 367. The Statute of Frauds could not be pleaded when there was part performance: see *May* v. *Platt* (1900), 1 Ch. 616; *Thompson* v. *Hickman* (1907), 1 Ch. 550. This matter is not affected in any way by the Judicature Act.

Bodwell, K.C., for respondent: The bargain was that money was to be advanced and the property was to be charged with the advance. The owner was to be charged for the payment of the debt. In this case the mistake is proved, and the document should be rectified. Specific performance only has reference to executory agreements; we are asking to correct a mistake in a conveyance which has been executed: see *In re Boulter. Ex parte National Provincial Bank of England* (1876), 4 Ch. D. 241 at p. 244; *Breslauer* v. *Barwick* (1876), 36 L.T.N.S. 52; *Wilson* v. *Wilson* (1854), 5 H.L. Cas. 40 at p. 66. A mistake can be rectified: *Johnson* v. *Bragge* (1901), 1 Ch. 28; *Lincoln* v. *Wright* (1859), 4 De G. & J. 16. The appellants have confused this case with those where specific performance is asked for: Fry on Specific Performance, 5th Ed., p. 399, par. 815; Story's Equity, 13th Ed., par. 161. The cases referred to by appellants' counsel do not apply.

Argument

Martin, in reply: The cases cited by respondent's counsel have nothing to do with the Statute of Frauds.

Cur. adv. vult.

7th April, 1914.

MACDONALD, C.J.A.: A mortgage was executed by the appellant Bertha F. Hall, as mortgagor, by her husband, Alfred Hall, the other appellant, as party of the second part, to the respondent, as mortgagee, to secure an advance to Alfred Hall of $4,000. It was so executed because of a mistaken belief of their respective attorneys that the title to the lots mortgaged

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was in Mrs. Hall. The title in fact was in Alfred Hall, and hence this action to rectify the mistake. The appellants are unable or unwilling to repay the loan, yet they resist the rectification of what they cannot deny was a mutual mistake. They resist this on the technical ground that the Court cannot receive oral evidence of a mistake because of the Statute of Frauds. This is an attempt on the part of at least the appellant Alfred Hall to use the Statute of Frauds for the purpose of fraud. There is not even the poor pretext on his part that there could be a doubt about the merits of the respondent's case.

The learned Chief Justice who tried the action in effect rectified the mortgage by declaring that Alfred Hall should be described not as party of the second part, but as mortgagor. No personal order for payment was made against Mrs. Hall; her name was not struck out of the mortgage, but the effect of the judgment is to relieve her of liability. The net result is that the mortgage has been rectified so as to make the owner of the lots, who was also the borrower of the money, the mortgagor; to put him in the position which but for the mutual mistake he would undoubtedly have been in from the beginning, and to release Mrs. Hall, though not formally, from the transaction. In that result I think the learned judge was right, though I should have gone more directly to the point, and have struck Mrs. Hall's name out of the mortgage.

MACDONALD, C.J.A.

Apart from the defence of the Statute of Frauds, appellants' counsel contended that because there was some evidence that the original intention of the respondent was to have a mortgage in which some one would join as guarantor (that being the suggested reason for joining Alfred Hall as party of the second part, though the mortgage contains no guaranty clause), no reformation which the Court can make can effectuate the whole agreement of the parties, and hence, the decree, in effect, makes a new agreement between them not in accord with their virtual understanding. While there is some such evidence in support of that suggestion, I think it nevertheless plain enough that the real agreement between the parties was that the respondent should lend the money to Alfred Hall, and that Alfred Hall should secure the repayment of the loan by a mortgage of the

lots in question, executed by himself if the title were in him, and if not, then by his wife, if the title were in her, and in the latter event, he, as the borrower, was to join to bind any interest he might have and to pledge his personal credit. Had the title been in him, I do not think that his wife, or anyone else, would have been asked to join as guarantor. What was intended, then, was a conveyance of the property in mortgage, and Alfred Hall's personal covenant to pay, and by the rectification decreed that has been effectuated.

I now come to the defence of the Statute of Frauds. Mr. *Martin,* for the appellants, relied mainly on *Woollam* v. *Hearn* (1802), 7 Ves. 211*b*; *Davies* v. *Fitton* (1842), 2 Dr. & War. 225; *May* v. *Platt* (1900), 1 Ch. 616; and *Thompson* v. *Hickman* (1907), 1 Ch. 550. The first named decides that a Court of Equity cannot, because of the Statute of Frauds, rectify an executory agreement for a lease on oral evidence. In other words, that the Courts will not decree specific performance against a defendant of an executory agreement together with rectification of the instrument sued on. The other cases shew this, that where it is sought to rectify a deed which was executed in pursuance of a prior written agreement, not on the ground that it does not conform to the terms of the agreement, but that neither conform to the real bargain, the Courts will not rectify because that would be tantamount to reforming a written executory agreement on parol evidence, and then decreeing specific performance of it by in effect directing the execution by the defendant of a corrected deed. Had this mortgage been executed in pursuance of a prior written agreement, the case would come clearly within the very terms of these decisions. There was no prior written agreement in this case, and hence, assuming they were well decided, I think the cases relied upon by Mr. *Martin* are not authorities against the decree complained of.

This distinction, to my mind, explains the apparent contradiction between those cases and those upon which respondent's counsel relied; as for instance, *In re Boulter. Ex parte National Provincial Bank of England* (1876), 4 Ch. D. 241, in which a charge in the nature of a mortgage on real property was rectified on parol evidence, notwithstanding that the Statute of Frauds

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was pleaded; and *Thomas et ux.* v. *Davis et al.* (1757), 1 Dick. 301, referred to with approval by Cozens-Hardy, J. in *Johnson* v. *Bragge* (1901), 1 Ch. 28; and in Sugden on Vendors and Purchasers, 14th Ed., at p. 122. *Thomas et ux.* v. *Davis et al.* was not a case of the rectification of a marriage settlement, but of a conveyance, and does not differ in principle from the case at bar.

That the absence of a prior written agreement materially distinguishes this case from *Davies* v. *Fitton, supra,* and others of like character already mentioned, I need only refer to the language of the Lord Chancellor (Sugden) in that case, where at p. 233 he says:

"It is said, that if a mistake was proved, and that there was no written contract, the parol evidence would be admissible. Perhaps it might, because there is no settled rule of law in the way, and, as there is no written contract, the Court must endeavour to ascertain, by the best evidence it can get, what was the contract of the parties, and whether there was any mistake."

Again, in *Murray* v. *Parker* (1854), 19 Beav. 305 at p. 308, the Master of the Rolls, Sir John Romilly, said:

"In all cases, the real agreement must be established by evidence, whether parol or written. If there be no previous agreement in writing, parol evidence is admissible to shew what the agreement really was; if there be a previous agreement in writing which is unambiguous, the deed will be reformed accordingly; if ambiguous, parol evidence may be used to explain it."

MACDONALD, C.J.A.

In that case the Statute of Frauds was set up, nevertheless the rectification was made. But I do not cite the case so much for the result as for the rule laid down by the Master of the Rolls, that "if there be no previous agreement in writing, parol evidence is admissible to shew what the agreement really was."

Having reached the conclusion that the Statute of Frauds was not a bar in circumstances like these to the admission of parol evidence, either before or since the Judicature Act, it becomes unnecessary to express a settled opinion as to whether the statement in Fry on Specific Performance, 5th Ed., p. 400, that—

"this vexed question has, it is believed, been finally solved by the Judicature Act, 1873, s. 24, subs. 7,"

is a correct statement or not.

It was argued that *Olley* v. *Fisher* (1886), 34 Ch. D. 367; *May* v. *Platt* and *Thompson* v. *Hickman, supra,* shew that that

statement is not a correct one, but as I read these cases, they do not decide anything with respect to the effect of that subsection upon a question of this kind. It would appear to me that the subsection could hardly be said to have made any change, because the principles applicable to the rectification of instruments was the same before as since the Judicature Act, namely, equitable principles.

No difficulty arises in this case about the facts. The moment it was proven that the title was, at the time the mortgage was given, in the husband, a fact proved by the production of the certificate of title, it became manifest, without more, that a mistake had been made in the mortgage in inserting the name of the wife instead of that of the husband as mortgagor. Very little in this case depends upon oral evidence. Reading the mortgage in connection with the documentary evidence of title, it is just as obvious that a mistake had been made as it was that a mistake had been made in the instrument in question in *Wilson* v. *Wilson* (1854), 5 H.L. Cas. 40, where it was apparent to their Lordships that "John" ought to be read "Mary."

MACDONALD, C.J.A.

I would dismiss the appeal, with costs.

IRVING, J.A.: With reference to Mr. *Martin's* second point, that, assuming mistake proved, the Court will not enforce by a decree of specific performance an agreement to which the Statute of Frauds is applicable, but which has been rectified on parol evidence.

The old rule which is set out in *Woollam* v. *Hearn* (1802), 7 Ves. 211*b*, 2 Wh. & T. L.C., 8th Ed., 513, has been modified since the passing of the Judicature Act. Two examples are: *Olley* v. *Fisher* (1886), 34 Ch. D. 367, and *Shrewsbury and Talbot Cab and Noiseless Tyre Co.* v. *Shaw* (1890), 89 L.T. Jo. 274. These were executory agreements, untouched by the Statute of Frauds, and, therefore, are not authorities in the present case. North, J., in giving judgment in *Olley* v. *Fisher, supra,* at p. 370 said that—

IRVING, J.A.

"Now [since the passage of the Judicature Act] the Court can have no difficulty in entertaining an action for the reformation of a contract and for the specific performance of the reformed contract in every case in which the Statute of Frauds does not create a bar."

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It is on this opinion that Mr. *Martin* relies, and he cites two cases which he claims support his argument, *viz.*: *May* v. *Platt* (1900), 1 Ch. 616, and *Thompson* v. *Hickman* (1907), 1 Ch. 550. Before discussing these cases it may be well to consider the circumstances under which a deed will be reformed. Where there is a previous agreement in writing which is unambiguous, the deed will be reformed, and parol evidence is unnecessary. Where the previous written agreement is ambiguous, parol evidence may be allowed in to explain the ambiguity. Where there is no previous writing, the rectification can only be allowed on oral evidence when there is clear proof of the intention, and no contradiction, on oath, by the defendant.

Now, in *May* v. *Platt, supra,* which was for rectification of a conveyance, the previous agreement in writing was unambiguous, and Farwell, J. refused to admit parol evidence to contradict the previous agreement.

