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 XXI.

VICTORIA, B. C.
PRINTED BY THE COLONIST PRINTING AND PUBLISHING COMPANY, Limited
1916.

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.

MEMORANDUM

On the 9th of April, 1916, the Honourable Paulus Æmilius Irving, one of the Justices of the Court of Appeal, died at the City of Victoria.

TABLE OF CASES REPORTED

IN THIS VOLUME

TABLE OF CASES CITED.

A

B

K

L

M

S

RULES OF COURT.

August 30th, 1916.

HIS HONOUR the Lieutenant-Governor in Council, under the provisions of the "Supreme Court Act," directs that the Supreme Court Rules, 1906, be further amended as follows.

By Command.

G. A. McGUIRE,
Provincial Secretary.

ORDER XI.

That the following clause 8 be added to Rule No. 64 immediately after clause 7 thereof:—

"8. If in any pending action, suit, cause, or matter personal service of any summons, order, warrant, notice, or other document, proceeding, or written communication is required to be made on any party, the Court or a Judge may order and direct that such party shall be served out of the jurisdiction with such summons, order, warrant, notice, or other document, proceeding, or written communication so required to be served."

ORDER XXXIB.

That the following Rule No. 370U be added immediately after Rule No. 370T:—

"370U. The Court or a Judge may order the examination for discovery, at such place and in such manner as may be deemed just and convenient, of an officer residing out of British Columbia of any corporation party to an action, and service of the order and of all papers necessary to obtain such examination may be made upon the solicitor for such party, and conduct money may be paid to him, and if the officer fails to attend and submit to such examination, pursuant to such order, the corporation shall be liable if a plaintiff to have its action dismissed, and if a defendant to have its defence struck out and to be placed in the same position as if it had not defended. The preceding orders as to production and inspection of documents shall so far as practicable apply to any such examination, and such examination may be used in evidence at the trial, subject to the limitations set out in Rule No. 370R, relating to the examination of parties."

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

IN RE LAND REGISTRY ACT AND CLANCY.

COURT OF APPEAL

1915

Jan. 5.

IN RE LAND REGISTRY ACT AND CLANCY

Statute, construction of—Application to register conveyance—Power of attorney — Certified copy — Non-compliance with Act — Registration refused—Land Registry Act, R.S.B.C. 1911, Cap. 127, Secs. 77, 80, 81 and 84; B.C. Stats. 1914, Cap. 43, Sec. 24—Power of Attorney Act, R.S.B.C. 1911, Cap. 16, Sec. 6.

On petition for the registration of a conveyance, the Court will not review the registrar's exercise of discretion under subsection (7) of section 80 of the Land Registry Act unless he has refused, or has not in fact exercised his discretion.

APPEAL by the Registrar-General of Titles from an order of MORRISON, J. at Victoria on the 8th of December, 1914, directing the registration of a conveyance from one Margaret Quinn (by her attorney, W. J. Clancy) to Elizabeth Clancy. With the conveyance, when tendered for registration, was a certified copy of a power of attorney from Margaret Quinn to W. J. Clancy. This power of attorney was prepared in Port Arthur, Ontario, and sent to the State of Michigan, U.S.A., where it was executed by Margaret Quinn, the affidavit of the witness to

Statement

COURT OF APPEAL

1915

Jan. 5.

IN RE LAND REGISTRY ACT AND CLANCY

Statement

the execution being taken before a notary public for the County of Wayne in that State. The power of attorney was subsequently registered in the registry office at Port Arthur. A copy of the power of attorney, certified by the deputy registrar at Port Arthur, who stated that the original was registered in the registry office there, was then sent with the conveyance to Victoria, British Columbia, for registration. The application to register was refused by the registrar, under the power vested in him by section 24 of the Land Registry Act Amendment Act, 1914, on the ground that no acknowledgment or proof of the execution of the original power of attorney by Margaret Quinn, who was a married woman, was submitted, as required by sections 77, 80, 81 and 84 of the Land Registry Act, and section 6 of the Power of Attorney Act, also that the applicant had failed to comply with the requirements of section 84 of the Land Registry Act as amended by section 17, subsection (*b*), B.C. Stats. 1912, Cap. 15, as the original power of attorney was registered in a country other than that in which it had been executed.

The appeal was argued at Victoria on the 5th of January, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

H. C. Hanington, for appellant: If a certified copy of a power of attorney is to be accepted, satisfactory proof must be submitted that the original was properly executed, and the original must be executed and acknowledged according to the laws of British Columbia: see section 6 of the Power of Attorney Act, R.S.B.C. 1911, Cap. 16. The appeal depends on the construction to be placed on section 84 of the Land Registry Act, as amended by section 17, subsection (*b*), B.C. Stats. 1912, Cap. 15. The registrar held that the applicant had not brought himself within that section. The original was executed in Michigan and registered in Port Arthur, and the copy submitted was certified by the deputy registrar in Port Arthur. This is not in compliance with that subsection.

F. C. Elliott, for respondent: The power of attorney was prepared in Port Arthur and sent to Michigan for execution.

The copy, being certified by the deputy registrar in Port Arthur, is a compliance with the Act, as the subsection referred to contains the words, "or some other officer." This, it is contended, includes the deputy registrar at Port Arthur, but in any case the section does not apply here, as it only covers a case where the original would have to be registered in Michigan.

Hanington, in reply.

MACDONALD, C.J.A.: The only case in which a judge would review the action of the registrar would be that of the registrar refusing to exercise, or not in fact exercising, his discretion, which is not this case. I think, therefore, the appeal should be allowed.

MACDONALD, C.J.A.

It is quite clear that the provisions of the Land Registry Act have not been complied with, and that the registrar was right in refusing registration.

IRVING, J.A.: I agree.

IRVING, J.A.

MARTIN, J.A.: I agree. It is quite apparent to me that the laws of this Province demand that all instruments which are offered for registration in its land registries must conform to the requirements, and it is particularly desirable that this should be so, we having a system of indefeasible title. I do not think the case was made out with regard to the right to review the registrar's exercise of discretion under section 80 (7). But if it were, and if it were open to the learned judge to have reviewed it, then I think the learned judge, with all respect, wrongly reversed the decision of the registrar and it should be restored.

MARTIN, J.A.

GALLIHER, J.A.: I agree.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I agree.

MCPHILLIPS, J.A.

Appeal allowed.

Solicitor for appellant: *H. C. Hanington.*
Solicitor for respondent: *F. C. Elliott.*

COURT OF APPEAL

1915

Jan. 7.

NEWTON v. BAUTHIER: SHAW, ASSIGNEE.

Practice—Final order—Appeal—Motion to Court of Appeal to allow further evidence—Due diligence not shewn.

When it appears that by using due diligence, evidence sought to be admitted on motion before the Court of Appeal could have been procured for the hearing in the Court below, where a final order was made, the application will be refused.

NEWTON v. BAUTHIER

MOTION by the respondent (plaintiff) to the Court of Appeal from an order for leave to cross-examine one John J. Banfield upon two affidavits sworn by him and read on the application that resulted in the order from which this appeal was taken, and for a further order for leave to adduce before the Court, on the hearing of the appeal, further evidence in answer to said affidavits. The order appealed from was made on an application for payment out to the plaintiff of certain moneys paid into Court to the credit of the action, and the affidavits in question were filed and served by the respondents on the third and concluding day of the argument (October 1st). Counsel for the plaintiff (respondent) did not ask for an adjournment, and CLEMENT, J., who heard the application, allowed the affidavits to be read, and judgment was given forthwith ordering payment out of the moneys in question to the plaintiff. On the 5th of October following, the respondent's solicitors wrote the appellant's solicitors stating that the statements in Banfield's affidavits were incorrect, and in the event of an appeal he intended to take such steps as he could to bring the facts properly before the Court. On the 8th of December he again wrote asking that in the event of an appeal Banfield be produced for cross-examination, but the solicitors did not come to any agreement, and notice of appeal was filed, and served on the 10th of December. Respondent's solicitors took no further action in attempting to cross-examine Banfield on his affidavits, or to obtain further evidence before giving notice of this motion.

Statement

COURT OF APPEAL

1915

Jan. 7.

NEWTON v. BAUTHIER

The motion was heard by MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A. at Victoria on the 7th of January, 1915.

Casey, for the motion: This is an application to examine one Banfield, one of the defendant's witnesses, on his affidavits, and to adduce further evidence in answer thereto. In support of this, we refer to *Strauss* v. *Goldschmidt* (1892), 8 T.L.R. 239. The contention in this case is between Newton and Bauthier's assignee, Shaw. We contend the order made was not final.

Argument

E. A. Lucas, contra: The order made was a final order: see *In re Herbert Reeves & Co.* (1902), 1 Ch. 29; *Standard Discount Co.* v. *La Grange* (1877), 3 C.P.D. 67 at p. 71. The question is whether there is any further step to take in order to fix the status of the parties.

Casey, in reply.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the application. It now appears by the admission of counsel for the applicant that this is a final order. In such a case fresh evidence cannot be adduced except by leave of the Court. It is apparent to me that due diligence has not been shewn to obtain the evidence now sought to be put in. That being so, and there being no special circumstances to induce me to depart from the ordinary rule, it ought not now to be admitted.

IRVING, J.A.

IRVING, J.A.: I regret to say I must agree. In *Turnbull & Co.* v. *Duval,* before the Privy Council (1902), A.C. 429, an application was made for a new trial to let in newly-discovered evidence. The Privy Council refused the application, because they said if the appellants had taken the trouble to require an affidavit of documents before trial the evidence would then have been discovered.

MARTIN, J.A.

MARTIN, J.A.: I agree to the dismissal of the application. In regard to the question of slips of counsel, I only draw attention to what was said by this Court in *McEwan* v. *Hesson* (1914), 20 B.C. 94.

COURT OF APPEAL

1915

Jan. 7.

NEWTON v. BAUTHIER

GALLIHER, J.A.: I agree. I merely wish to say that I can scarcely bring my mind to think that this can be termed a slip of counsel, or, at all events, such a slip as counsel is entitled to relief against. A slip of counsel which is a slip against which he can obtain relief is governed largely by the circumstances. Here, apart from the slip of counsel in that sense, it seems to me in this regard to be against a cardinal principle that presents itself to counsel.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The slip rule is incapable, in my opinion, of being invoked by counsel. The line of action pursued by counsel is not to be relieved against save where something has occurred savouring of breach of faith or fraud. I agree that the application be dismissed.

MARTIN, J.A.

MARTIN, J.A.: In order to avoid any misunderstanding, I wish to say that I agree with what my brothers GALLIHER and MCPHILLIPS have said in considering that this was not a case of indulgence on account of a slip of counsel.

Argument

Lucas: Will your Lordships make the costs to us in any event of the appeal?

Casey: In view of the fact that we gave our learned friend notice immediately after we knew the facts, we submit that these costs should be costs to abide the result of the appeal.