In *Thompson* v. *Hickman* (1907), 1 Ch. 550; 76 L.J., Ch. 254, the application was to rectify a conveyance in unambiguous terms, the deed being of minerals "lying on each side of and adjoining a railway." It was proposed to make it read so as to include the minerals underlying the railway. The previous agreement used the same unambiguous terms. Neville, J. said that he would follow *Davies* v. *Fitton* (1842), 2 Dr. & War. 225, and *May* v. *Platt,* the ground of these decisions being that the evidence of intentions was not admissible. These two cases do not bear on the Statute of Frauds. In neither of them was *Olley* v. *Fisher, supra,* cited, but in *Johnson* v. *Bragge* (1901), 1 Ch. 28, the present Master of the Rolls, then Cozens-Hardy, J., when the *dictum* in *Olley* v. *Fisher* was read to him, scouted the idea that the Statute of Frauds formed any defence in an action of fraud or mistake, and he cited a case decided in 1757 —*Thomas et ux.* v. *Davis et al.,* 1 Dick. 301—where the rectification of a conveyance of land was sought. The evidence of the attorney who received instructions to prepare the deed and did prepare the deed was admitted. This evidence, though admissible, was not deemed sufficient.

IRVING, J.A.

Other cases of more recent date were cited, but the opinion

of Cozens-Hardy, J. itself seems to remain unquestioned, and it is cited in text-books as settling the law.

The decision of Bacon, C.J. in *In re Boulter. Ex parte National Provincial Bank of England* (1876), 4 Ch. D. 241, seems to recognize the same doctrine, in the case of honest mistake.

I do not think this part of the case can be stated better than it is put by Mr. Cyprian Williams in the second edition (1910) of his Vendors and Purchasers at pp. 783-4:

"It is no defence to an action for rectification to plead that the antecedent contract was one which the Statute of Frauds requires to be in writing, and that it was made by word of mouth only (*Johnson* v. *Bragge* (1901), 1 Ch. 28). For if made by word of mouth, the contract was not void, but only not enforceable; and if the parties really assented to such a contract and had also a common intention of reducing or giving effect to all the terms of that contract to or by writing, and this intention were frustrated owing to the omission or mis-statement by mistake of some material term of the contract, it would be giving countenance to fraud to allow the defendant to repel proof of the mistake under cover of the statute. If, however, the writing purport to contain the contract, but omit some material part thereof, and there were no common intention to put the whole contract into writing, the document cannot be rectified. If this were not so, the Statute of Frauds could never be enforced."

IRVING, J.A.

The first and more difficult point remains: Was there satisfactory proof of the mistake to justify the amendment?

It is always necessary to shew that there was an actual contract antecedent to the instrument which is sought to be rectified. A Mr. Bliss was authorized by Alfred Hall to obtain a loan, and he was authorized to execute a mortgage of his property. He applied through a firm of brokers, Chrimes & Jukes, who in turn applied to the plaintiff's solicitors, and an agreement was reached to advance the money, but by some blunder the mortgage was drawn with Mrs. Hall as mortgagor, Alfred Hall being joined as guarantor. Alfred Hall was informed by Mr. Bliss that the loan had gone through, and was asked if he himself would execute the mortgage, to which Hall replied: "No, you do it for me, under your power of attorney." There is no contradiction by Alfred Hall.

I would hold the evidence sufficient to justify the rectification, and dismiss the appeal.

GALLIHER, J.A.

GALLIHER, J.A.: I would dismiss the appeal.

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It is abundantly clear, upon the evidence, that Bliss had full authority to execute a mortgage on the lands in question in the name of the owner, Alfred Hall, and that it was the intention of all parties to charge these lands with the mortgage as against the owner. Alfred Hall was the owner, but by error his wife was named in the instrument as mortgagor, Alfred Hall being named as the party of the second part, presumably as guarantor for the payment of the moneys advanced, but with no covenant in the mortgage deed. What is sought here is to rectify the instrument, transposing the names of Alfred Hall and Bertha Fulton Hall, so that Alfred Hall becomes the mortgagor, and to have specific performance of the mortgage decreed. This transposition would make the instrument what it was originally intended to be as against Alfred Hall. The parol evidence is clearly admissible for this purpose, and since the Judicature Act (where the Statute of Frauds does not intervene, at all events), the Court can rectify the agreement and decree specific performance in the one action: see *Olley* v. *Fisher* (1886), 34 Ch. D. 367.

GALLIHER, J.A.

Mr. *Martin,* counsel for the appellants, contended that when rectification was made, the Court had before it a document partly written and partly dependent on oral testimony, and being so, the Statute of Frauds (which was pleaded) comes in and says you cannot enforce specific performance. The mortgage is an executed agreement, and as it stands, complies with the requirements of the Statute of Frauds. The Court here is not making a new agreement between the parties, but declaring what the written agreement between the parties is. It is true that conclusion is arrived at by the admission of oral evidence, but I do not think it is a case where the Statute of Frauds applies. *In re Boulter. Ex parte National Provincial Bank of England* (1876), 4 Ch. D. 241, is, I think, in point.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal is one from a decision of HUNTER, C.J.B.C. at the trial.

The action was one brought to rectify a certain mortgage upon real estate in the City of Vancouver, executed on the 1st of December, 1911, it being alleged that by mutual mistake of the parties to the action, the defendant Bertha Fulton Hall was in

the mortgage described as the mortgagor and the defendant Alfred Hall was described as the party of the second part, whereas Alfred Hall should have been described as the mortgagor and Bertha Fulton Hall as the party of the second part, the party of the first part being the plaintiff Fordham. The action was one, also, for foreclosure and possession of the lands. The defendants, who are husband and wife, severed in their defences and denied any mistake, advance of money under mortgage, authority in the attorney to execute the mortgage, and alleged that parol evidence was inadmissible to vary the mortgage, and pleaded section 4 of the Statute of Frauds.

The learned Chief Justice held that it was a case of mutual mistake and a proper case for rectification as claimed, and that in default of payment of the mortgage money, interest and costs, the defendants be foreclosed of and from all right, title and interest in the lands, and that the plaintiff do have possession of the lands.

The defendants join in an appeal to this Court, alleging that the learned trial judge erred in holding as he did, and that the evidence established (a) that the defendant Alfred Hall should have been the mortgagor, and that the defendant Bertha Fulton Hall should have been joined as guarantor thereof, and that by mistake Bertha Fulton Hall was named as the mortgagor and the defendant Alfred Hall the party of the second part, and that by further mistake the mortgage did not contain a covenant on the part of the defendant Alfred Hall to pay the mortgage money and interest, and denying that a case was made out for rectification—as if rectification was ordered and the defendant Alfred Hall be the mortgagor, and the defendant Bertha Fulton Hall the party of the second part as guarantor —in that the mortgage as executed was executed by and on behalf of the defendant Alfred Hall by his attorney (one Bliss), who also executed the mortgage for and on behalf of the defendant Bertha Fulton Hall—the power of attorney from the defendant Bertha Fulton Hall did not authorize any such guarantee; (b) that even if the evidence could support rectification, no order could be made directing the payment of the mortgage money and interest, and in default foreclosure by

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reason of section 4 of the Statute of Frauds; (c) that the evidence did not support the learned trial judge in his decision that the intention was that both defendants should be parties to the mortgage.

It was most strenuously and ably argued by Mr. *Martin,* and his argument was supported by a very careful citation of authorities, that no document can be rectified to the extent that the same be made good under the Statute of Frauds by the introduction of parol evidence, and change the legal effect of the document.

Upon the facts of the present case, however, in my opinion, no difficulty arises in applying an admittedly well-known principle, that being: that the Court will correct the mistake to carry out the real and manifest intention. Further, it is open to the Court, in an action for rectification, to admit of parol evidence being given to establish the nature of and the real intention of the parties. Malins, V.C. in *Welman* v. *Welman* (1880), 49 L.J., Ch. 736 at p. 741 said:

"Every case to be found in the books all go on this: although a vested interest may be acquired, yet if the Court is satisfied that a deed was executed in a form in which it ought not to have been, and not in conformity with the intention of the parties, it will, regardless of all interests acquired, and whatever the consequences to those who have acquired vested interests may be, put the deed into a proper form, and one which is in accordance with the intention of the parties. Therefore, I am not acting contrary to any case."

MCPHILLIPS, J.A.

In the present case, with rectification decreed, no vested or previously-acquired interests are at all affected. The Statute of Frauds is no bar, and in no way prohibits the Court in the exercise of its power of rectification in a proper case. *In re Boulter. Ex parte National Provincial Bank of England* (1876), 46 L.J., Bk. 11, was a case where is was held "that the bank, having advanced their money upon an agreement for the mortgage of certain houses, was entitled in equity to have the memorandum rectified so as to carry out the agreement, and that they must be treated by the Court of Bankruptcy as possessing a valid security upon the two houses." Bacon, C.J. at p. 13 said:

"In my opinion the whole argument has proceeded on an entirely erroneous principle. The Statute of Frauds in my judgment has no more to do with this case than Magna Charta has. The contract is plainly

proved between these people. It is a contract for advancing money, and that there should be a security upon certain property."

The facts of the present case, to my mind, are perfectly simple; the defendant Alfred Hall was advanced the money mentioned in the mortgage by the plaintiff; the land is rightly described; the mortgage is duly executed, as it happens, by the two defendants; but, unquestionably, the owner of the land to whom the advance was made was intended to be the mortgagor, but by error he is not so named, but is described as the party of the second part; and the party of the second part is not made a covenanting party in any way—unless it can be said that the proviso at the end of the mortgage supplies this deficiency, and it would, upon the facts of the case, be reasonable to so hold.

The rectification being made, *i.e.*, Alfred Hall's name being inserted in the place of Bertha Fulton Hall as the mortgagor of the first part, nothing more is necessary, as the mortgage is duly executed under seal, and the plaintiff becomes entitled to have the terms of the mortgage carried out, and the money advanced thereunder paid, or in default thereof, foreclosure, as one of the remedies available to the plaintiff.

In *Johnson* v. *Bragge* (1901), 70 L.J., Ch. 41, at p. 45, the Master of the Rolls (then Cozens-Hardy, J.) said:

"The instrument of August 6, 1865, is under seal. No further deed will be required. The deed, when rectified by inserting the few words needed to correct the blunder made by the solicitor friend, will be a perfectly valid appointment. The jurisdiction I am asked to exercise does not depend upon any doctrine peculiar to powers. When once the deed is made to accord with what I find to have been the real bargain and intention of all parties to it, no further relief will be needed."

MCPHILLIPS, J.A.