Judgment

Per curiam: No, you have made a demand, but you were not entitled to what you were demanding. We think Mr. *Lucas* has been very moderate in asking that they be made the costs in the appeal, rather than forthwith, because, in our opinion, it should be the appellant's in any event.

Motion dismissed.

Solicitors for appellant: *Lucas & Lucas.*
Solicitor for respondent: *G. G. Duncan.*

GILBERT v. SOUTHGATE LOGGING COMPANY.

COURT OF APPEAL

1915

Jan. 5.

GILBERT v. SOUTHGATE LOGGING CO.

Practice—Court of Appeal—Application to postpone hearing until following sittings of Court—Appeal not set down.

Where notice of appeal has been given for a certain sittings of the Court for which the case has not been set down, the Court may postpone the hearing until the following sittings.

The proper practice is to apply to the Court for an extension of time, and then serve notice for the following sittings.

APPLICATION by the appellant (plaintiff) to the Court of Appeal to postpone the hearing of the appeal until the following sittings of the Court in Vancouver. The appellant had given notice of appeal for the January sittings in Victoria, but had not set the case down for hearing. Statement

The application was heard at Victoria on the 5th of January, 1915, by MACDONALD, C.J.A., IRVING, GALLIHER and MCPHILLIPS, JJ.A.

A. D. Macfarlane, for the application.

The respondent, did not oppose the application.

MACDONALD, C.J.A.: As counsel are in agreement that the order should be made, I see no reason why it should be refused. I think, however, the proper practice would be to apply to the Court for an extension of time and serve notice for the Vancouver sittings, then the proceedings would appear *ex facie* to be regular and in order. MACDONALD, C.J.A.

IRVING, J.A.: In my opinion we should let this go over to the Vancouver sittings. If notice of appeal is given, this Court has jurisdiction to deal with the case either at Victoria or Vancouver. IRVING, J.A.

GALLIHER, J.A.: That is the view I take. GALLIHER, J.A.

MCPHILLIPS, J.A.: I agree. MCPHILLIPS, J.A.

Order accordingly.

Solicitors for appellant: *McLellan, Savage & White.*

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

MACDONALD, J.

1915

Jan. 8.

VICK v. MORIN & THOMPSON.

VICK v. MORIN & THOMPSON

Negligence—Injury to infant of tender age—Contributory negligence—Intervening third party—Reasonable anticipation of danger.

The defendants in the course of construction of a steam-heater left a detached section thereof on the floor in the basement of a school which to their knowledge was, in inclement weather, used by the children to play in. The section being in the way of the children, the caretaker, under instructions from the school teacher, removed it from the floor and placed it with another similar section in an upright position against the wall. The section fell on a boy nine years of age and injured him.

Held, dismissing the action, that the defendants could not have been expected to take precautions to prevent an accident which could not reasonably have been foreseen by them.

Held, further, that the doctrine of contributory negligence does not apply to a child of tender years.

Gardner v. *Grace* (1858), 1 F. & F. 359, approved.

Statement

ACTION for damages for injuries sustained by the plaintiff, a boy nine years of age, through the alleged negligence of the defendants, tried by MACDONALD, J. at Grand Forks on the 10th of November, 1914. The facts are set out fully in the reasons for judgment.

M. A. Macdonald (*A. Macneil,* with him), for plaintiff.
Winn, for defendants.

8th January, 1915.

Judgment

MACDONALD, J.: Plaintiff on the 6th of January, 1914, was attending the public school at Phœnix, B.C. He was aged nine years and while playing in the basement of the school had his leg broken by an iron section of a steam-heater falling upon him. It appears that this piece of iron was about five feet in height and weighed over 500 pounds. It had been supplied by the defendants in the construction of a steam-heater, but shortly before the accident had been detached from the heater and remained on the floor for a time. It was then with another like section placed against the wall of the base-

ment in an almost perpendicular position. In view of the circumstances, this was an act of gross carelessness and most reprehensible, as what happened was most likely to occur. The children used this basement in cold weather as a playground. To my mind, it is immaterial as to exactly what caused the iron section to fall and in the excitement of his play, it is not probable that the plaintiff could recollect with any particularity the events that took place just prior to his being thrown to the floor. Even if he had taken hold of this section, having regard to his tender age and inexperience, I would not consider him to blame. In expressing this opinion as to such an infant plaintiff not being liable for contributory negligence in such circumstances, I am following the view of the law expressed in Ruegg, 8th Ed., and cases there cited, in preference to that in Mayne on Damages, 8th Ed., p. 83. I might state that one of the cases cited in Mayne in support of the statement that "it is now settled that the docrine of contributory negligence applies to infant plaintiffs" is questioned, if not expressly overruled, in *Clark* v. *Chambers* (1878), 3 Q.B.D. 327 at p. 339, where Cockburn, C.J. on this point, refers to *Mangan* v. *Atterton* (1866), 4 H. & C. 388, as "obviously in conflict with other cases cited." Channell, B. in *Gardner* v. *Grace* (1858), 1 F. & F. 359, says:

"The doctrine of contributory negligence does not apply to an infant of tender age."

Judgment

I do not think plaintiff did anything which it is unreasonable to expect such a child to do. Where then does the liability rest for the pain, suffering and expense consequent upon the accident? It was the duty of the board of school trustees to have the basement reasonably safe as a playground, but the action is not against the board. It is sought to hold the defendants liable, as having supplied the iron section which caused the injury and then carelessly leaving it in a place where such result might happen. Notwithstanding the strong contention to the contrary, I am quite satisfied that the defendants were the contractors for the installation of the steam-heater and as such supplied the section in question. Such a weighty piece of iron was not necessarily dangerous if allowed

MACDONALD, J.

1915

Jan. 8.

VICK v. MORIN & THOMPSON

to remain on the floor in the course of their work, or for a short time after it had been temporarily discarded. As soon as the children resumed the use of the basement after the Christmas holidays it became apparent that it was an inconvenience in the course of their play, but did not while in that position cause any injury. It was moved and placed against the wall so as to be a standing menace to the safety of the children. This was clearly an act of negligence, but, assuming that it was not done by a servant or agent of the defendants but by a third party, then are the defendants liable? Defendants were not called to give evidence on their own behalf and certain admissions made by them to the father of the plaintiff remained uncontradicted. They appear to have gone some length in such admissions, if they did not consider themselves to blame, but, on the other hand, their statements may have only been actuated by sympathy and the thought that although not to blame still they had supplied the material which, through the carelessness of another party, had caused the injury. Defendants as contractors only had a limited use of this basement, and after the holidays, except for repairs or adjustments to the steam-heater, the board had complete possession and control of such basement. They are not thus in the same position as the defendants in *Makins* v. *Piggott & Inglis* (1898), 29 S.C.R. 188. This iron section was not under ordinary circumstances something that might be considered dangerous to human life or limb. Defendants, however, knew that the basement was being used as a playground and the question is if the thing left might, in such circumstances be dangerous to the children? Considering its size, weight and shape, was it such an obstruction to the use of the playground that the defendants might reasonably expect its removal? "There can be no negligence unless there is a duty": Lord Dunedin in *Nocton* v. *Ashburton* (*Lord*) (1914), A.C. 932 at p. 964. Such a duty may arise in many ways. Even assuming that the defendants might expect that the section would be removed to give freer play to the children, still defendants doubtless would contend that they were not negligent because they might presume that in removal it would not be placed in such a dangerous position. Have the defendants a

Judgment

right to assume that such material would be properly disposed of? Was there a duty cast upon them to see that no danger was likely to result to those whom they were aware had the right to use the premises—that a thing, not inherently dangerous, might become so in any such manner as here occurred? It was certainly an obstruction, and one which would likely be speedily removed to some place near at hand. In *Clark* v. *Chambers, supra,* a barrier armed with spikes was placed by the defendant upon the road and moved by a third party to another portion of the highway, where the plaintiff was injured. While the instrument dealt with is not of a similar character to the one considered in this action, still the decision assists in determining the point as to the liability of a person obstructing a public or private place. Chief Justice Cockburn, at p. 338, refers to the liability of a party placing the barrier on a road as follows:

"A man who unlawfully places an obstruction across either a public or private way might anticipate the removal of the obstruction, by some one entitled to use the way, as a thing likely to happen; and, if this should be done, the probability is that the obstruction so removed will, instead of being carried away altogether, be placed somewhere near. . . . If the obstruction be a dangerous one, wheresoever placed, it may, as was the case here, become a source of danger, from which, should injury to an innocent party occur, the original author of the mischief should be held responsible. Moreover, we are of opinion that, if a person places a dangerous obstruction in a highway, or in a private road over which persons have a right of way, he is bound to take all necessary precaution to protect persons exercising their right of way, and that if he neglects to do so he is liable for the consequences."

Judgment

This quotation would absolutely govern the situation if the obstruction placed by the defendants in this playground were held to be a "dangerous one wheresoever placed."

In *Jackson* v. *London County Council and Chappell* (1911-12), 28 T.L.R. 66, 359, both the defendant council, which had the management or control of the school, and Chappell, who was employed to carry out certain repairs to the school, were held liable. In that case the contractor sent to the school a truck containing materials known as "rough stuff" and composed of four parts of sand and one part of lime with a little hair. The truck and its contents were left, at the suggestion of the caretaker, in a corner of the boys' playground.

MACDONALD, J.

1915

Jan. 8.

VICK v. MORIN & THOMPSON

When the school re-opened after the Christmas holidays, the headmaster noticed the truck and gave instructions to the caretaker to have it removed, as he considered it dangerous. The caretaker telephoned to the contractor asking him to remove it, but he did not do so. At the close of the school in the afternoon as the boys were leaving, the truck, which had been left unguarded, tipped over and one of the boys threw a portion of the contents and injured the eyes of the plaintiff. The action had been tried before a judge and jury and the trial judge expressed great doubt as to whether there was any evidence of negligence fit to go to the jury. He instructed the jury (p. 67) "that they must be reasonably satisfied that the accident which happened was one which might reasonably have been anticipated by the defendants and guarded against." It was a question of degree and it was difficult to say, when near the border line on which side the case fell. It was more a question of fact than of law. Judgment having been given for the plaintiff against each of the defendants, the matter came before the Court of Appeal for consideration. Lord Justice Vaughan Williams stated that the jury had found, in substance, that the accident was one which might have been anticipated from the mere fact of leaving the truck where it was. He held that the jury had also found that such truck was dangerous on account of being left where it might have been a convenient plaything for the boy. Reference was made to the fact that the schoolmaster had recognized the truck as a source of danger. No particular reference was made to the contents of the truck being dangerous while in the playground, on account of the nature of the mixture.

Judgment

In *Cooke* v. *Midland Great Western Railway of Ireland* (1909), A.C. 229, the defendant company was held liable through permitting children to go on its premises and play with a turntable which was in a dangerous condition. The House of Lords held that under the peculiar circumstances there was evidence of negligence to go to the jury. The article thus allowed to be used by the children was in itself dangerous, and the decision does not to my mind assist the plaintiff in this action. It is contended, however, that from the remarks of

Lord Macnaghten in this case, referring to *Lynch* v. *Nurdin* (1841), 1 Q.B. 29, the section in question, left as it was, should be considered a "nuisance." This contention is entitled to considerable weight, but I do not think should be accepted.

In *Bailey* v. *Neal* (1888), 5 T.L.R. 20, a child aged nine and a half years left school and while trying to clamber on a roller standing on the street near the school got his fingers caught in the wheels in consequence of another boy tampering with the shafts of the roller. Defendant was held not liable, but in that case great precautions had been taken to secure the roller and keep it in place.

As to the removal of the section, Barnes, the schoolmaster, gave instructions to the caretaker on account of its inconvenience to the children. He was a favourable witness for the defendants, and while he did not give specific evidence as to how the removal of this particular section took place, he accepted the responsibility of having placed the other section against the wall in like position. He seemed disposed to have the Court draw the inference that the section which caused the injury was moved by the caretaker under his instructions, though he could not be certain in this connection. It was stated that the caretaker was in attendance at the trial, but he was not called as a witness by the defendants.

Assuming that the section in question was placed against the wall by the schoolmaster or the caretaker, could the defendants expect that such a careless act would have been performed and were they required on that account to take precautions to prevent an accident occurring? Was such an act "of a sort that might have been foreseen and very easily prevented?" I do not think so. If the section had been left on the floor, as far as the evidence discloses, it would only have been an inconvenience and not a danger to the children while engaged in play. It only became dangerous through the neglect of some third party who did not purport even to act on behalf of the defendants. The accident to the plaintiff is to be regretted, but, in my opinion, the action should be dismissed. This does not preclude the plaintiff from bringing action against any other person or persons in connection with his

Judgment

MACDONALD, J.
1915
Jan. 8.

injury. Defendants are entitled to their costs, but if their sympathy towards the plaintiff and his father is the same as at the time when the boy was in the hospital, then they may be inclined to forego such costs.

VICK v. MORIN & THOMPSON

Action dismissed.

MORRISON, J.
1915
Jan. 11.

HALPIN v. CORPORATION OF THE CITY OF VICTORIA.

Negligence—Injury to child—Fireworks display—Municipal Act, B.C. Stats. 1914, Cap. 52, Sec. 161.

HALPIN v. CITY OF VICTORIA

Under section 161 of the Municipal Act the City authorities contributed towards the expenses of a fireworks' display. While the display was in progress an infant escaping from her parents approached within range of the fireworks, and was struck by an ignited fragment and injured.

Held, that the City was not liable for the injuries sustained.

ACTION tried by MORRISON, J. at Victoria on the 17th of December, 1914, for damages sustained by a child through the alleged negligence of the City of Victoria. The City (empowered under section 161 of the Municipal Act) contributed to the expenses of fireworks at Beacon Hill on the 25th of May, 1914. The entertainment was in charge of a committee of citizens called the "Celebration Committee," who raised funds for the entertainment and arranged with Messrs. Hitt Brothers, a firm who make a specialty of fireworks, to supply the material and conduct the fireworks display. This firm sent a competent employee, under whose control the display was given. The child, who was with her parents, eluded them, and getting too close to the fireworks was struck by an ignited fragment and sustained injuries.

Statement

McDiarmid (*Phelan,* with him), for plaintiff.
T. R. Robertson, for defendant.

11th January, 1915.

MORRISON, J.: The plaintiff is an infant and brings this action by her next friend, William Halpin, her father.

Beacon Hill park was entrusted to the City of Victoria, by grant dated the 21st of January, 1882, for the purpose of using and maintaining it for the recreation and enjoyment of the public. For many years this park has been used by the citizens of Victoria, especially for celebrating what was known as the Queen's birthday. In order the more adequately to effect this purpose, it has been customary for certain citizens to form themselves into a "Celebration Committee," which assumed the task and responsibility of managing the celebration and raising funds to defray the expenses incurred for any extra features deemed necessary for catering to the enjoyment of the public. One of these features, on the occasion in question, was a display of fireworks by Messrs. Hitt Brothers, who, from the evidence, appear to be a well-known reputable firm who make a specialty of this sort of entertainment. Pursuant to the arrangements made with this firm by the committee, they sent a competent employee, under whose sole control the display was given on the evening of the 25th of May, 1914, which was the annual date set aside for perpetuating the celebration of the Queen's birthday. The plaintiff, accompanied by her parents, had, together with a large concourse of people, assembled to witness the fireworks. Policemen, mounted and on foot, patrolled the immediate grounds on which the fireworks were shewn. Portions of this area were roped off, and where there were no ropes mounted police endeavoured to keep back the spectators. The plaintiff seems to have got away from her parents a short distance and, as I find as a fact, got within range of the spluttering piece which was then being displayed, whereby she was struck by an ignited fragment and sustained the injuries in respect of which she now claims damages from the defendant.

Judgment

Mr. *McDiarmid,* for the plaintiff, contended that the defendant must be held to have conducted the exhibition, because, pursuant to by-law, it contributed towards the celebration

MORRISON, J.

1915

Jan. 11.

HALPIN v. CITY OF VICTORIA

fund. This it was empowered by the Legislature to do: see section 161 of the Municipal Act. That being so, it seems to me counsel must logically go further and contend that this power to contribute carries with it an implied obligation to conduct the celebration and to assume the responsibility therefor. Even in that case, the right of action would only arise in a case of negligence such as this is upon a breach of duty to exercise due care in the circumstances. Assuming that view to be sound, I find as a fact that due care was so exercised by the defendant.

Mr. *McDiarmid* also strove to apply the principle of *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330. I think that the facts in this particular case preclude the application of the principle in *Rylands* v. *Fletcher*.

Judgment

Assuming I am wrong in that view of the law, I am of opinion that the City did not conduct the celebration and are no more liable to the plaintiff than are the others who contributed to the committee's fund. It follows then the action is dismissed.

Action dismissed.

IRVING AND MORRIS v. BUCKE.

COURT OF APPEAL

1915

Jan. 7.

IRVING v. BUCKE

Practice—Application to Court refused—Cannot be reheard by another judge of same Court—Judicial comity.

Where a judge of the Supreme Court makes an order refusing an application, the remedy is, in general, by appeal, unless leave be given to renew it.

APPEAL from an order of HUNTER, C.J.B.C. at Vancouver, dismissing defendant's application to open up a judgment entered in default of appearance. The writ was issued on the 3rd of July, and judgment was entered in default of appearance on the 11th of July. This was done pending an application to set aside the writ on the ground that the address of the plaintiffs was not given. When this came on for hearing it was adjourned, and consolidated with an application to set aside the judgment. On this application coming on, and after two adjournments, it was dismissed in the absence of the defendant. Defendant then applied to CLEMENT, J. to reopen and was refused. He later applied to HUNTER, C.J.B.C. to set aside the judgment. The application was refused, and defendant appealed.

Statement

The appeal was argued at Victoria on the 7th of January, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

E. A. Lucas, for appellant: The application was not fully heard and disposed of on the merits before CLEMENT, J., so that the cases of *Hallren* v. *Holden* (1914), [20 B.C. 489]; 7 W.W.R. 462; and *In re Holt* (1880), 16 Ch. D. 115, do not apply. We are entitled to have the case reopened *ex debito justitiæ*. The address of the plaintiffs was not on the writ, and judgment was signed for a liquidated sum when it was not a liquidated demand, but a claim under an agreement for sale of land: see *Leader* v. *Tod-Heatly* (1891), W.N. 38.

Argument

J. W. de B. Farris, for respondents: The whole question

COURT OF APPEAL

1915

Jan. 7.

IRVING v. BUCKE

is whether the case was finally disposed of before CLEMENT, J. The appellant now bases the appeal on the ground that it was not a specially indorsed writ, but that is a matter which was finally disposed of at the first hearing.

Lucas, in reply.

MACDONALD, C.J.A.: I think the appeal must be dismissed on the ground that the matter ought not to have come before Chief Justice HUNTER at all. The matter was really disposed of so far as the Supreme Court was concerned by the order of CLEMENT, J. and it was not competent to the party defeated in that application to apply to another judge of the same Court.

I do not put it on the ground of *res judicata* because that is a doctrine which I think may not be applicable to some classes of interlocutory applications. It can, however, be safely put on the ground of judicial comity, though I am far from saying that once an order is made refusing an application that is not an end of it so far as that Court is concerned. Before the Judicature Act it was the practice in England in a certain class of cases, such as *habeas corpus,* to apply to successive judges, but I think the practice required that the judges should be judges of different Courts. This practice is referred to in my judgment in *In re Tiderington* (1912), 17 B.C. 81, but since the Judicature Act, when a judge of the Supreme Court makes an order refusing an application, the remedy (if any) is, in general, by appeal unless leave be given to renew it.

MACDONALD, C.J.A.

IRVING, J.A.: I agree with the Chief Justice—that the appellant ought not to have gone before Chief Justice HUNTER after Mr. Justice CLEMENT had refused to deal with the matter. The practice on *ex parte* proceedings and of reconsideration are dealt with in rules 738 and 739.

IRVING, J.A.

MARTIN, J.A.: I concur. The appeal herein, instead of being taken, as it should have been, to this Court from Mr. Justice CLEMENT, was, in fact, endeavoured to be taken before another judge of the same Court, which is not lawful. I agree also with what the Chief Justice has said

MARTIN, J.A.

COURT OF APPEAL

1915

Jan. 7.

IRVING v. BUCKE

with regard to the practice in these matters of canvassing different judges of the same Court.

GALLIHER, J.A.: I concur.

MCPHILLIPS, J.A.: I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Lucas & Lucas.*
Solicitors for respondents: *Farris & Emerson.*

DANA AND FULLERTON v. THE VANCOUVER BREWERIES, LIMITED.

MORRISON, J.

1914

Dec. 4.

COURT OF APPEAL

1915

Jan. 13.

DANA v. THE VANCOUVER BREWERIES, LTD.

Landlord and tenant—Lease—Liquor licence—City by-laws for improvements—Covenant by lessor to make improvements to retain licence—Repairs not made—Licence cancelled—Refusal by lessee to pay rent—Action by lessor to recover.

By an indenture of lease made in 1905, the plaintiffs' predecessors in title demised to the defendant a hotel licensed to sell liquors for a term of ten years. The lease contained a covenant by the lessor to enlarge and improve the premises from time to time in compliance with any by-laws or regulations passed by the City of Vancouver with relation to premises for which liquor licences are granted. Prior to July, 1913, a by-law was passed by the City requiring the premises of hotels licensed to sell liquors to be enlarged and improved in certain particulars. The plaintiffs did not make the improvements required and in July, 1913, the renewal of the liquor licence was refused. In an action to recover two months' rent due on the 15th of December, 1913:—

Held, that the lease does not in terms nor by implication provide against the contingency of the licence being cancelled. The non-renewal of the licence had not the effect of putting an end to the lease and the defendant was therefore liable for the rent.