The distinction to be drawn from *Thompson* v. *Hickman* (1907), 76 L.J., Ch. 254, and the present case is this: in that case there was a previous agreement in writing and a deed following it, and Neville, J. held that where a deed has been executed in pursuance of and in conformity with a previous agreement in writing come to between the parties, the Court will not rectify the deed on the ground that due effect has not been given to the intention of the parties: see p. 258.

The present case is one where the mortgage—being the agreement entered into between the parties, and duly executed—does not give effect to the intention of the parties, and the aid of the

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Court is invoked to carry out the real intention of the parties. In Halsbury's Laws of England, Vol. 21, p. 21, we read:

"Although where a written contract is followed by a conveyance the conveyance may, on the ground of common mistake, be rectified so as to correspond with the contract (*Beale* v. *Kyte* (1907), 1 Ch. 564), yet when the two documents as executed correspond, common mistake will not, it seems, be sufficient ground for rectifying both."

And in the foot-note (a) reference is made to *Thompson* v. *Hickman, supra,* amongst other cases, reading:

"*Davies* v. *Fitton* (1842), 2 Dr. & War. 225: *May* v. *Platt* (1900), 1 Ch. 616; *Thompson* v. *Hickman* (1907), 1 Ch. 550, where Neville, J., at p. 561, said that the law was as stated in the text, but that he had great difficulty in following the reasoning on which the cases appear to be based. The above decisions were founded on the old equitable rule that the Court would not grant specific performance of a written contract with parol variation; but *quære* whether that rule should still prevail since the Judicature Act, 1873 (36 & 37 Vict., c. 66), s. 24 (7); see *Olley* v. *Fisher* (1886), 34 Ch. D. 367; *Shrewsbury and Talbot Cab and Noiseless Tyre Co.* v. *Shaw* (1890), 89 L.T. Jo. 274."

The course of conduct of the defendants in the present case well merits the application of the observations of Turner, L.J. in *Lincoln* v. *Wright* (1859), 4 De G. & J. 16, at p. 22 (124 R.R. 133):

"Having considered this case since the hearing, I am satisfied that the decree is well founded. Without reference to the question of part performance, on which I do not think it necessary to give any opinion, I think that the parol evidence is admissible, and is decisive upon the case. The principle of the Court is, that the Statute of Frauds was not made to cover fraud."

MCPHILLIPS, J.A.

The defendants, although both executing the mortgage—it is true by their attorneys in fact—attempt to escape liability, and relieve the land from an encumbrance which certainly was agreed to as security for the money advanced, and the money advanced was admittedly received by the defendant Alfred Hall.

In the notice of appeal which was given to this Court (the defendants acting jointly in the appeal), paragraph 1 reads as follows:

"That the learned judge misapprehended the effect of the evidence and that the real meaning of the evidence was that the mortgage in question was drawn up in pursuance of instructions, which were that the defendant Alfred Hall, who was the owner of the property, should be the mortgagor, and the defendant Bertha Fulton Hall should join in said mortgage as a guarantor of the amount of the mortgage money and interest; that by mistake the defendant, Bertha Fulton Hall, was made the mortgagor, and

the defendant, Alfred Hall was made party of the second part; and that by further error the said mortgage did not contain, as was intended, a covenant on the part of the said Alfred Hall to pay the said mortgage money and interest."

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Now, the above was the view of the evidence taken by the learned counsel for the defendants, and it was contended that no case for rectification was made out, as the attorney in fact for the defendant Bertha Fulton Hall was without authority to enter into any such guarantee, and in transposing the names, the defendant Bertha Fulton Hall would become the guarantor. That does not necessarily follow, nor do I find that the evidence establishes that the defendant Bertha Fulton Hall was to be the guarantor. The intention was to make her a party, along with her husband, to the mortgage.

It would certainly be the utilization of the Statute of Frauds to perpetuate fraud to be constrained to hold that the statute is a bar to relief, and that rectification is not permissible, upon the facts of the present case, and even as the defendants themselves view the facts. I would also think that, upon the facts, in any case an equitable mortgage was created which would entitle foreclosure being decreed—apart from rectification.

It is to be noted that no judgment has gone against the defendant Bertha Fulton Hall for the mortgage money, interest and costs.

MCPHILLIPS, J.A.

With regard to the question of costs, these, as is well known, under the law as we have it, follow the event unless the Court or judge shall, for good cause, otherwise order. The practice of the Courts, where complete discretion exists, has been to consider the conduct of the parties in awarding and disposing of the question of costs in cases of mistake and rectification of documents. The defendants, to say the least, have acted unreasonably and unjustly in refusing to correct the mistake, and resisting rectification. I therefore think that this case is not one for making any special order, but that the costs should follow the event.

In my opinion, and for the foregoing reasons, I see no ground upon which the decision of the learned Chief Justice should be

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disturbed, and it follows that the judgment appealed from should be affirmed, and the appeal dismissed.

Appeal dismissed.

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Solicitors for appellants: *Martin, Craig, Parkes & Anderson.*
Solicitors for respondent: *Martin Griffin & Co.*

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FARRELL v. THE "WHITE."

Admiralty law—Seaman's wages—"Lay," definition of—Within category of "wages" and not of "bonus."

FARRELL v. THE "WHITE"

A sailor who engages on a whaling voyage and is to receive a certain sum per month "and lay" (the term "lay" being set out in the ship's articles as an apportionment to the officers and crew of various amounts for various kinds of whales that are taken by the ship) may include the sum due him under "the lay" in an action for wages against the ship; the sum so due is not subject to forfeiture under a clause in the articles providing for the forfeiture of a "bonus" in case the seaman leaves his employment before the final termination of the whaling season.

ACTION for a balance due the plaintiff for wages as pilot on the whaling steamer "White." Heard by MARTIN, Lo. J.A. at Victoria on the 14th of October, 1914.

The plaintiff had hired at the rate of $50 per month "and lay," the amount of his wages being so entered on the ship's articles. "The lay" was set out in a printed table in the articles apportioning to the officers and crew various amounts for the different kinds of whales that were caught, and preceding this table the articles contained the following clause:

Statement

"Wages to be paid monthly, and bonus to be paid at the final termination of the whaling season, 1914. Should any of the persons signed on the articles leave the employment of the Canadian North Pacific Fisheries,

Ltd., or be discharged for insubordination before the final termination of the whaling season 1914, he shall forfeit all claims to a bonus."

The plaintiff voluntarily quit the ship's service at the whaling station at Naden Harbour, Graham Island, some time before the termination of the whaling season. He was there partially paid off, and an understanding was arrived at between himself and the manager of the station that he would receive his lay money upon his arrival at Victoria, he being given a statement that there was due him $60. Being refused payment in Victoria on arrival there, he brought this action for balance due for wages.

Statement

J. Percival Walls, for plaintiff.
Bodwell, K.C., for the ship.

29th October, 1914.

MARTIN, LO. J.A.: I reserved the question raised by this action for further consideration because of its wide application to seamen employed in various kinds of fisheries on this coast wherein it is customary to give lays. The plaintiff sued for a balance alleged to be due to him for wages as pilot on the whaling steamer "White," at the rate of $50 per month "and lay," so entered on the articles. The lay is set out in a printed table in the articles, apportioning to the officers and crew various amounts for various kinds of whales, that which the plaintiff is entitled to being $25 for each right whale, $10 for each sperm whale, $4 for each sulphur-bottom whale, $2 for each fin-back whale, and $1 for each hump-back. Preceding this table, the articles contain this printed clause: [already set out in statement.]

Judgment

At the end of the table of lays is this written notice: "Fireman and cook to receive $5 per month bonus at end of 'season.'" In the list of the crew given later in the articles, out of the 19 seamen who signed on in various capacities, 11 were to receive so much wages in cash per month "and lay," seven were to receive so much wages "and bonus," and the master was entered as under a "special agreement."

I decided at the trial that, on the facts, the plaintiff voluntarily signed off at the whaling station at Naden Harbour, Graham Island, on the 14th of July last, and that he was not

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entitled to his expenses of coming to the ship's home port at Victoria. But a further dispute arises from the fact that at the time he was paid off and signed off, he did so on the understanding with the manager of the station that he was to be paid his lay money on his arrival in Victoria, and he received a statement from the manager, dated the 13th of July, shewing that he was entitled to the sum of $60 for whales of various kinds captured during his service. This statement is addressed to the Company (Canadian North Pacific Fisheries, Ltd.) at Victoria, and begins: "As shewn by our pay-rolls, bonus and lay have been earned by W. Farrell, Pilot S.S. "White," for periods ending [particulars here]. Total $60." At the foot is this clause:

"NOTICE.—Stations will issue pay-rolls for amount of bonus earned as shewn on the statement. Pay-roll draft must be attached to the statement and sent to Head Office by mail. This account will be checked by head office and draft issued to employee at Victoria. This statement and draft must be sent direct to Victoria office and not given to employee."

This statement given to the plaintiff was probably a duplicate of that which would be sent to the Company's head office at Victoria. On his arrival at Victoria the plaintiff presented this statement at said head office, where he was informed that the matter would be referred to the master of the "White" for report, but the amount was not then paid the plaintiff, nor later, though he made at least one more demand for it, and, therefore, a refusal to pay must be inferred, and the right to recover is now contested.

Judgment

The difficulty arises from the use of the words "bonus" and "lay," and reliance for the plaintiff is placed upon the fact that a distinction is recognized and drawn both in the articles and statement between them, and that while the articles provide for the "forfeiture of claims to a bonus" in case of discharge for insubordination, or leaving the employment "before the final termination of the whaling season," yet no such consequences attach to a lay.

In Abbott's Law Dictionary a lay is thus, in general, defined, founded on the case of *Coffin* v. *Jenkins,* 3 Story, 108 (U.S. Circ. Ct.):

"A share of the profits of a fishing or whaling voyage, which is, by the

usages of those employments, commonly allotted to each officer and seaman, as his compensation, and in lieu of fixed wages. This custom does not create any partnership in the profits of the voyage. The lay is regarded, in Admiralty, as in the nature of wages for seamen in the common merchant service, and is governed, as respects forfeiture, by the same rules."

Lays were the custom in the British whale fishery from early times, and were, in that fishery, stipulated in the articles to be paid out of the produce of the voyage to be divided in certain proportions. It is stated in *Wilkinson* v. *Frasier* (1803), 4 Esp. 182, that the proportion of a common sailor was a one-hundred and ninetieth part. In that case it was decided by Lord Alvanley that—

"the share was in the nature of wages, unliquidated at the time, but capable of being reduced to a certainty on the sale of the oil, which had taken place: and that he should not therefore consider them [seamen] as partners, but as entitled to wages to the extent of their proportion in the produce of the voyage."

In *Perrott* v. *Bryant* (1836), 2 Y. & C. 61, a similar method of remuneration is described as "really only a mode of calculating the amount of the wages due to the dredgers from the owners of the boats."

In the case of such a lay as is now before the Court there was no occasion to wait till the end, or the produce of the voyage, to determine the share due thereunder, because it was liquidated at the time and set out in the table of lays, and therefore immediately upon the whales being brought into the station every man on the articles was entitled to credit on his wages for the amount of his lay. The test may be seen in this, that if after the whales had been brought to the station it had been destroyed by fire, so that the whales could not be utilized, nevertheless the crew had earned their lay, *i.e.*, their additional wages, and ascertained the amount thereof, though it would be otherwise if, *e.g.*, the lay were payable out of the proceeds of the oil, etc., from the catch.

Judgment

A "bonus," however, is of a fundamentally different nature. It is thus defined in the new English Dictionary:

"A boon or gift over and above what is normally due as remuneration to the receiver, and which is therefore something wholly to the good.

"(a) Money or its equivalent, given as a premium, or as an extra or irregular remuneration, in consideration of offices performed, or to encourage their performance; sometimes merely a euphemism for *douceur*, bribe.

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"(c) A gratuity paid to workmen, masters of vessels, etc., over and above their stated salary."

The first of the above clauses was adopted in *In re Eddystone Marine Insurance Company* (1894), W.N. 30, and it was held that the word "bonus" on share certificates was utterly inappropriate to their having been issued in satisfaction of a debt or other liability and, therefore, the holder of them was fixed on a list of contributaries as liable for the full value thereof.

It follows from the foregoing, I think, that the forfeiture clause should, under the articles and form of the lay thereby provided for, be restricted to what it in terms includes, *viz.*: a bonus, and not be extended to cover something of so different a nature as a lay, and consequently the plaintiff is entitled to judgment for the amount of his lay. It is desirable to note, since a lay had been held to be in the nature of wages, that it was on that ground that the several plaintiffs in the consolidated actions of *Miller et al.* v. *The Orion* failed to recover their lays when their actions for wages were dismissed in the trial immediately before the present case was called on, because the plaintiffs had been discharged for insubordination.

Judgment

Judgment for plaintiff.

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Criminal law—Evidence—Oath of Hindoo—Form of administering.

Where a witness, without objection, takes an oath in the form ordinarily administered to persons of his race or belief, it is binding, and he cannot afterwards be heard to say that he was not sworn.

Rex v. *Lai Ping* (1904), 11 B.C. 102, followed.

It is unnecessary that a witness be explicitly asked "if the oath in the form in which he took it is recognized by him as binding on his conscience" when there is no such word as "conscience" in his language; all that is required is to use such appropriate and equivalent terms as would bring home to the mind of the witness the fact that he was binding himself according to his moral sense to speak the truth (IRVING, J.A. dissenting).

Curry v. *The King* (1913), 48 S.C.R. 532, followed.

CRIMINAL APPEAL by way of case stated from GREGORY, J. and the verdict of a jury in a trial for perjury, held at the Vancouver Spring Assizes on the 26th of June, 1914. The charge was that Shajoo Ram, while appearing as a witness before the deputy police magistrate at Vancouver in a judicial proceeding wherein one Baboo Singh was charged with having broken a shop window, did falsely swear that he was not present at a meeting at the Sikh Temple, on Second Avenue in Vancouver, on the night of Saturday, the 10th of January, 1914. There was no evidence of the words that the magistrate put to the interpreter to be interpreted to the accused by way of administering the oath, and the magistrate was not called as a witness. Counsel for the accused consented to the admission of the transcript of the proceedings in the police court as evidence that it was in the course of a judicial proceeding that the alleged perjury had been committed, but not as evidence that the accused had been sworn. A Hindoo interpreter who was present at the proceedings before the magistrate, and one L. J. Ricketts, who acted as interpreter in the proceedings in question, were the only witnesses called to prove that the accused had been properly sworn in the police-court proceedings. The accused was called on his own behalf at the trial, and

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affirmed by putting up his hand. At the close of the case for the Crown, counsel for the accused asked to have the case taken from the jury, on the ground that there was no evidence that the accused had been sworn at the police-court proceedings. Leave was given to apply for a stated case later. The jury were then instructed, and they found against the prisoner. On the application for a stated case, counsel for the accused asked that the evidence of the Hindoo interpreter, taken in the police court, should be made part of the stated case. This was refused, but leave was given to appeal on the point. The questions submitted were:

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"1. Was there evidence that a proper oath had been administered to the accused in the police-court proceedings, in which perjury was alleged to have been committed, and was I right in charging the jury that there was such evidence?

"2. Was I right in refusing the application of counsel for the accused that the deposition of Gwyther taken in the police-court proceedings should form part of this case?"

The appeal was argued at Vancouver on the 9th of November, 1914, before IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

R. M. Macdonald, for appellant (prisoner): The accused gave evidence in a magistrate's court, and on this evidence he was tried for perjury. We contend that the evidence was not given under oath. There are three aspects of the case: (1), as to what took place in the police court by way of an oath at all, *i.e.*, as to administering an oath; (2), whether the facts established are such as to constitute an oath; and (3), assuming an oath was administered, is it a valid oath, in view of its not having been put by the stipendiary magistrate? The essence of an oath is an appeal to a man's idea of a God and future punishment. Unless there is an oath or affirmation, an essential of the offence of perjury is wanting: see Crankshaw's Criminal Code, 3rd Ed., 153. There must be an appeal to a Supreme Being under the sanction of religion: see *Attorney-General* v. *Bradlaugh* (1885), 14 Q.B.D. 667 at p. 696; *The Queen's Case* (1820), 2 Br. & B. 284; 22 R.R. 662; *Curry* v. *The King* (1913), 48 S.C.R. 532. We contend that if the prisoner is an infidel he cannot take an oath, and if he is a Christian he has not taken

an oath: see *Rex* v. *Ah Wooey* (1902), 9 B.C. 569; *Rex* v. *Lai Ping* (1904), 11 B.C. 102; *In re Collins* (1905), *ib.* 436; *Rex* v. *Lu Tuck* (1912), 19 Can. Cr. Cas. 471; *Reg.* v. *Moore* (1892), 61 L.J., M.C. 80. The mere fact that a man goes into the box and goes through some form of promise to tell the truth is not sufficient upon which to ground a charge of perjury: see *Rex* v. *Deakin* (1911), 16 B.C. 271. There must be some connection between the officer who is entitled to administer on oath and the witness. As to the necessity for an officer to be cognizant of what is taking place, see *The King* v. *Courtenay* (1808), 9 East 246 at p. 252; *Rex* v. *Phillips* (1908), 14 B.C. 194 at p. 199. The evidence is that an affirmation was the form of oath administered.

A. D. Taylor, K.C., for the Crown: We say the man was duly sworn; it was not an affirmation. If it cannot be supported as an oath, it cannot be supported at all. There is no statutory form of an oath: see *Reg.* v. *Southwood* (1858), 1 F. & F. 356. He was sworn before the trial judge in giving evidence on his own behalf in the same way as he was before the magistrate. The fact of raising his hand is an invocation to a power above: see *Curry* v. *The King* (1913), 48 S.C.R. 532. Such a form of oath as is binding on his conscience is sufficient: see *Rex* v. *Lai Ping* (1904), 11 B.C. 102 at p. 104; *In re Collins* (1905), *ib.* 436.

Argument

Macdonald, in reply.

IRVING, J.A. (oral): In this case I have reached the conclusion that there was no proper oath administered. There is no indication whatsoever of a Diety being invoked. That invocation is essential to constitute an oath. Therefore, the case, in my opinion, should be answered in favour of the prisoner.

IRVING, J.A.

It seems to me that this case shews a very loose and unsatisfactory way of doing business as permitted in the police court. It may take a little more time to do things properly and in order, but it is necessary that they should be done properly in order to be legal.

MARTIN, J.A.: In my opinion the learned judge of Assize was right in deciding, on the evidence, that a proper oath was

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administered in the police court. It is conceded that the witness was competent to take an oath. I pause here to say that there is no doubt that the words "You take your oath" were used, as will be seen by reference to the evidence, in which Ricketts, the interpreter, says what he told him was: "The oath that you take." So this clears up the doubt that was expressed by counsel for the prisoner as to whether the language really used was not "You eat your oath," suggesting that it was used advisedly, in accordance with some peculiar form of religious observance. It is clearly only an error of the stenographer.

I think in principle that this case is governed by the unanimous decision of the Full Court in *Rex* v. *Lai Ping* (1904), 11 B.C. 102, wherein all the four judges agreed (including Mr. Justice Duff, now of the Supreme Court of Canada, my brother IRVING, and myself), that an oath administered to a non-Christian Chinaman was properly administered, though all he did, after stating that he swore by burning a paper after writing his name on it, was to write his name on a piece of paper and burn the same while being told "that he was to tell the truth, the whole truth, and nothing but the truth, or his soul would burn up as the paper had been burned." There was in this, be it noted, no invocation of a Deity or Supreme Power, or statement that the witness's conscience was bound, yet the decision of the Court, given at p. 106, in the language of the Chief Justice, with whom all agreed, is as follows:

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> "It seems to me that when a man without objection takes the oath in the form ordinarily administered to persons of his race or belief, as the case may be, he is then under a legal obligation to speak the truth, and cannot be heard to say that he was not sworn. If we were to decide otherwise we would deprive the evidence given in a Court of Justice of the most powerful and necessary sanction which it is possible to give it, namely, the risk of a prosecution for perjury."

In the case at bar the prisoner said, through the interpreter, "I take my oath to tell the truth and nothing but the truth," and also held up his hand at the time of so doing. It was not disputed that this is the "form of oath ordinarily administered to persons of his race or belief," and that fact further appears by the case before us containing part of the evidence on the trial in the Assize Court, whereby it is shewn that the accused,

and present appellant, himself was again sworn in the same way, according to the "custom of his people," by putting up his hand and "affirming," as the interpreter loosely terms it, though he, of course, does not use that word in its real technical sense, as appears by his next remark: "He swears by putting his hand up. It is like affirming," and he says this is "the usual oath." Also, in answer to the learned judge, the interpreter stated that he had put the oath to the witness in such a way that it "would compel him to tell the truth." I attach no importance to the fact that the witness was not explicitly asked "if the oath, in the form in which he took it, was recognized by him as binding upon his conscience," because it is clear from the recent decision of the Supreme Court of Canada in *Curry* v. *The King* (1913), 48 S.C.R. 532, that it is not necessary so to do. I refer particularly to the judgment of Anglin, J. at p. 540. And in the case at bar such a question, in those exact words, could not have been asked or answered, because we are told by the two interpreters that there is no such word as "conscience" in the witness's language. Gwyther says:

"The word 'conscience,' well, I have never used it yet on a trial, and as far as I know, no one else knows how to put it to them. It is to be binding on them. It is to be binding on their conscience. It is one and the same thing. It is simply a translation of the one thing into the other."