Grimsdick v. *Sweetman* (1909), 2 K.B. 740, followed.

MORRISON, J.

1914

Dec. 4.

COURT OF APPEAL

1915

Jan. 13.

DANA v. THE VANCOUVER BREWERIES, LTD.

Statement

APPEAL by defendant from the decision of MORRISON, J. in an action tried by him at Vancouver on the 1st and 2nd of December, 1914, for rent of a hotel and licensed premises. On the 15th of November, 1905, the then owner leased the premises to the defendant Company for a term of ten years. He subsequently sold subject to the lease, the plaintiffs eventually becoming the owners on the 2nd of February, 1912. There was a covenant in the lease that the lessor should make such enlargements, additions and improvements to the premises as might be required from time to time by the city by-laws to hold the licence. In the forepart of 1913 the law governing licensed houses was materially changed, requiring many important improvements and enlargements of such premises. The necessary changes were not made on the premises by the plaintiffs and the licence was not renewed in July, 1913. The defendant Company then refused to pay rent and the plaintiffs brought this action. The defence put forward was that the plaintiffs not having complied with the law as to enlarging and improving the premises, and the licence not having been renewed in consequence, the rent set out in the lease was not payable. The learned trial judge was of opinion that the parties did not contract on the basis of the continued existence of a liquor licence for the premises, and the rent was due and payable. The defendant Company appealed on the ground that the evidence established that the parties contracted on the basis of the continued existence of the liquor licence for the premises in question and that the learned judge erred in finding that the lease did not in terms nor by implication provide against the contingency of the licence being cancelled.

C. B. Macneill, K.C., for plaintiffs.

S. S. Taylor, K.C. (*Stockton*, with him), for defendant.

4th December, 1914.

MORRISON, J.

MORRISON, J.: I do not think the parties herein contracted on the basis of the continued existence of a liquor licence for the premises in question: *Taylor* v. *Caldwell* (1863), 3 B. & S. 826 at p. 838. The lease does not in terms nor by implica-

MORRISON, J.

1914

Dec. 4.

COURT OF APPEAL

1915

Jan. 13.

DANA v. THE VANCOUVER BREWERIES, LTD.

tion provide against the contingency of the licence being cancelled: *Grimsdick* v. *Sweetman* (1909), 2 K.B. 740 at p. 747. The case advanced by the defence is not in my opinion a sufficient answer to the claim for rent.

There will be judgment for the plaintiffs with costs on the Supreme Court scale.

The appeal was argued at Victoria on the 13th of January, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Harvey, K.C., for appellant: The lessor was to make all improvements required to hold the licence and it was on account of their not making the improvements that the licence was not renewed and we are therefore excused from paying rent. The licence not being renewed, the whole substratum of the lease is gone and there is an implied covenant that when they do not do their duty we are released from paying rent: see *Taylor* v. *Caldwell* (1863), 3 B. & S. 826; *Krell* v. *Henry* (1903), 2 K.B. 740; *Nickoll & Knight* v. *Ashton, Edridge & Co.* (1901), 2 K.B. 126; *Grimsdick* v. *Sweetman* (1909), 2 K.B. 740; *Chandler* v. *Webster* (1904), 1 K.B. 493; *Elliott* v. *Crutchley, ib.* 565.

Argument

C. B. Macneill, K.C., for respondents: The appellant must distinguish the case at bar from *Grimsdick* v. *Sweetman* (1909), 2 K.B. 740 before he can succeed. He paid rent for three months after renewal of the licence was refused. He can use the hotel for anything else; an "unlicensed hotel," for instance: see *Blum* v. *Ansley* (1900), 16 T.L.R. 249; *Newby* v. *Sharpe* (1878), 8 Ch. D. 39; *Hart's Trustees* v. *Arrol* (1903), 6 F. 36; *In re Arthur. Arthur* v. *Wynne* (1880), 14 Ch. D. 603; Halsbury's Laws of England, Vol. 18, p. 572.

Harvey, in reply: We say it was by reason of the structural changes not having been made as required under the new by-law that the renewal of the licence was refused.

MACDONALD, C.J.A.: I think the appeal should be dismissed.

MACDONALD, C.J.A.

IRVING, J.A.: I agree. The case of *Herne Bay Steam Boat*

IRVING, J.A.

MORRISON, J.

1914

Dec. 4.

COURT OF APPEAL

1915

Jan. 13.

DANA v. VANCOUVER BREWERIES, LTD.

Company v. *Hutton,* one of the Coronation cases, reported in (1903), 2 K.B. 683, seems to me more like this than the case of *Krell* v. *Henry, ib.* 740 on which Mr. *Harvey* relies. In the *Steam Boat* case, the ship and crew were engaged for the purpose of attending the naval review, at which the King was to appear, and also for a day's cruise about the Fleet. On an action brought to recover the balance that was due, the plaintiffs were held entitled to recover, because the attending of the naval review was not the sole reason for the contract, there had not been a total failure of consideration, or a total destruction of the lease.

MARTIN, J.A.

MARTIN, J.A.: I think the learned judge below has rightly relied on the *Grimsdick* case, which cannot be distinguished in principle from this. The question of compensation for loss of licence does not alter the principle.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I entirely agree with the judgment of the learned judge in the Court below and in my opinion the case is clear beyond controversy. If it was intended there should be any warranty of the continuance of a licence that covenant should be contained in the lease.

The only provision for the abatement of rent is the one with regard to fire. With regard to the covenant to do certain work, if that was not done by the lessor when it should have been done, there would be the right of action for damages, but because there may be a right of action for damages that in no way puts an end to the lease.

An interesting case upon the question here argued that we should import an implied condition is *Erskine* v. *Adeane* (1873), 8 Chy. App. 756. Sir G. Mellish, L.J., at pp. 763-4, said:

"The common law of England is distinguished from the law of almost all other countries by the fact that it does not imply contracts and agreements to anything like the same extent, but generally obliges those who make contracts to insert in those contracts all the stipulations by which they intend to be bound. No doubt there are cases in which obligations

may be implied, but as a general rule the man who wishes to have a particular stipulation for his benefit must take care to have that stipulation inserted in the contract. I see no reason why this particular obligation should be excepted from what I consider to be the general law."

In the language of Lord Justice Mellish, "I see no reason why this particular obligation should be excepted from what I consider to be the general law." The rent is clearly payable. The appeal should be dismissed.

Appeal dismissed.

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

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

REX v. MAY.

Criminal law—Evidence—Adverse witness—Crown discrediting its own witness on criminal trial—Comment by trial judge on failure of accused to rebut testimony—Canada Evidence Act, R.S.C. 1906, Cap. 145, Sec. 9.

A brother of the accused, who had made a statement to the police (taken down in writing) identifying certain clothing as belonging to the accused, was called as a Crown witness on the trial, when he failed to identify the clothing. Counsel for the Crown then applied to cross-examine him as a hostile witness, under section 9 of the Canada Evidence Act, but his application was refused; later counsel for the Crown was allowed to read to the jury the statement previously made by witness to the police, and the trial judge, in his charge, referred to it as being in evidence, but advised the jury not to base a finding on the statement so admitted.

Held (IRVING, J.A. dissenting), that the Court must find the witness is adverse before evidence is allowed to prove that the witness made at other times a statement inconsistent with his present testimony, and it being highly probable that the jury was greatly influenced by the writing in question, there should be a new trial.

A direction to the jury on a criminal trial that the accused had failed to account for a particular occurrence to which, by reason of the testi-

COURT OF APPEAL

1915

Feb. 9.

REX v. MAY

mony adduced against him, the onus was cast upon him to answer, is not a comment upon the failure of the accused to testify, and does not contravene section 4 of the Canada Evidence Act.

CRIMINAL APPEAL by way of case stated by CLEMENT, J. on a trial for murder. The accused was found guilty at the Prince Rupert Assizes on the 8th of December, 1914. The Crown called as a witness a crippled brother of the accused. This witness had previously made a statement to the police, in which he said that the accused came home on the morning (shortly after midnight) and slept with him (witness) in the same bed. At that time he wore only his trousers, underclothes and boots. Earlier in the night, when he went out, he wore a shirt, and witness identified one produced by the police as the one so worn by the prisoner. At the trial he was unable to identify the shirt, and counsel for the Crown then applied to cross-examine him as a hostile witness but the application was refused. The coat and hat of the accused, as well as a pocket-book with his name written in it, together with other writing, were found near the body of the murdered man. The shirt was found some distance away from the scene of the murder, on a trail. The witness who found the shirt remembered having purchased one like it for the accused sometime before. The learned trial judge charged that the evidence of the crippled brother should be treated as only proving that the trousers were the property of the accused and that his evidence did not tend to prove that the shirt was the shirt of the accused although evidence was properly allowed in that on another occasion the witness did recognize the shirt as that of his brother's, but that there was, however, other evidence and it was for the jury to decide whether the shirt was in fact the shirt of the accused. There was no proof offered of the handwriting in the pocket-book. The learned judge, in his charge, commented on the fact that the accused had failed to account for a particular occurrence to which, by reason of the testimony adduced against him, the onus was cast upon him to answer. The questions of law reserved for the opinion of the Court were as follow:

Statement

"(1.) Was there error in law in the course pursued at the trial in

reference to the testimony of Joseph May or any part thereof?

"(2.) Does the charge to the jury contain any comment on the failure of the accused to testify in his own behalf upon his trial?"

COURT OF APPEAL

1915

Feb. 9.

REX v. MAY

The appeal was argued at Victoria on the 21st of January, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

D. S. Tait, for the accused: Counsel for the Crown was allowed to read a statement made by the witness May (a brother of the accused) to the police that had not been put in as an exhibit: see *Reg.* v. *Little* (1883), 15 Cox, C.C. 319. May was cross-examined thoroughly, and the trial judge found that he was not "hostile." The term "adverse" is not to be taken as meaning "hostile." In this regard, see *Price* v. *Manning* (1889), 42 Ch. D. 372; *Greenough* v. *Eccles* (1859), 5 C.B.N.S. 786; 28 L.J., C.P. 160; *Rice* v. *Howard* (1886), 16 Q.B.D. 681. As to whether the judge's charge amounted to a comment that the prisoner did not give evidence on his own behalf, see *Rex* v. *Aho* (1904), 11 B.C. 114; *Reg.* v. *Coleman* (1898), 2 Can. Cr. Cas. 523; *Rex* v. *McGuire* (1904), 9 Can. Cr. Cas. 554; *Allen* v. *Regem* (1911), 44 S.C.R. 331; *Ex parte McIntyre* (1909), 16 Can. Cr. Cas. 38.