In such circumstances, all that it was possible to do would be to use such appropriate and equivalent terms as would bring home to the mind of the witness the fact that he was binding himself, according to his moral sense, to speak the truth. There are many words in many languages which cannot be directly or exactly expressed by those in other language, but the law does not allow justice to be defeated by requiring the performance of formal or technical linguistic impossibilities.* Here the inter-

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*Note.—In the preface of Lieutenant Colonel Morgate, Bengal Staff Corps, to his translation of that remarkable book (now a standard text-book) entitled "From Sepoy to Subadar: being the life and adventures of a Native Officer of the Bengal Army written by himself" (New Ed., Calcutta, 1911), the translator says: "I have attempted to render into English the life and adventures of this native officer, and in so doing have often been obliged to give the general meaning, rather than adhere to a literal translation of many sentences and ideas, the true idiom of which it is almost impossible to transpose into English," thus, at p. 42, the author, speaking of his feelings at the siege of the Fort of Hassar, says, "My liver became like water," to which this note is appended: "For 'heart' in a metaphorical sense Indians usually say 'liver.' "—A.M.

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preter Ricketts says: "I asked him the best way I could if that was binding upon his conscience," and again: "I put it to him the strongest way I could," and, as he speaks the language well, what more would be expected? He said to the witness: "The oath that you take—is this binding on you?" and the witness replied that it was. Surely that can mean one thing, and one thing only—that it was clearly brought home to the witness that he was bound by his moral sense, *i.e.*, his conscience (though that word could not be exactly employed), to tell the truth, and if he did not, it would be wilful and corrupt falsehood. Accompanied, as this statement was, by the uplifting of the hand towards the heavens, a solemn and significant act, inseparable in such circumstances from an intention to invoke a Diety supposedly therein dwelling, and one for a great length of time associated with "the more ancient of the two forms known in modern proceedings, 'the adjuratory invocation of the Deity with uplifted hand commonly called the Scotch oath,'" as the Chief Justice of Canada puts it in *Curry* v. *The King, supra,* at p. 534, I have no doubt whatever that the conscience, as we call it, of the witness was duly bound. As the Chief Justice went on to say:

> "Having taken the oath in that form without objection it is an admission that the witness regarded it as binding on his conscience."

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It must be conceded that he was duly sworn according to the "form ordinarily administered to persons of his race or belief," because the evidence to that effect is uncontradicted, and, therefore, he could be convicted of perjury on this very oath which is here attacked if he were being tried in his own country, India, and yet it is said that he can escape that punishment on the same oath in this country! I confess I am unable to follow such reasoning. It is directly contrary to the decision in *Rex* v. *Lai Ping, supra,* which we are bound by, and which has been followed for ten years and never questioned. The suggestion that the valid oath of a witness somehow loses its efficacy to bind him because he happened to change his residence to some other part of the Empire places so great a premium on perjury that I feel it should receive no encouragement from this Court. In the judgment of Idington, J. in *Curry* v. *The King, supra,* at

p. 539, there is a paragraph, the last, which contains expressions peculiarly appropriate to this case:

"It is extremely desirable that men appearing as witnesses in our Courts and in such capacity taking any form of oath or making any affirmation, should understand they are, when wilfully and corruptly speaking falsely under any such circumstances, liable to be convicted of perjury, whatever may be their peculiar religious, mental or moral conceptions of the binding effect of the form of oath or affirmation."

With regard to the precautions taken by the magistrate, it appears to me that he took unusual care to satisfy himself by putting questions through the interpreter, in the way pointed out, to see that the oath he administered himself was properly put and that the conscience of the witness had as a matter of fact been bound, and two interpreters were used, *viz.*: Ricketts, and a check interpreter, Gwyther, who is a Government interpreter of Hindoo languages in the Canadian Immigration Department.

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GALLIHER, J.A. (oral): While I take the view that on the whole greater care should have been taken in this case in the administration of the oath, I am inclined to think that the oath was sufficiently administered.

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MCPHILLIPS, J.A. (oral): I agree with my brother MARTIN. I merely wish to add, in dealing with people who do not speak the English language, no matter what language it may be, there will always be difficulty perhaps in rightly conveying, in apt words of that foreign language, the true meaning of what is a first essential in a British Court of Justice, and that is, that all evidence should be preceded by an oath, or failing an oath, an affirmation, which is provided by statute.

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Now, in this particular case, upon the evidence, I consider the stated case furnished to us shews that sufficient care was taken to properly convey and have portrayed to the mind of the witness what he was bound to do, and that was to take an oath under the law as we have it. I am the more impelled to come to this conclusion when I find that this witness, when giving his evidence in the Assize Court, also was sworn in the same manner, and, apparently, was thought to have been sufficiently

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sworn there. It would seem to me that if we were to come to the conclusion that he was insufficiently sworn in the police court, we would have to conclude that, likewise, he was insufficiently sworn in the Supreme Court. I think that that would affect very seriously the administration of criminal justice—that there should be any requirement of a more strict nature than, apparently, followed out in the Supreme Court, and I think as well followed out in the police court. The whole question would be then: Did this witness come into the Court with the intention to take an oath which was binding upon him? And we have the natural response that would go with that—as it appears when he wished his evidence to be believed for the purpose of his exculpation, in the Supreme Court—he was sworn in like manner.

My conclusion, therefore, is, that the question should be answered in favour of the Crown.

Appeal dismissed, Irving, J.A. dissenting.

Solicitors for appellant: *MacNeill, Bird, Macdonald & Darling.*

Solicitors for respondent: *Taylor & Hulme.*

IN RE KERR AND GOLD.

Municipal law—Voters' list—Revision—Finality of—Supplementary list—Municipal Elections Act, R.S.B.C. 1911, Cap. 71, Secs. 16 to 21, 92, 93—Municipal Act, R.S.B.C. 1911, Cap. 170, Sec. 260.

When the validity of an election is questioned under section 92 of the Municipal Elections Act, if it appears that the voters' list had been prepared and revised in accordance with the formalities required by the Act, it will be taken to have been revised "in accordance with law," and the Court will not go behind the revision to inquire into the qualifications of the voters.

APPEAL from a decision of MORRISON, J. on the petition of Edward Gold for a declaration to avoid the election of James A. Kerr as reeve of the Corporation of South Vancouver on the 16th of May, 1914, on the grounds that the voters' list used at said election was not compiled, revised or certified to in accordance with law, and that it was changed after final revision. The facts are that the petitioner Gold was elected an alderman at the annual municipal election in January, 1914, but, owing to some question as to his qualification, he resigned, and ran and was again elected in March. In May the reeve resigned and Gold, resigning his office as alderman, ran for the office of reeve and was defeated by Kerr by 558 votes. The election was attacked on two grounds: first, that some 1,200 names were wrongly put on the list, and secondly, that a supplementary list, containing about twelve names of representatives of certain companies and churches within the municipality, was added to the revised list after the January election and used in the May election. The respondent raised the objection that, under section 92 of the Municipal Act, the list as revised and used at the January election could only be attacked by reason of corrupt practices or on the ground that the voters' list was not compiled, revised or certified in accordance with law, and that if, as was admitted, the list had been prepared and revised in accordance with the formalities required by the Act, the Court could not go behind

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the revision and inquire into the qualifications of each voter. The objection was sustained, and the evidence submitted was confined to the question of the addition of a supplementary list after the January election and to the votes actually polled therefrom, it being proved that three men whose names were on this list voted. It was held by the trial judge that there was no evidence of corrupt practice or undue influence, and as the votes from the supplementary list that were polled did not affect the general result of the election, the petition was refused. The petitioner appealed.

The appeal was argued at Vancouver on the 3rd and 4th of December, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Woodworth, for appellant: Section 21 of the Municipal Elections Act should be qualified by section 92. Twelve hundred names were put on the list that should not have been there, and Kerr's majority was 558. Even after the Court of Revision had settled the list, and after the first election, a supplementary list was added, containing the names of those who voted as representatives of certain churches and corporations. We should have been allowed, under section 92 of the Act, to shew that 1,200 names were improperly put on the revised list: see *Perry* v. *Morley* (1911), 16 B.C. 91. We contend that the adding of a supplementary list after the January election invalidates the subsequent election: see *The King ex rel. Black* v. *Campbell* (1909), 18 O.L.R. 269; *Re Hickey and Town of Orillia* (1908), 17 O.L.R. 317.

R. W. Hannington, for respondent: The only question is that of the supplementary list added after the first election in January, and there is only evidence of three votes being polled from this list. Under the Elections Act, as long as the principle laid down for the conduct of an election is complied with, no irregularity will avoid the election. In the *Morley* case, the election was set aside because the list was improperly compiled, but in the present case the Act was complied with, and in the absence of fraud the list, as revised, is final: see *McKenzie* v. *Martin* (1897), 28 Ont. 523. It was held in *Berthier Election*

Case (1884), 9 S.C.R. 102 at p. 118, that a judge should not upset an election unless he is satisfied beyond reasonable doubt that it is void. In *The King ex rel. Black* v. *Campbell, supra,* it was held there was no actual revision, as it was done on a Sunday.

Woodworth, in reply: By using the supplementary list a wrong principle was adopted, and the polling of three votes from that list avoided the election.

Cur. adv. vult.

7th December, 1914.

MACDONALD, C.J.A.: I think the appeal should be dismissed. It appears that the only thing which could be called a supplementary list was a list of not more than a dozen persons, who voted as representatives of certain companies and churches. With respect to those, I think it has not been sufficiently shewn that they were not entitled to vote as such representatives. But even if they were not entitled to vote, it is not suggested that there was fraud or intentional wrong in connection with their voting; and, as their votes did not affect the result, the petitioner cannot succeed because of their having voted.

MACDONALD, C.J.A.

The only question which caused me some doubt was the construction of section 92 of the Municipal Elections Act, which section appears to give the petitioner the right to question the validity of the election on the ground that the voters' list had not been revised "in accordance with law." Now, if the meaning to be given to that is that the Court may go behind the revision and inquire into the qualifications of the electors, then, of course, this Court would have to do that in this case. But it seems to me what was meant was that, given a list which had been prepared and revised with the formalities required by the Act, the list must be deemed to have been revised "in acordance with law," and once that appears, we are not justified in going behind that revision to inquire into the qualifications of the voters.

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

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MARTIN, J.A.: I agree. The only question before us for

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consideration is the list itself, because, on the facts, I take it there was no supplemental list and, therefore, the matter should be dealt with under sections 21 and 92.

Now, if section 21 stood alone, I do not think it could be seriously contended that we would have the power to consider the validity of the list which is before us at this election, because the language of that section is definite and certain. It provides that the list "shall be the list of qualified voters for that or any subsequent election." The use of the word "qualified" is peculiar, and of itself confers upon the voter his right to vote; that is to say, that language defines and limits that right, and, unless the exercise of the right could be assailed under section 92, in my opinion, it would be unquestioned.

Now, section 92 provides that, for four different causes, a person's right to vote may be questioned. First, on the ground it has not been compiled; second, not revised; third, not certified, "in accordance with law"; and fourth, that it has "been changed after final revision."

The formalities "in accordance with law," so specified, are found chiefly in sections 16 to 20. The word "compiled" there is not used in a technical sense, because that word is not used in any of the other sections that have been referred to, nor have I been able to find it in the Act itself. So that, I am of

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the opinion that the compilation intended is a progressive matter, and can well apply, and does apply, to the construction of the provisions under section 19, where the list is revised. After having been revised and "certified as correct" by the reeve and "closed on the 15th of December," then the Council proceeds to hear and determine all cases where it has been complained either that names of persons have been improperly placed on, or omitted from, the list. Not only that, but, also, any claims that other names should subsequently have been placed upon the list, by reason of the fact that their rights have accrued subsequently to the original revision, are also considered; and if such names are allowed, then, of course, they would appear upon the list. In that sense the list would be further compiled, not only in

that sense, but in a primary sense. Therefore, the expression "compiled," or "compilation," is meant to extend all through the proceedings. The revision of the list, then, would properly be made by that tribunal, and if that tribunal is properly constituted according to law, and sits on the day and at the times and places according to law, then the list is unassailable. So far as that is concerned, the same reasoning applies to certification. The final certification, under section 20, where the word "compilation" is not used, is to be by the clerk. If it could be shewn that there had not in fact been a certification or correct "making out" of the list, or that it had been "made out" by an official not entitled to do so, it would not be "certified in accordance with law," under the combined effect of sections 16 and 20, and, therefore, would be open to inquiry by this Court.

Then, in order to make provision for matters which might arise subsequently to that, and otherwise open to attack upon the ground of fraud, we have the reason for the appeal to this Court for interference. All of the formalities prescribed by the Act, if they have been complied with, in my opinion, give ample protection to the voter; we have the various stages, and the final provision in section 92 which would justify the interference of this Court upon the grounds mentioned. MARTIN, J.A.

We have it admitted here, in regard to the formalities which I have mentioned—giving the interpretation that I have given to the word "compiled"—that the proper tribunal has passed upon these matters, and has said that the final certificate has been issued according to law. It is not alleged that there has been any change after final revision, or, if alleged, it has not been proved as a matter of fact. In such circumstances, I am of the opinion that this view of the statute fully and adequately gives effect to both sections, and carries out the legislative intent; that is to say, that these earlier matters of domestic investigation and procedure antecedent to the final sitting of the tribunal provided in the Act, are not to be agitated in this Court.

I think the learned trial judge reached the right conclusion.

GALLIHER, J.A.: I agree the appeal should be dismissed. At an early stage of the argument, I was impressed with the GALLIHER, J.A.

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view that the formalities prescribed by section 92 of the Act had been complied with. Later in the argument I entertained some doubt with regard to the compilation of the lists. But, on further consideration of the different provisions of the Act, I reasoned it out in very much the same manner as has been expressed by my brother MARTIN. The Act provides that the clerk shall prepare the lists; that the reeve shall certify to them; that the Court of Revision shall sit, in order that names wrongly put on such lists may be removed, or that the names of those who have since become entitled to vote may be placed upon the lists. When those formalities are complied with, we have a completed list. Those latter steps, I think, are just as much a part of the compilation as what we might term the original compilation by the clerk. We find this provision followed by the directions contained in section 20 of the Act to the clerk, that he shall, immediately after the correction and revision of the lists, make out correct alphabetical lists. That section is followed by section 21, which provides that such lists, so revised and issued, shall be the lists of qualified voters. After looking more fully into the Act, the doubt I entertained with regard to the use of the word "compilation," as used in section 92, has been removed.

I think the learned trial judge was right.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree the appeal should be dismissed.

I think it may well be said that the trend of modern legislation has been to reduce, as much as possible, attacks upon voters' lists, in fact, to make such lists, at some definite time, impregnable. This is well portrayed by the language of the Act we have under consideration. It is accentuated particularly in section 21, where it is provided that the list, once used, is to be thereafter used throughout the year—throughout that time it has vital force. Highly anomalous would it be if this Court should determine the list invalid, and the statute—always speaking—require nevertheless that that list be used throughout the year.

Therefore, applying the well-recognized principle which governs Courts in their construction of statute law, we must

take the statute as a whole. Reading the statute as a whole, there is no difficulty in arriving at the conclusion the list cannot be successfully assailed. My brother MARTIN has, in detail, analyzed the different sections. I entirely agree with the view he has expressed. I think the legislative intent is well expressed in the statute.

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Appeal dismissed.

Solicitors for appellant: *Woodworth, Fisher & Crowe.*

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

THE HUMBOLDT v. THE ESCORT No. 2.

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THE HUMBOLDT v. THE ESCORT No. 2

Admiralty law—Salvage—Basis of remuneration—Derelict—Definition of.

The tug Escort No. 2 (with crew of 11 men, estimated value, $10,000) became disabled owing to a broken propeller on the 22nd of November, 1913, and was in such a position (a little to the S.E. of Hannah Bank, in the Sea Otter Group, Smith Sound) that in a short time she would, beyond reasonable doubt, have become a total wreck, had not the S.S. Humboldt (estimated value, $150,000; cargo, $150,737) come to her assistance. After an hour's manœuvring in a position of peril to an appreciable degree (being from one-half to three-quarters of a mile from a reef), she made fast to the Escort and took her in tow, bringing her to Alert Bay, a distance of about 50 miles, with a divergence from her course of about five miles. The heavy swell made it impossible to take the master and crew off the Escort, and they had, before the arrival of the Humboldt, made preparations to abandon her, take to their boat and make a hazardous trip of 15 miles to shore. In an action for salvage services:—

Held, the value of the services rendered should be estimated in the ordinary way and not on the basis of the tug being regarded as a derelict, as she was not abandoned at the time she was taken in tow. The award is $2,000.

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ACTION claiming compensation for salvage services, instituted on behalf of the owners, masters and crew of the S.S. Humboldt against the owners of the tug Escort No. 2. Heard by MARTIN, Lo. J.A. at Vancouver on the 30th of October, 1914.

C. B. Macneill, K.C., for plaintiff.
A. Alexander, for defendant.

23rd December, 1914.

MARTIN, Lo. J.A.: This is a claim for salvage services rendered to the tug Escort No. 2 (137.37 tons gross), which, on the 22nd of November, 1913, had become disabled owing to her propellor being broken, and had got into such a position (a little to the S.E. of Hannah Bank, in the Sea Otter Group, Smith Sound) that she would, beyond any reasonable doubt, in the state of the wind and tide, have become a total wreck within a very short time had not the S.S. Humboldt come to her assistance at 1.15 p.m., in response to her danger signals. The Humboldt finally took her in tow at 2.20, after an hour's manœuvring which placed the Humboldt in a position of peril to an appreciable degree, because when she did finally make fast to the Escort and take her in tow she was between half and three-quarters of a mile from the reef. Owing to the heavy swell it was then impossible to take the master and crew (consisting of 11 souls, all told) off the Escort, and they had, before the arrival of the Humboldt, made preparations to abandon her and take to their only boat and make the somewhat hazardous attempt to reach land at Cape Calvert, some 15 miles away, which was the most favourable point to reach in the circumstances.

Judgment

The Humboldt is a wooden steamship of 1,075 tons gross, valued at $150,000, with a crew of 46 men all told, and had 50 passengers on board and a cargo of $8,725, and gold bullion to the amount of $142,132. She towed the Escort to Alert Bay, about 50 miles distant, and the only safe port in the circumstances, at night, arriving there at 4 a.m. the following day, after being further delayed about three hours by fouling the hawser (which had to be cut out of the wheel) in bringing the Escort up alongside when nearing Alert Bay. In performing

this service the Humboldt did not have to diverge from her regular course more than five miles.

A conflict arose as to the value of the Escort and much evidence was given on both sides, and I have found difficulty in determining this often vexed question (as to which *cf. Dunsmuir* v. *The Otter* (1909), 18 B.C. 435; *The Vermont Steamship Co.* v. *The Ship Abby Palmer* (1904), 8 Ex. C.R. 446; *The Iron-Master* (1859), Swab. 441; *The Harmonides* (1903), P. 1; 9 Asp. M.C. 354; *The Marpessa* (1906), P. 14; and *The Hohenzollern, ib.* 339; 76 L.J., Ad. 17) and the conclusion that I can arrive at which is nearest to my own satisfaction is to fix her value at $10,000.

It was submitted that the Escort should, in the circumstances, be considered to be a derelict, as she was in a hopeless position and on the point of being abandoned by her master and crew, who were about to take to their boat when succour arrived, and, therefore, a large award should be given, a moiety being asked for, and the cases of *The Hebe* (1879), 4 P.D. 217, and *The Livietta* (1883), 8 P.D. 24, were cited in support of the submission. But they do not assist the plaintiff, because it was admitted that the respective vessels were in fact derelicts in each of these cases. I have been unable to find any authority in support of the contention that a vessel should be deemed to be a derelict before it has been abandoned. The general rule is stated in Lord Justice Kennedy's work on Civil Salvage, 2nd Ed., at pp. 61-2, where the cases are cited:

Judgment

"'Derelict' is a term legally applied to a thing which is abandoned and deserted at sea by those who were in charge of it, without hope on their part of recovering it (*sine spe recuperandi*), and without intention of returning to it (*sine animo revertendi*). It is in practice usually applied only to a vessel, but it might properly be used of cargo also apart from a vessel. The question whether a vessel is or is not to be adjudged a derelict is decided by ascertaining, not what was actually the state of things when she was quitted by her master and crew, but what were their intention and their expectation when they quitted her."