Argument

Maclean, K.C., for the Crown: The witness was the accused's brother; he made a statement identifying a certain shirt as his brother's and later, in the box, said he did not know the shirt. The statement was allowed to be read to impeach the witness's credit and was used for that purpose only: see *Melhuish* v. *Collier* (1850), 15 Q.B. 878; *Oldroyd's Case* (1805), R. & R. 88; *Reg.* v. *Jerrett et al.* (1863), 22 U.C.Q.B. 499 at p. 520.

Tait, in reply: The *Melhuish* case was before the statute, and the case of *Rice* v. *Howard* (1886), 16 Q.B.D. 681, is in our favour.

Cur. adv. vult.

9th February, 1915.

MACDONALD, C.J.A.: The questions submitted are as follow: [already set out in statement.]

The second question should be answered in the negative.

MACDONALD, C.J.A.

Turning to the record of the proceedings to which the learned judge has referred us, and upon which the answer to the first

COURT OF APPEAL

1915

Feb. 9.

REX v. MAY

question must depend, it will be found that the learned judge was applied to by Crown counsel for permission to examine the witness Joseph May as an adverse witness under section 9 of the Canada Evidence Act, though called on behalf of the Crown. The learned judge thought that although there was nothing to lead him to say that the witness had proved adverse, yet, in order to decide that question, he might receive the evidence of a previous statement alleged to be at variance with an answer the witness had just given in the box. The propriety of that course appears to me to depend upon the strict legal construction to be placed on the section in question, which is in derogation of the common law. As I read the section, it is made a condition precedent to the admission in evidence of a previous contradictory statement by the witness that he should, in the opinion of the Court, have proved adverse. Coleridge, C.J., in *Rice* v. *Howard* (1886), 16 Q.B.D. 681, refused to look at an affidavit which was alleged to contain a statement by the witness in that case at variance with his then testimony for the purpose of deciding the question of the witness's hostility. On appeal to the Queen's Bench Division the judgment below was sustained on other grounds, and while the Court declined to express a final opinion upon the question now before us for decision, Grove, J., with whom Stephen, J. concurred, nevertheless said (55 L.J., Q.B. 311 at p. 312):

MACDONALD, C.J.A.

"With regard to the first point, as to rejection of evidence in not looking at the affidavit in order to ascertain if the witness were hostile, the great difficulty seems to be that in order to satisfy the judge of the witness's hostility counsel would have to put in the very evidence which he wanted to prove his right to use. Upon this point I entertain considerable doubt. It has not been decided whether, when a witness does not appear to be hostile, the judge can look into other matters to shew that he is hostile."

Several other cases were referred to during the argument, but in none of them was the precise point now under consideration decided. It cannot, I think, be doubted that the question of the witness's hostility is one to be decided in the presiding judge's discretion. If he has exercised that discretion we cannot, sitting as a Court of Criminal Appeal, review his finding. Here the learned judge has made it plain that he did not, and as he thought, could not, from anything which was at the

time before him, decide whether the witness had proved adverse or not. In other words, he made it plain that he had not exercised the discretion vested in him, but determined to admit the alleged contradictory statement before coming to an opinion as to whether the witness had proved adverse or not. If my view be correct, he admitted a writing which, but for the statute, would be inadmissible, and which under the statute would only be admissible when he had come to the conclusion that the witness had proved adverse. I think, therefore, that the first question must be answered in the affirmative.

I then come to consider the application to the circumstances of this case of section 1019 of the Code. It was contended by counsel for the Crown that even if the writing were improperly admitted, yet the learned judge, by the following instruction, sufficiently warned the jury against paying attention thereto:

"I think you should treat the evidence of that cripple [Joseph May] as only proving this fact: that is, that the trousers were the property of the accused. With regard to his identification of the shirt, I think Mr. *Peters* is right in saying that his evidence does not tend to prove that the shirt is the shirt of the accused. It simply proves that in the box before you, where he was subject to cross-examination, he was not prepared to identify the shirt. It was given in evidence, properly, I think, under the Code, that upon another occasion he had stated that he did recognize the shirt as being his brother's, but I do not think that should lead you to decide the case upon any finding upon his testimony, that the shirt was the shirt of the accused. There is, of course, other evidence, and the weight of that is for you to decide, which goes to substantiate that fact, that the shirt that was found there on the trail, was, in fact, the shirt of the accused."

MACDONALD, C.J.A.

There is nothing in this to warn the jury that the improperly-admitted evidence must be discarded by them. Naturally, the learned judge did not intend so to instruct them, because he told them that the writing was properly admitted. His warning was as to the weight to be attached to the evidence of Joseph May. His instruction did not, in my opinion, go far enough. The jury should have been told that the writing was not properly before them at all, and was not legal evidence of the facts it purported to relate, that they must discard it altogether—not that "I do not think that [the writing] should lead you to decide the case upon any finding upon his testimony, that the shirt was the shirt of the accused."

In the absence of such sufficient warning it must appear

COURT OF APPEAL

1915

Feb. 9.

REX v. MAY

highly improbable that the jury was influenced by the writing: *Ibrahim* v. *Regem* (1914), A.C. 599 at p. 616.

I think it highly probable that the jury was greatly influenced by the writing in question, and that, hence, the conviction should be set aside and a new trial ordered.

IRVING, J.A.: The question how far a party is at liberty to discredit his own witness—and in what way—has been a subject of dispute for many years. Section 9 of the Canada Evidence Act, R.S.C. 1906, Cap. 145, represents section 3 of the Imperial Criminal Procedure Act, 1865 (28 & 29 Vict., c. 18), which re-enacted section 22 of The Common Law Procedure Act, 1854 (17 & 18 Vict., c. 125).

The section and the following one are not happily arranged.

Section 3 suggests a doubt that you cannot contradict a witness called by you, even if hostile, unless you get a ruling from the judge that he is hostile. That is not the law, and was not the law in 1859, when *Greenough* v. *Eccles*, 5 C.B.N.S. 786, was decided. Williams, J. says at p. 802, that you might contradict him by other evidence relevant to the issue, although you could not discredit him by general evidence of bad character, and he adds (p. 803):

> "This right to contradict your witness by other evidence relevant to the issue is not only established by authority, but founded on the plainest good sense."

IRVING, J.A.

When the leave to cross-examine has been obtained, the 10th section applies.

Now, what took place was this: The police, before the trial, had obtained from the brother of the prisoner a written statement, and he had also been examined in the police court, and when this brother went into the box he was, at the outset, asked if he previously had not made a different statement to that which he was now making with reference to the way in which he (the prisoner) had spent the afternoon. Mr. *Peters* took the objection that the witness could not be cross-examined until he had shewn his hostility in open Court and the judge's leave obtained; and that until such leave had been obtained it was impossible for the previous statement or depositions to be put in. The learned judge thought that one way to prove the witness's hostility was

to look at the depositions, and he did so, and came to the conclusion the difference between the two statements as to that particular point was immaterial. The examination proceeded, and the witness was shewn various articles of clothing, which he identified. These, it is not disputed, were the prisoner's. He was then shewn a shirt, and was asked if that was his brother's, to which question he replied at first, "No," and then said: "I don't know." The following then occurred:

"Now ask him if he remembers telling the police at the police office up at Hazelton that that was John May's shirt?

"Mr. *Peters*: Now, my Lord——

"The Court: That question, so far, is all right.

"Mr. *Peters*: Now, he puts the question, does he remember telling that it was so and so?

"The Court: Well, perhaps the proper form of the question would be 'did you ever at any time make a different statement.' [Argument.]

"The Court: Well, if it is necessary, I will consider a special case, but I am quite clear. How am I to be guided in considering whether the man is hostile or no? He may keep a most placid demeanour in the box——

"Mr. *Peters*: This man must be acquitted or convicted upon the evidence given in this Court, and not by statements made out of Court.

"The Court: No, that is quite true.

"Mr. *Peters*: By getting this evidence in, you are trying this man, not on the evidence given in this Court, but by statements outside.

"The Court: No. Surely I can tell the jury that that is not evidence, but I have to be satisfied as to the man's hostility. How am I to be satisfied?

"Mr. *Peters*: By his demeanour.

"The Court: No, I do not think so. At all events, I am going to allow this question, so far. Ask him if he made at any time, a different statement." IRVING, J.A.

The Crown counsel then put the question, giving time and place, and later on the Crown used the paper in contradicting him, and also called two other witnesses to contradict him.

I break off here to repeat what I have already said, on the authority of Williams, J., that it was open to contradict him by these other two witnesses without leave of the judge. In his address to the jury, counsel for the Crown read to them the statement made by the witness to the police.

In the course of his summing up, the learned judge said:

"Before speaking of the evidence as presented at the place of the crime, there are two or three matters that perhaps I had better dispose of. Very strong objection has been made to the reception of the testimony of the

COURT OF APPEAL

1915

Feb. 9.

REX v. MAY

brother of the accused. It is a harrowing thing in any criminal trial, particularly in a murder trial, where one brother is called upon to give evidence against another. And in this case, I think you should treat the evidence of that cripple as only proving this fact: that is, that the trousers were the property of the accused. [Let it be noted that the trousers were not referred to in the written statement.] With regard to his identification of the shirt, I think Mr. *Peters* is right in saying that his evidence does not tend to prove that the shirt is the shirt of the accused. It simply proves that in the box before you, where he was subject to cross-examination, he was not prepared to identify the shirt. It was given in evidence, properly, I think, under the Code, that upon another occasion he had stated that he did recognize the shirt as being his brother's, but I do not think that should lead you to decide the case upon any finding upon his testimony, that the shirt was the shirt of the accused. There is, of course, other evidence, and the weight of that is for you to decide, which goes to substantiate that fact, that the shirt that was found there on the trail, was, in fact, the shirt of the accused."

The prisoner was found guilty, and the learned judge reserved for the opinion of this Court the question:

"Was there error in law in the course pursued at the trial in reference to the testimony of Joseph May or any part thereof?"

The question includes: (1) the allowance of the cross-examination of the witness; (2) the contradiction of the prisoner's sworn testimony (a) by the production of the statement, and (b) by the proof of the two witnesses; (3) the right of counsel for the Crown to read it in his address; and (4) the direction of the judge with reference to the evidence. In my opinion, the cases establish that the proper way to determine the question of the witness's hostility is by his conduct in the box, and that Mr. *Peters's* objection—that the learned judge was putting the cart before the horse—was well taken; but, nevertheless, eminent judges have adopted the same method that the learned judge adopted in this case, *e.g.*, Bramwell, B. in *Amstell* v. *Alexander* (1867), 16 L.T.N.S. 830, where that learned judge thought that although the witness had displayed no animus he was nevertheless adverse, and allowed the witness to be contradicted after being informed of the different statement. That was a *nisi prius* decision, and the case does not seem to have gone further. Again, in the case of *Rex* v. *William Smith* (1909), 2 Cr. App. R. 86 and 106, tried by Lord Coleridge, J., where a boy—the prisoner's son—gave evidence on the trial at variance with a previous statement made by him to the police, the learned judge,

IRVING, J.A.

having become cognizant of the statement, allowed the counsel for the prosecution to treat the boy as hostile, and to refer in his address to the jury to the fact of the statement and the witness's variance from it.