In the case at bar it is therefore clear that from no point of view could the Escort be regarded as a derelict, as there was no abandonment, and, therefore, I shall deal with the value of the salvage services in the ordinary way, and have decided to award the sum of $2,000 and the value of the damaged hawser, $270,

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as a fair remuneration therefor, deducting, however, the amount received from the sale of the damaged hawser, said amount to be proved by the affidavit of Max Kalish, at his company's expense, pursuant to his undertaking given in that behalf. Judgment will be entered accordingly, with costs.

Judgment for plaintiff.

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PATTERSON v. HODGES

PATTERSON v. HODGES *ET AL.*: ROWE, THIRD PARTY.

Practice—Third-party procedure—Claim to indemnify over—Summons for directions—Judgment on—Right of third party to cross-examine plaintiff—Affidavit of merits—Rule 174.

The filing of an affidavit of merits is a condition precedent to the postponement of the hearing of a defendant's application for an order for directions under Order XVI., r. 52, at the instance of a third party, in order to cross-examine a plaintiff on his affidavits.

APPEAL by third party from an order of MORRISON, J. at chambers in Vancouver on the 29th of June, 1914, made upon an application for judgment by the plaintiff under Order XIV., and an application by the defendants for directions under Order XVI., r. 52, against one W. J. Rowe, who had been served with third-party notice.

Statement

The Port Hammond Lumber Company, upon whose property Rowe held a mortgage for $12,000, went into liquidation on the 11th of November, 1912, the defendant W. E. Hodges being appointed liquidator. In February, 1914, Hodges entered into a written agreement with the plaintiff whereby he agreed to pay him a ten per cent. commission if he found a purchaser of the company's assets at the price of $22,000, and in the event of his (Hodges) making a sale himself at a less sum, he agreed to pay to him a minimum commission of $2,000. In the following month a further arrangement was made between

them whereby one G. W. Chatwin was to receive one-half the commission in the event of a sale. On March 25th, 1914, Hodges arranged for a sale of the property to the mortgagee Rowe, Rowe agreeing to indemnify Hodges against any claim the plaintiff might have for commission. The property was sold to Rowe, who in turn sold to one Hartwell for $22,000, Hartwell being one of the men with whom the plaintiff had negotiated previously as a prospective purchaser of the property.

The applications were heard together, and the Court ordered that the plaintiff be at liberty to sign final judgment against the defendants, and that the defendants sign final judgment against the third party. The third party, who had not filed an affidavit of merits, was, on application, refused a postponement of the hearing in order to cross-examine the plaintiff on his affidavits.

Statement

The appeal was argued at Vancouver on the 30th of November and the 15th and 16th of December, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Steers, for appellant: The applications for directions and judgment under Order XIV. were heard at the same time. As to the agreement between the third party and the defendants, this was not binding, as there was no consideration. In support of this, see *Stewart* v. *Rennie* (1835), 5 U.C.Q.B. (O.S.) 151; *McManus* v. *Bark* (1870), L.R. 5 Ex. 65. We have a right to cross-examine the plaintiff; this is particularly so in the case of a third party who is a stranger to the action.

Argument

Abbott, for respondent (Hodges): The defendants applied for directions under marginal rule 174. The third party must file an affidavit of merits before he can cross-examine the plaintiff; the procedure under rule 171 is controlled by rule 174. [He referred to *Ward* v. *Dominion Steamboat Line Co.* (1902), 9 B.C. 231; *Gloucestershire Banking Co.* v. *Phillips* (1884), 12 Q.B.D. 533; *Warren* v. *Pettingill* (1913), 25 W.L.R. 387; *Northern Trust* v. *Ross* (1895), 4 B.C. 253; *Bell & Co.* v. *Von Dadelszen* (1883), W.N. 208.] The third party must get past rule 174 before he can step into the

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defendant's place. On the application for directions the judge may, if he is satisfied there is a question to be tried, order the trial to go on, and as between the third party and the plaintiff he can allow the action to go on, the defendant dropping out: see *Coles* v. *Civil Service Supply Association* (1884), 26 Ch. D. 529; *Norris* v. *Beazley* (1877), 46 L.J., Q.B. 515; *Barton* v. *London and North Western Railway Co.* (1888), 38 Ch. D. 144 at p. 153.

Gillespie, for respondent (plaintiff): The third party is not before the Court until the order for directions is made, in which the third party's position is defined.

Argument

Steers, in reply: We are attacked on a contract of indemnity and irrespective of the rules, we have a substantive right to cross-examine the plaintiff that cannot be taken away from us by the rules: see *Fisher* v. *Keane* (1879), 11 Ch. D. 353; *Regina* v. *Toland* (1892), 22 Ont. 505 at p. 509. Even under the rules on procedure, the judge has no discretion to refuse the right to cross-examination: see *McGuire* v. *Miller* (1902), 9 B.C. 1.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal should be dismissed. Had an affidavit of merits been filed and an application made to postpone the hearing for the purpose of cross-examination upon the plaintiff's affidavits, and had that been refused by the learned trial judge, I should have been disposed to allow the appeal. I think every facility ought to be allowed to a defendant, when an application is made for speedy judgment, to elucidate the facts in his favour and to elucidate those facts, if he can, from the plaintiff's own mouth. However, the third party, occupying very much the position of the defendant in this case, has not chosen to put an affidavit on file that there is merit in his defence; hence, I think the refusal of the learned trial judge to allow him to cross-examine was not wrong.

IRVING, J.A.

IRVING, J.A.: I thought at the outset that there had been a denial of that natural justice which must govern in all cases before judgment can be entered against anybody, but in this case the third party, it seems, had an opportunity to file

affidavits and refused to do so. The general rule is to file all affidavits of all parties before you can proceed to cross-examine the opposing party. On reading rule 174 it seems plain that, when a judge is satisfied that there is a question properly to be tried, he may make such and such an order and, if not so satisfied, he may order judgment, as the nature of the case may require, to be entered in favour of the defendant against the third party. The judge in this case was not satisfied that there was a question to be tried. On reading the letter of the 25th of March, 1914, it appears that Rowe, the third party, wrote to Hodges, the defendant, this letter: "Referring to your letter of the 24th of March to Mr. Chatwin, promising him 5 per cent., and referring further to your letter of the 25th of March promising Patterson 5 per cent., now, in consideration of your agreeing to enter into the contract of even date herewith, I undertake and agree to carry out and perform the obligations contained in the said letters." Upon that letter, it seems to me that the third party had ample notice of the giving of this promise of 5 per cent. to Patterson of which he now complains, and I think there is the end of his case.

IRVING, J.A.

With regard to the other suggestion, resting on the contention that there was no consideration for this letter of the 25th of March, it appears to me that there is abundant consideration, namely, the consideration of a promise for a promise.

I would dismiss the appeal.

MARTIN, J.A.: I agree that the order of the learned judge below should not be disturbed. The third party has, in the present case, no ground for complaining of the refusal of the right to cross-examine. I agree, also, that merits should be shewn before he should get his right to cross-examine, but I take the suggestion, aptly presented by Mr. *Abbott*, that said merits might be shewn from material already before the Court on file, either by the plaintiff in his application or by the defendant in his opposition to it. That is to say that, if it should appear in this particular case, taking it as a concrete example, that the cross-examination of the plaintiff had disclosed that there was fraud and that he could not maintain his

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action, I think that the third party would be shewing merits by reference to such cross-examination; in other words, merits may be shewn either by affidavit or by material already on file. Here both these elements are wanting.

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GALLIHER, J.A.: At the moment I am not prepared to give judgment. The majority of the Court have intimated their view that the appeal should be dismissed. I see no reason why I should ask for the case to be reserved.

GALLIHER, J.A.

It seems to me that there was sufficient before the Court to entitle the third party to develop the fact of whether there was or was not fraud in the matter.

McPHILLIPS, J.A.: I am not prepared to state that the judge sitting as he was in this case—exercising discretionary authority—was not entitled to make the order that he did. It might well be that if I were sitting, exercising the same authority, I would not have made the order; yet I am not strong enough in my conviction to say that the judgment was not in accordance with the exercise of a proper discretion.

I may say there is express authority that in interlocutory motions there is no absolute requirement to make an order for cross-examination on affidavits. I might, as a passing remark, say that the proceedings under consideration were all interlocutory. In *La Trinidad (Limited)* v. *Browne* (1887), 36 W.R. 138, North, J. said:

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> "I cannot admit that the rules oblige me to order the attendance of a deponent for cross-examination."

I was very much impressed with the careful argument of Mr. *Abbott,* in which he fully elaborated the general principles governing directions in third-party proceedings, and the injustice of submitting the plaintiff to embarrassment when the matter to be determined was one wholly between the defendants and the third party, and that, as the third party did not satisfy the judge that as between the defendants and the third party there was a reasonable matter of defence to try, the order was, upon the facts, properly made.

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Therefore, on the whole, I am of the opinion that the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *Edwin B. Ross.*
Solicitor for respondent (Patterson): *W. D. Gillespie.*
Solicitor for respondent (Hodges): *T. J. Baillie.*

HAZELL v. CULLEN *ET AL.*

CLEMENT, J.

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Fraudulent assignment—Debtor and creditor—Advance by creditor on receipt of assignment to secure present advance and pre-existing debt—Validity of assignment—Fraudulent Preferences Act, R.S.B.C. 1911, Cap. 97, Secs. 3 and 4.

Where a creditor receives an assignment of certain assets from a debtor as security for both a present advance and a pre-existing debt, and it appears from the evidence that the present advance was made to enable the creditor to afterwards plead the validity of the assignment under section 4 of the Fraudulent Preferences Act:—

Held, that the assignment is invalid both as to the present advance and the pre-existing debt.

ACTION tried by CLEMENT, J. at Vancouver on the 25th and 26th of November, 1914, on an issue as to the validity of certain assignments by a debtor as against attaching orders taken out by creditors subsequently to the date of the assignments. One Lund, the debtor, to whom moneys were due by one Madam Gorman, made an assignment to the plaintiff on the 11th of April, 1914, in the shape of an order to his solicitor, into whose hands the fund in dispute had come, to pay to the plaintiff $5,500; a week later Lund, being advanced $700 by the plaintiff, made an absolute assignment to him of the whole fund with other assets, any balance over and above the amount due

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the plaintiff to be held by him in trust for Lund. Lund's creditors attacked the assignments within the 60 days specified in subsection (2) of section 3 of the Fraudulent Preferences Act, R.S.B.C. 1911, Cap. 94. The plaintiff contended that under subsection (1) of section 4 of the Fraudulent Preferences Act the assignment was valid as security for a "present actual *bona-fide* advance of money," also that under subsection (4) of the same section, the assignment should be upheld as "security given to a creditor for a pre-existing debt where, by reason or on account of the giving of the security, an advance in money is made to the debtor by the creditor in the *bona-fide* belief that the advance will enable the debtor to continue his trade or business and to pay his debts in full."