The appeal in this last case, heard before Alverstone, L.C.J., Darling and Jelf, JJ., was dismissed, the judgment saying (p. 107):

"The fact that the boy was allowed to be treated as a hostile witness really made no difference to the case."

Apparently the contradictory proof by the constables in that case, having regard to the charge, was sufficient to uphold the prosecution.

Now let us again turn to the direction to the jury. The judge referred to the fact that the witness, on "another occasion," had identified the shirt, but said that he did not think that should lead the jury to decide the case upon any finding upon the brother's testimony that the shirt was the shirt of the accused. He then goes on to invite the attention of the jury to the other evidence (properly admissible, as I have pointed out), the weight of which he said it was for the jury to decide. The learned judge having drawn the distinction between what was said "on another occasion" and in the witness's "testimony," and having expressly told the jury that "his evidence did not tend to prove that the shirt was the shirt of the accused," the case is governed by section 1019: see *Ibrahim* v. *Regem* (1914), A.C. 599 at p. 616; 83 L.J., P.C. 185 at p. 193; explaining *Makin* v. *Attorney-General for New South Wales* (1894), A.C. 57, and pointing to the correcting effect of the judge's charge. The first question I would answer adversely to the prisoner.

IRVING, J.A.

With reference to the reading of the witness's statement to the jury, and the argument based on the fact that the statement referred to matters other than the shirt, it would have been better, I agree, if the learned judge had told the jury that the statement was not to be regarded as evidence at all, but, nevertheless, I think the matter was cured by what the judge said.

As to the second question, I refer to *Rex* v. *Burdell* (1906), 11 O.L.R. 440; and *Rex* v. *Guerin* (1909), 18 O.L.R. 425, and I would answer that question adversely to the prisoner.

COURT OF APPEAL

1915

Feb. 9.

REX v. MAY

MARTIN, J.A.

MARTIN, J.A.: Dealing first with the second question reserved, I need only say that I agree with my brother MCPHILLIPS that it should be answered in the negative; it is covered in principle by *Rex* v. *Aho* (1904), 11 B.C. 114.

The first question should be answered in the affirmative. It raises, clearly I think, a "question of law" under section 1014, *viz.*: as to whether or no the learned judge was entitled to take the course he did to decide the question of the witness "proving adverse" under section 9 of the Canada Evidence Act. I pause here to say that I feel there is much to be said in favour of the contention that was pressed upon us that as a matter of fact the learned judge did not find that the witness had "proved adverse," but had allowed the question to drift along without giving a definite ruling upon it. If I were forced to come to a decision upon his action it would be in favour of the accused, because, though others might take the view that though no definite ruling was given, yet an adverse one may be gathered from the whole proceedings on the point; nevertheless, to my mind, and with all due respect, we ought not to be placed in such an unsatisfactory position when a man's life is at stake, and I should feel it my duty to give the accused the benefit of an ambiguous situation; no room for uncertainty should have been left in so important a matter.

But assuming that the fact was found, then the evidence the learned judge resorted to in order to "prove" that fact was objected to, and if it were not permissible for him to consider it, then there was no ground at all for finding the witness to be "adverse" to the party who called him, and, as a consequence, allowing him to be cross-examined and, in effect, contradicted out of his own mouth by that party, since the learned judge stated that he did not so find because of the witness's demeanour, and there was no other evidence. If the learned judge had reached his conclusion upon demeanour, as well as upon evidence he even wrongly admitted, then there would have been no appeal from his decision, as there would have been some evidence, at least, to ground it on: *Rex* v. *Mulvihill* (1914), 19 B.C. 197 at p. 209; *Rice* v. *Howard* (1886), 16 Q.B.D. 681; 55 L.J., Q.B. 311; 34 W.R. 532; *Price* v. *Manning* (1889),

42 Ch. D. 372. While I quite agree with what was said in *Rice* v. *Howard* about the necessity of the trial judge being free to exercise his discretion in determining these "preliminary or interlocutory questions arising during a trial," and that he should not be hampered in the exercise of that discretion by requiring strict proof of the material upon which he does exercise it, yet that language does not apply, as will be seen later, to a case like the present, where the complaint is that there was no material at all before him upon which he could or did act. It is not a question of strict proof, but of no proof. While all the decisions since the statute was first passed in 1854 (those before are not of real assistance) are not uniform upon the meaning to be given the word "adverse," it having in some cases been apparently treated as meaning "unfavourable" or "opposed in interest," yet the weight of authority is overwhelmingly in favour of its being construed as "shewing a hostile mind," which was the view taken in the leading decision on the point by the Court of Common Pleas, *in banc,* in *Greenough* v. *Eccles* (1859), 5 C.B.N.S. 786, and not only has no Court of higher authority questioned that view, but it has been independently adopted (without citing it) by the Court of Appeal in *Price* v. *Manning, supra,* overruling *Clarke* v. *Saffery* (1824), Ry. & M. 126, wherein all the Lord Justices agree that the witness must be shewn to be "hostile" before he can be cross-examined by the party calling him, and Lord Justice Lopes says in his judgment that the Master of the Rolls (Lord Esher) and Lord Justices Lindley and Bowen also took the same view, so the decision is one of great authority, including all the members of the Court of Appeal.

MARTIN, J.A.

There is direct authority against the contention that is put forward by the Crown here, and it is to be found in the ruling given by Coleridge, C.J. in *Rice* v. *Howard, supra,* at p. 682 in the Q.B.D. Report, where counsel for a defendant having called a witness, Howard, found he was giving evidence in conflict with that which he had previously given in an affidavit, and for that reason "asked leave to treat Howard as a hostile witness and in order to shew he was hostile asked Lord Coleridge, C.J. to look at" said affidavit, but the learned judge, "being of opinion that

COURT OF APPEAL

1915

Feb. 9.

REX v. MAY

there had been nothing in the witness's demeanour, or in any way he had given his evidence, to shew that he was hostile, refused to look at the affidavit."

A new trial was moved for in the Queen's Bench Division on the ground that the affidavit should have been looked at, but the Court refused it, holding that it had no power to review the discretion of the Chief Justice. It will be observed that this result is precisely in accordance with what I have written above, in that the matter had been decided by the trial judge upon evidence before him, *viz.*: the demeanour and the way in which the witness had given his evidence, and therefore there was no appeal; and in like manner there would have been none in this case if the learned judge below had based his decision on that ground. It is further to be noted that in the course of the argument of *Rice* v. *Howard,* Mr. McCall, as *amicus curiæ,* drew the attention of the Court to a prior decision of Mr. Justice Field in 1878 in *Vestry of St. Leonard's, Shoreditch* v. *Stimson,* where he adopted the same course as Lord Coleridge did, and "refused to look at a letter tendered for the same purpose as the affidavit here." And in the report given in the Weekly Reporter, *supra,* p. 533, Grove, J. said, with the concurrence of Stephen, J.:

"And Mr. McCall referred us to a case which is almost identically this case, except that there it was a letter instead of an affidavit on which it was proposed to cross-examine a witness. There the judge refused to look at the letter; and the Court held that it was a matter entirely within his discretion. Thus we have one express decision and one strong *dictum.* And that is quite sufficient to bind us."

MARTIN, J.A.

The proposition now put forward that the witness can be contradicted, as was done at the trial, either by his own inconsistent, or other statements, before he is found to be adverse, *i.e.,* "hostile," is, in my opinion, not only contrary to the best authority, but to the letter and spirit of the statute, which says that:

"If the witness, in the opinion of the Court, proves adverse, such party may contradict him by other evidence, or, by leave of the Court, may prove that the witness made at other times a statement inconsistent with his present testimony . . . ."

There is a condition of hostility which must first be established before the party is entitled to the consequences of such proof, *i.e.,* the right to contradict or discredit his own witness;

this result is stated in the statute to be conditional upon the proof, but what has been done here is to invoke the consequences to prove the condition, which would be something akin to hanging an accused to prove a murder—in other words, an inversion of the intention of the statute. The matter is clearly put by Williams, J. in *Greenough* v. *Eccles, supra,* at p. 803, in what he says is the "reasonable and indeed necessary" construction of the statute:

". . . . The section requires the judge to form an opinion that the witness is adverse, before the right to contradict, or prove that he has made inconsistent statements, is to be allowed to operate."

Willes, J. agreed "entirely" with Williams, J., and Cockburn, C.J. did not assent.

I am therefore of the opinion, following these three direct decisions upon the point, that it was not open to the learned trial judge in the case at bar to have permitted the witness to be contradicted in advance by his own statement, either to enable the judge to form an opinion upon his hostile mind or for counsel to discredit him. In the circumstances, the failure to prove the witness to be adverse prevented his statement being admitted as evidence for any purpose.

In coming to this conclusion, I do not wish it to be understood that in my opinion the trial judge is necessarily restricted to the demeanour of the witness, or the way he gives evidence, in determining this preliminary question of hostility. He may be assisted to that end by questioning the witness, or allowing him to be questioned by counsel. It might be, *e.g.,* that in answer to the judge the witness might make such admissions of previous antagonistic or revengeful utterances against an opposite party as would establish the existence of a hostile mind, and said utterances might be proved against him if not admitted.

MARTIN, J.A.

It follows from the foregoing that, in my opinion there must be a new trial, because the statement was "improperly admitted" as evidence for any purpose against the accused, and it is clear to me that by such admission "some substantial wrong or miscarriage was thereby occasioned on the trial," within the meaning of section 1019 of the Criminal Code. It not only "may

COURT OF APPEAL

1915

Feb. 9.

REX v. MAY

have influenced the verdict of the jury and caused the accused substantial wrong," as the majority of the Supreme Court of Canada held to be sufficient to grant a new trial in *Allen* v. *Regem* (1911), 44 S.C.R. 331 at pp. 341, 363, but it must inevitably have done so in the circumstances before us: *cf. Rex* v. *Davis* (1914), 19 B.C. 50 at p. 64. It may be that the result would have been different if the learned judge, after allowing the statement complained of to be "given in evidence," as he stated in his charge, and read to the jury, had warned the jury to disregard it, not only as pertaining to the red shirt, but otherwise, but instead of so doing, he treated it as being an element in the weight of evidence before them for certain purposes at least, whereas it was not admissible at all. In the case of a confession wrongly admitted, it was held by this Court in *Reg.* v. *Sonyer* (1898), 2 Can. Cr. Cas. 501, that even a warning is

MARTIN, J.A.

not sufficient, but that the jury should be discharged and a new one empanelled, though, according to the late decision of the Privy Council in *Ibrahim* v. *Regem* (1914), 83 L.J., P.C. 185, which my brother GALLIHER has kindly called my attention to, it would appear that this course need not always be taken, their Lordships (after pointing out the difference between their duty and that of a "statutory Court of Criminal Review") saying, p. 194, "the rule can hardly be considered to be settled . . . ." and the result has varied in different circumstances. In considering the cases on the point, the statutes on which they were decided must be closely scanned, because an apparently slight change from the language employed in our section 1019 may have grave results.

GALLIHER, J.A.: The case reserved for the opinion of this Court is: [already set out in statement].

When the whole of the judge's charge is read as it relates to the second point, I am quite clear that this question should be answered in the negative.

GALLIHER, J.A.

The error in law complained of in the first question reserved is that in the examination-in-chief of Joseph May, a brother of the accused, called on behalf of the Crown, the learned trial judge permitted Crown counsel to cross-examine him with

regard to a previous statement made by him, which was in writing, and which statement was read to the jury, and also in permitting other witnesses to be called to prove such statement.

Section 9 of the Canada Evidence Act governs in this case. That section is as follows:

"A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the Court, proves adverse, such party may contradict him by other evidence, or, by leave of the Court, may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement."

In the present case we are concerned only with the second alternative in that section, "or, by leave of the Court, may prove that the witness made at other times a statement inconsistent with his present testimony."

Is it a condition precedent that before the Court permits this course to be taken, the witness shall, in the opinion of the Court, prove adverse? I think it is, although I confess it is not clear to me why the words "by leave of the Court" are placed in this clause. The principal test as to whether a witness is adverse or not is that of demeanour in the box, but there may be cases, such as here, where the witness speaks through an interpreter, and it is impossible to detect from his demeanour whether he is adverse or not. This seems to have been the predicament the learned judge found himself in, and he permitted the written statement of the witness to be put in, the witness to be examined thereon, and evidence adduced to prove the statement before finding (and in fact he made no specific finding) that the witness was adverse. A perusal of the English cases shews a considerable divergence of opinion as to the method to be pursued in such a case, but I find none of them which goes so far as to uphold the course pursued here. I do not go so far as to say that the judge at the trial may not satisfy himself in some way, without having the whole statement go before the jury, that the witness is adverse because he has made a contradictory statement at another time; in fact, I am of opinion that a witness may be found adverse by reason of his making such con-

GALLIHER, J.A.

COURT OF APPEAL

1915

Feb. 9.

REX v. MAY

tradictory statement, although his demeanour in the box does not disclose the fact. However, be that as it may, the course pursued here, in my opinion, amounts to a wrongful admission of evidence.

This brings us to a consideration of section 1019 of the Code. Did the admission of the evidence and the reading of the whole statement to the jury occasion a substantial wrong or miscarriage of justice? In the recent case of *Ibrahim* v. *Regem* (1914), 83 L.J., P.C. 185, Lord Sumner, delivering the judgment of their Lordships of the Privy Council, says at p. 194:

"In England, where the trial judge has warned the jury not to act upon the objectionable evidence, the Court of Criminal Appeal under the similar words of the Criminal Appeal Act, 1907, s. 4, may refuse to interfere, if it thinks that the jury, giving heed to that warning, would have returned the same verdict. . . . . Where the objectionable evidence has been left for the consideration of the jury without any warning to disregard it, the Court of Criminal Appeal quashes the conviction, if it thinks that the jury may have been influenced by it, even though without it there was evidence sufficient to warrant a conviction—*Rex* v. *Fisher* (1909), 79 L.J., K.B. 187; (1910), 1 K.B. 149."

A nice distinction seems to be drawn here in cases where the trial judge has warned the jury not to act upon the objectionable evidence, and where the jury are not so warned. We have, therefore, to consider under which of these two classes the case at bar falls. The learned trial judge instructed the jury that they were to treat the evidence of the cripple (meaning Joseph May) as only proving that the trousers were the trousers of the accused, and with regard to the shirt that what was given in evidence of a previous statement that he recognized the shirt as the shirt of the accused, should not lead them to decide the case upon any findings on Joseph May's testimony. The learned judge, by this, probably intended that the jury should have excluded from their minds as evidence the whole of the written statement put in in Joseph May's testimony, but I think he fell short in that respect by not specifically charging the jury to entirely disregard the written statement as proof of any material fact in the issue. I feel all the stronger in this regard by reason of the fact that the written statement which counsel for the Crown read to the jury, in addressing them, contains a statement that the accused, when he came home on the night of the

GALLIHER, J.A.

murder, had on no shirt, no hat—just underclothes, pants and boots. That condition would fit in with the fact that what was said to be the coat, hat and shirt of the accused were found at the scene of the murder.

Joseph May was questioned as to whether he had not described to the police how the accused was dressed when he returned that night, and denied that he had. As to this condition, there was, as I view it, no sufficient warning to the jury to disregard it, and as it was something very likely to impress itself upon the minds of the jury and to influence them, I would answer the question in the affirmative and grant a new trial.

GALLIHER, J.A.

McPHILLIPS, J.A.: The case reserved calls for answers to the following questions: [already set out in statement].

Answering the second question first, my opinion is that the learned trial judge did not comment on the failure of the accused to testify, therefore, my answer to question two is in the negative: *Rex* v. *Aho* (1904), 11 B.C. 114.

In my opinion, however, question number one must be answered in the affirmative. Firstly: In my opinion the learned trial judge did not hold that the witness Joseph May was a hostile witness, to admit of the production of extraneous evidence to contradict him, but if I should be in error in this, the admission of the written statement to establish hostility was error in law on the part of the learned judge. There should have been other evidence upon which the learned judge could have proceeded in arriving at the conclusion that the witness was adverse, and no such evidence being present, in my opinion, there was no exercise of a proper judicial discretion, and something was done not in accordance with the law: *Rice* v. *Howard* (1886), 55 L.J., Q.B. 311; *Price* v. *Manning* (1889), 58 L.J., Ch. 649; *Wright* v. *Wilcox* (1850), 19 L.J., C.P. 333; *Rex* v. *Crippen* (1910), 80 L.J., K.B. 290 at p. 293.

MCPHILLIPS, J.A.

Secondly: The written statement of the witness Joseph May was improperly admitted in evidence—it was inadmissible evidence as against the accused, and was used against him. This is clear and cannot, in my opinion, be gainsaid. *Rex* v. *Dibble alias Corcoran* (1908), 1 Cr. App. R. 155; 72 J.P. 498, is high authority that the contents of a previous statement to contradict and to discredit a witness are not evidence against the prisoner,

COURT OF APPEAL

1915

Feb. 9.

REX v. MAY

and in that case there was present that which is absent here—the caution to the jury against putting any reliance on the statement, as it was not evidence against the accused, and notwithstanding this caution, Alverstone, L.C.J., in giving the judgment of the Court of Appeal, at pp. 157-8 said:

"The statements of Williams and White were evidence against the latter, but not against Dibble, and it is difficult to doubt that the jury were prejudiced against Dibble by that evidence. Even the fair summing up and grave caution of the Recorder to the jury could not prevent that from happening. . . . . The unfortunate admission of Williams's and White's statements, unavoidable as it was, may have prejudiced the jury; it was impossible to believe that they had no effect on their minds; it was impossible to discover whether, in their absence, the jury would have considered Dibble's guilt to be proved."

In the reserved case it is stated that counsel for the Crown read the statement to the jury, and the learned judge referred to the statement in his charge to the jury in the following terms: [already set out in the judgment of the Chief Justice].

Upon the argument, the learned counsel for the Crown frankly stated that the statement was a "crucial statement," but contended that it was not admitted in evidence but only used to discredit Joseph May's story in the box and to contradict him. With all deference to the able argument advanced to establish this contention, and that no error in law occurred at the trial, I am impelled to say and to hold that the statement was admitted, and improperly admitted, in evidence.

MCPHILLIPS, J.A.

In the consideration of all criminal appeals, undoubtedly section 1019 of the Criminal Code is to be borne in mind, but in the present case exactly that which is provided against occurred—that is, a substantial wrong was done the accused on the trial.

In the result, the inadmissible evidence may have influenced and prejudiced the jury, bringing about a miscarriage of justice, which is to be relieved against. It therefore follows that in my opinion the appeal must be allowed, the conviction quashed, and a new trial directed. *Allen* v. *Regem* (1911), 44 S.C.R. 331 at p. 341.

Conviction quashed and new trial ordered, Irving, J.A. dissenting.

Solicitors for the prosecution: *Fisher & Warton.*
Solicitors for the prisoner: *Carss & Carss.*

LEDINGHAM AND LEDINGHAM v. SKINNER AND COX.

COURT OF APPEAL

1915

Feb. 26.

LEDINGHAM v. SKINNER

Executors and administrators—Evidence—Claim against estate of deceased persons—Absence of corroboration—Evidence Act, R.S.B.C. 1911, Cap. 78, Sec. 11.

Where two persons make a joint claim against the estate of a deceased person, it cannot be maintained unless there is independent corroboration in addition to what is supplied by each of the claimants giving the same testimony as the other.

Vavasseur v. *Vavasseur* (1909), 25 T.L.R. 250, followed.

APPEAL by plaintiffs from the decision of HUNTER, C.J.B.C. in an action tried at Victoria on the 23rd of June, 1914, brought against the executors of the estate of William Hoggan, deceased, for $8,625 for board and room provided David Hoggan, deceased, at various times between April, 1897, and April, 1908, and $495 for board and room provided William Hoggan, deceased, at various times between April, 1908, and December, 1909. David and William Hoggan, both of whom were bachelors, lived in Nanaimo, where they carried on business as grocers. Mrs. Ledingham, who was a niece of the Hoggans, lived with her husband in Victoria. David Hoggan, with others, had taken up land near Nanaimo in the Island Railway Belt, and had brought action against the Esquimalt and Nanaimo Railway Company to establish their right to the land as "actual settlers" for agricultural purposes within the British Columbia Settlement Act (Island Railway, Graving Dock, and Railway Lands Act, B.C. Stats. 1883, Cap. 14). In 1894 the case was taken to the Privy Council, where they lost. In 1896, David came to Victoria in order to carry on a campaign in the Legislature to secure an amendment to the Settlement Act in order to obtain recognition of his rights as a settler. In February, 1904, the Act was amended as required, but the right of the Legislature to pass the amendment was questioned, resulting in further litigation, which went to the Privy Council, there being a decision in his favour. The title, however, was not obtained

Statement

COURT OF APPEAL

1915

Feb. 26.

LEDINGHAM v. SKINNER

Statement

until after his death, which took place in April, 1908. The brother William then succeeded to the estate, and in the course of a year obtained title to the property. He died in December, 1912. On coming to Victoria in 1897 David stayed with his niece, off and on, until his death in 1908, according to the evidence of the plaintiffs, for 572 weeks, and immediately after his death William took his place in the house and was there 33 weeks, leaving in December, 1909. Mrs. Ledingham was added as a plaintiff during the trial. According to Mr. Ledingham's evidence, David promised to pay them for his board and lodging when he won his case. This was corroborated by Mrs. Ledingham, but there was no evidence as to the amount he was to pay. He also deposed that after David's death, William promised to pay him for David's board and lodging when he obtained title to the property and had disposed of it, this promise being made on condition that he would not sue for his claim. In this, also, he is corroborated by his wife. The learned trial judge dismissed the action. The plaintiffs appealed on the ground that the trial judge erred in not finding that there was corroborative evidence of the evidence given by the plaintiffs on the trial.