Ritchie, K.C. (*Alfred Bull,* with him), for plaintiff.
Gwillim, E. A. Lucas, and Findlay, for the several defendants.

23rd December, 1914.

CLEMENT, J.: At the trial I gave judgment in favour of the defendants in the first issue, with costs.

The second issue raises a question as to the validity of certain alleged assignments, made by one Lund to the plaintiff in the issue, of moneys due to Lund by one Madam Gorman, as against attaching creditors whose attaching orders are subsequent in date to such alleged assignments. An alleged equitable assignment of November, 1913, was set up, but I decided against the plaintiff's contention in this regard, as appears by the transcript of the proceedings at the trial. There remain to be considered two assignments, the first being in the shape of an order dated the 11th of April, 1914, by Lund, to Mr. D. W. F. McDonald, a solicitor of this Court, into whose hands, as Lund's solicitor, the fund in dispute had come, to pay thereout to the plaintiff in the issue $5,500, and the second being in the shape of an absolute assignment dated the 18th of April, 1914, by Lund, to the plaintiff of the fund, *inter alia.* The plaintiff's claim was therein stated at $8,395.41, and as to any moneys received by him under the assignment over and above his own claim, he was to be a trustee for Lund, his assignor.

Judgment

It is not disputed that these two assignments have been by

these proceedings attacked within the 60 days specified in subsection (2) of section 3 of the Fraudulent Preferences Act, R.S.B.C. 1911, Cap. 94.

On the facts, I have no hesitation in finding that they fall within the section, and must be held void against the defendants in the second issue, unless they can be brought within the saving grace of section 4. Under our statute, as under the similar statutes of Manitoba and Alberta (see Cassels's Ontario Assignments Act, 4th Ed., p. 16), "the preferential effect is fatal if the attack is brought within the 60 days"; and it becomes unnecessary, therefore, to consider questions as to the debtor's intent, the preferred creditor's concurrence in such intent, pressure, etc., which may still be open under the Ontario statute, as noted in Mr. Cassels's book. I may say, however, that the plaintiff has quite failed to satisfy me that he was unaware—in fact, I think he knew quite well—of the insolvent circumstances of Lund in the early months of 1914, before the assignments were made upon which he now relies. I think he also knew quite well and intended that the assignments to him would give him preference over the other creditors of Lund.

Mr. *Ritchie* contended that the assignment of the 18th of April, 1914, was, in part, "by way of security for" a "present actual *bona-fide* advance of money"; and that to the extent of such advance it should be upheld. He also contended that it was saved by the last clause of subsection (4) of section 4, as

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"a security given to a creditor for a pre-existing debt where, by reason or on account of the giving of the security, an advance in money is made to the debtor by the creditor in the *bona-fide* belief that the advance will enable the debtor to continue his trade or business and to pay his debts in full."

This last contention, if well founded in fact, would save the entire assignment. But, in my opinion, the facts are not as set forth in the clause already quoted. I do not think the plaintiff had any belief, *bona fide* or otherwise, if such a thing be possible, that his $700 advance would save the situation for Lund. I think he was willing to risk the $700 in order to enable this very contention to be afterwards advanced on his behalf.

This view of the facts is perhaps sufficient to dispose of the minor contention that the assignment should stand as to the

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$700 advance. It was not, in my opinion, a *bona-fide* advance upon the security of the assignment, but, as already intimated, an advance risked in the hope of saving an otherwise hopelessly futile transaction. Moreover, the proviso at the end of sub-section (1) of section 4 (if it applies) would invalidate the transaction even as to the advanced $700, as it can hardly be contended that there is any "fair and reasonable relative value" between $700 and an absolute assignment of a presumably presently available fund of some $12,000. But on the broader ground that the transaction was not, as to the $700 advance, "by way of security" within the meaning of the statute, I would be prepared to decide against the validity of the assignment even to the extent of the advance. The transaction was really an out-and-out purchase of what was thought to be a presently available fund. *Quoad* the $700 the assignment was absolute, and not, except in a technical sense, as security for the repayment by Lund of the $700 advanced to him by the plaintiff. My view of the facts and of the law in this regard may, perhaps, cover really the same ground.

The judgment, therefore, must be in favour of the defendants in both issues, and the plaintiff must pay the costs of these proceedings. There will be but one set of costs for each of the two sets of defendants.

Action dismissed.

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada or to the Judicial Committee of the Privy Council:

CHAMPION AND WHITE v. THE WORLD BUILDING, LIMITED, *et al.* (p. 156).—Affirmed by Supreme Court of Canada, 30th November, 1914. See 50 S.C.R. 382; 22 D.L.R. 465; 7 W.W.R. 1162.

CREVELLING v. CANADIAN BRIDGE COMPANY (p. 137).—Reversed by Supreme Court of Canada, 15th March, 1915. See 51 S.C.R. 216; 8 W.W.R. 619.

FALSE CREEK RECLAMATION ACT AND CITY OF VANCOUVER, *In re* (p. 453).—Affirmed by the Judicial Committee of the Privy Council, 3rd June, 1915. See 22 D.L.R. 117; 31 W.L.R. 678.

HOWARD v. MILLER AND NICHOLSON (p. 227).—Reversed by the Judicial Committee of the Privy Council, 6th November, 1914. See (1915), A.C. 318; 84 L.J., P.C. 49; 112 L.T.N.S. 403; 22 D.L.R. 75; 7 W.W.R. 627.

KOOP v. SMITH (p. 372).—Reversed by Supreme Court of Canada, 18th May, 1915. See 51 S.C.R. 554; 8 W.W.R. 1203.

REX v. SHAJOO RAM (p. 581).—Affirmed by Supreme Court of Canada, 15th March, 1915. See 51 S.C.R. 392; 8 W.W.R. 613.

Cases reported in 19 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:

COOK v. COOK (p. 311).—Affirmed by Supreme Court of Canada 2nd February, 1915. See 8 W.W.R. 512.

HAMMOND v. DAYKIN & JACKSON (p. 550).—Reversed in part by Supreme Court of Canada, 15th February, 1915. See 8 W.W.R. 512.

LOACH v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED (p. 177).—Affirmed by the Judicial Committee of the Privy Council, 26th July, 1915. See 23 D.L.R. 4; 32 W.L.R. 169; 8 W.W.R. 1263.

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2.——*Husband and wife — Contract — Liability of husband for goods supplied to the wife.*] The defendant's wife purchased goods from plaintiffs from time to time during three years to an amount of more than $1,000. The price of the goods was charged to the wife, who occasionally made payments on account. Finally this action was brought against the husband to recover a balance of account amounting to $346.75. The plaintiffs had no dealings with defendant until he issued a notice that he would not be responsible for his wife's debts, when they sought to fix the debt upon him. It was proven at the trial that defendant had always furnished his wife with sufficient money to clothe and feed herself and her children and that he knew nothing about the goods having been obtained from plaintiffs, and had expressly forbidden his wife to pledge his credit. *Held*, that the husband has rebutted the presumption placed upon him by law that he authorized his wife to purchase the goods. FINCH & FINCH v. MINNIE. - - - - - - - - **331**

CRIMINAL LAW — *Evidence — Oath of Hindoo—Form of administering.*] Where a witness, without objection, takes an oath in the form ordinarily administered to persons of his race or belief, it is binding, and he cannot afterwards be heard to say that he was not sworn. *Rex* v. *Lai Ping* (1904), 11 B.C. 102, followed. It is unnecessary that a witness be explicitly asked "if the oath in the form in which he took it is recognized as binding on his conscience" when there is no such word as "conscience" in his language; all that is required is to use such appropriate and equivalent terms as would bring home to the mind of the witness the fact that he was binding himself according to his moral sense to speak the truth (IRVING, J.A. dissenting). *Curry* v. *The King* (1913), 48 S.C.R. 532, followed. REX v. SHAJOO RAM. - - - - - - **581**

2.——*Practice — Evidence — Statements made to constable after arrest on a charge of burglary and after warning—Admissibility of on a trial for murder.*] The prisoner was arrested on a charge of burglary. After being given the usual caution he made certain statements to a constable; subsequently he was charged with murder, and on his trial the Crown sought to put his statements in evidence. *Held*, that the statements were admissible. REX *v.* VAN HORST. - - - - - - - - - - - - **81**

3.——*Practice — Evidence — Statement made to constable in answer to questions after arrest and after the usual caution—Admissibility of.*] A prisoner, arrested and given the usual caution, was taken by motor to the police station, where he arrived about five minutes after the caution. There he made a statement in answer to questions put by the police. *Held*, that the statement was admissible in evidence. *Regina* v. *Day* (1890), 20 Ont. 209, followed. REX v. WALLAGE. - - - - - - - - **97**

4.——*Seduction—Under promise of marriage—Words from which a promise of marriage may be inferred.*] On a charge of seduction under a promise of marriage the words, "Do you love me enough to live with me? I have enough money for two," are not capable of bearing the inference that there was a promise of marriage. REX v. SPRAY. - - - - - - - - - **147**

5.——*Stated case—Carnal knowledge of girl under 18 years by owner upon his own premises—Criminal Code, Sec. 217—Scope of—Federal statutes — Desirability of uniformity of decisions in different Provinces.*] The accused was charged with an offence against section 217 of the Criminal Code, which provides that "every one who, being the owner or occupier of any premises, ... induces or knowingly suffers any girl under the age of 18 years to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man, or generally, is guilty of an indictable offence. . . . ." There was no evidence that the accused had induced a girl within the prescribed age to be in the premises for the purpose of being carnally known by any man other than himself. *Held*, that the object of the section is to forbid the use of premises as assignation houses to which girls may be induced to resort, and it is not an offence, within the section, for the owner of the premises to induce a girl within the prescribed age to be therein for the purpose of himself having connection with her. *Rex* v. *Sam Sing* (1910), 22 O.L.R. 613, followed. The prac-

SURETY — *Discharge of — Building contract—Arrangement between building owner and contractor for extension of time for completion and increased remuneration — Custom.*] A surety is not discharged by dealings between the creditor and the principal debtor subsequently to the contract, which are manifestly to the advantage of the surety, or which are contemplated in the contract between the creditor and the principal debtor, or which do not amount to a binding contract founded on valuable consideration. *Per* MARTIN, J.A.: A surety may be bound by a term annexed by custom

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