The appeal was argued at Vancouver on the 3rd and 4th of November, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

F. C. Elliott, for appellants: The action is for a *quantum meruit* for services rendered in providing David Hoggan, deceased, with board and lodging. Hoggan had brought an action against the Esquimalt & Nanaimo Railway to establish his right to certain land on Vancouver Island as "an actual settler," and in 1894 his case was carried to the Privy Council, where he lost. He then applied to the local Government to obtain title to the property, and finally succeeded, but died in 1908, before he realized on the property. His brother William, who succeeded him, died in 1912. During his labours with the Government in trying to obtain title to the property, David Hoggan lived with the plaintiffs, Mrs. Ledingham being his niece. According to the evidence of both Mr. and Mrs. Ledingham, he promised to pay them well for his board and lodging as soon as he succeeded in getting title to the property, but title was not

secured until the estate came into the hands of William Hoggan. The trial judge did not question the truth of the plaintiffs' evidence, but held that there was not sufficient corroborative evidence to comply with the law, *i.e.*, section 11 of the Evidence Act. On the question of the corroboration required, see Phipson on Evidence, 5th Ed., 481; *Griffith* v. *Paterson* (1873), 20 Gr. 615. The surrounding circumstances may amount to sufficient corroborative evidence even without a further witness: see *McDonald* v. *McDonald* (1902), 33 S.C.R. 145; *Thompson* v. *Coulter* (1903), 34 S.C.R. 261; *Green* v. *McLeod* (1896), 23 A.R. 676. Corroborative evidence arising from some other facts or circumstances tending to support the principal's statement may be held to be sufficient, and the evidence of the principal's wife is corroborative: see *Batzold* v. *Upper* (1902), 4 O.L.R. 116; *Re Curry, Curry* v. *Curry* (1900), 32 Ont. 150. Corroborative evidence may be given by an interested party: see *Radford* v. *Macdonald* (1891), 18 A.R. 167. In any event, we are entitled to payment under an implied contract. There are two points urged against us, first, that we are barred by the Statute of Limitations; second, by the Statute of Frauds. As to the first, the money was not due until David Hoggan succeeded in obtaining title to the property he claimed, and the title was not obtained until after his death in 1908, when William Hoggan had the property in his hands. The statute would commence to run from the date of the receipt of the title: see *Helps* v. *Winterbottom* (1831), 2 B. & Ad. 431; *In re Kensington Station Act* (1875), L.R. 20 Eq. 197; *Nichols* v. *North Metropolitan Railway and Canal Co.* (1894), 71 L.T.N.S. 836; *Harris* v. *Quine* (1869), L.R. 4 Q.B. 653; *Hodgson* v. *Anderson* (1825), 3 B. & C. 842. The property was William Hoggan's after David's death, but only subject to the payment of all debts owed by David: see Halsbury's Laws of England, Vol. 7, p. 364, par. 749; *Knowlman* v. *Bluett* (1874), L.R. 9 Ex. 307; *Souch* v. *Strawbridge* (1846), 2 C.B. 808.

Argument

D. S. Tait, for respondents: Mr. and Mrs. Ledingham are both parties to the action. The corroboration of the evidence of one party to the action by that of another party

COURT OF APPEAL

1915

Feb. 26.

LEDINGHAM v. SKINNER

to the action is not a compliance with the statute: see *Vavasseur* v. *Vavasseur* (1909), 25 T.L.R. 250; *Taylor* v. *Regis* (1895), 26 Ont. 483; *McDonald* v. *McDonald* (1902), 33 S.C.R. 145; *Morton* v. *Nihan et al.* (1880), 5 A.R. 20 at p. 28. There must be independent corroboration: see *Rawlinson* v. *Scholes* (1898), 79 L.T.N.S. 350. A claim of this nature is always viewed with suspicion, and the evidence must be positive, and not susceptible of several meanings: see *In re Finch. Finch* v. *Finch* (1883), 23 Ch. D. 267; *Thompson* v. *Coulter* (1903), 34 S.C.R. 261. David Hoggan received his Crown grant in 1904, therefore the claim is precluded by the Statute of Limitations, and the onus is on the plaintiffs to take the case out of the statute: see *Beale* v. *Nind* (1821), 4 B. & Ald. 568; *Wilby* v. *Henman* (1834), 4 L.J., Ex. 262; *Hurst* v. *Parker* (1817), 1 B. & Ald. 92. There is no evidence of when David Hoggan actually occupied rooms and received board during the time claimed, and the outside circumstances rebut the plaintiffs' claim. We say there was no contract, and the plaintiffs' evidence lacks corroboration in law.

Argument

Elliott, in reply.

Cur. adv. vult.

26th February, 1915.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: In my opinion the evidence is not such as to warrant the reversal of the judgment appealed from. It does not satisfy me that either David Hoggan or William Hoggan contracted to pay for the board and lodging which formed the basis of the plaintiffs' claim. The plaintiff's wife, afterwards added as a co-plaintiff with her husband, R. L. Ledingham, was the adopted daughter of David and William Hoggan. It was therefore quite natural that David and William Hoggan should be entertained as guests by the plaintiffs. The frequency and length of David Hoggan's visits have, I am satisfied, been greatly exaggerated. Even if the evidence of the one plaintiff can be admitted as corroborative of that of the other, as to which I find it unnecessary to express an opinion, the whole is so unsatisfactory as to justify a refusal to give effect to the plaintiffs' claim against the representatives of the deceased persons.

Subsequent events militate greatly against the plaintiffs' claims. Plaintiff R. L. Ledingham swears that David Hoggan agreed to pay for his board and lodging when he had won his case in the Privy Council, commonly known as the "Settlers' Rights Case." This is not quite as it is pleaded, but I will take his sworn statement and that of his wife and co-plaintiff in preference to the formal pleading. Judgment in the Privy Council in David Hoggan's favour was delivered on the 22nd of July, 1907: see *McGregor* v. *Esquimalt and Nanaimo Railway* (1907), A.C. 462. On the 30th of July, 1906, plaintiff R. L. Ledingham had borrowed $1,000, on a promissory note from David Hoggan, and on the 21st of September, 1907, that is to say, two months after David Hoggan had won his case, Ledingham repaid $500 on account of the note, and as he swears, after David Hoggan's death, repaid the balance to William Hoggan, David Hoggan's executor. Ledingham's explanation of this is not at all satisfactory. His repayment of these moneys was inconsistent with his claim that at that time he was entitled to a large sum of money from David Hoggan for board and lodging.

MACDONALD, C.J.A.

The appeal should be dismissed.

IRVING, J.A.: For the protection from unfounded claims it has always been a rule of the Courts that claims against the estate of a deceased person should be examined with jealous suspicion: *In re Garnett. Gandy* v. *Macaulay* (1885), 31 Ch. D. 1, applied in a case somewhat similar to this, *Doidge* v. *Mimms* (1900), 13 Man. L.R. 48. That rule was originally a rule of practice, but since 1900 it has been made a rule of law. That statute, now section 11, R.S.B.C. 1911, Cap. 78, has not extended the rule, but merely changed it from a rule of practice to a rule of law.

IRVING, J.A.

In the present case, which was dismissed by the Chief Justice for reasons then given, but of which we have not been furnished copies, we were lead to believe by appellants' counsel on his opening that the plaintiffs' claim was hardly disputed, and that it was only a question as to the sufficiency of the corroborative testimony that prevented judgment being given for the plaintiffs. On hearing the other side, a very different

COURT OF APPEAL

1915

Feb. 26.

LEDINGHAM v. SKINNER

question or series of questions are presented for our decision. As we have not the findings of fact by the learned Chief Justice it is necessary for us to go into the evidence at some length.

The action launched in April, 1913, is brought against the executors of the late William Hoggan (who died in December, 1912) for board and lodging furnished to his brother David Hoggan for 572 weeks, *viz.*: from 1st April, 1897, to 23rd April, 1908, and also for board and lodging furnished to the late William Hoggan for 33 weeks, *viz.*: from 23rd April, 1908, to 6th December, 1909. The action was brought by the husband of a niece of the two Hoggans in respect of board and lodging in the home of the plaintiff and his wife in Victoria, on two distinct contracts made with each of the two brothers David and William by the plaintiff the wife, no one else being present at the interviews when the alleged contracts were made. The making of the contracts is questioned. The fact that David Hoggan did spend some time in the Ledingham home either as a guest or a lodger is not disputed, but that he was there for weeks and weeks is denied, and the rate per week is said to be excessive.

IRVING, J.A.

I have read the evidence and I agree with the conclusion reached by the Chief Justice. Having regard to the great lapse of time, this is a case which should be considered with jealous suspicion, and I would hold that the plaintiff has not proved either of the contracts with David or William he relies on.

I will take the alleged contract with David first which was supposed to have been made in 1897. The relationship of the parties throws considerable light on the questions at issue, and therefore it will be convenient to describe the parties and their occupations. The two Hoggans, David and William, were brothers—both bachelors—who lived at Nanaimo and there carried on business in partnership as grocers. The plaintiff, Mary Ledingham, was their niece, who had been brought up by their mother. Another member of their family was Thomas Aitken, who also lived at Nanaimo. David Hoggan and others, one of whom was Samuel Waddington, had taken up land near Nanaimo in what is known as the Island Railway Belt, and

had brought an action against the Esquimalt & Nanaimo Railway to establish his right to that land as "an actual settler" for agricultural purposes within the meaning of the British Columbia Settlement Act (Island Railway, Graving Dock, and Railway Lands Act, B.C. Stats. 1883, Cap. 14). His case was carried to the Privy Council, where he was beaten, the decision being that he was in no sense an actual settler for agricultural purposes. The decision was given in the Spring of 1894: see (1894), A.C. 429; 63 L.J., P.C. 97. At that time David Hoggan, who was about 60 years of age, had, in addition to his grocery business at Nanaimo, some 790 acres on Gabriola Island and some lots in the City of Vancouver. The plaintiff, Mary Ledingham, was married and living in Victoria with her husband the plaintiff Robert Ledingham, and there was also living (in Victoria I think) William Ledingham, a brother of Robert. This brings us down to the Fall of 1896, when, according to plaintiff, David came to his house and remained there until his death, which took place on the 23rd of April, 1908. He came to Victoria (as I understand Robert Ledingham to say) to carry on with greater convenience a campaign in the Legislature to secure an amendment to the Settlement Act so that his rights as a settler would be recognized. In this campaign William Ledingham was to assist him. The arrangement we are told was that the property claimed was, in the event of success, to be divided equally among David Hoggan, William Ledingham and one Hawthornthwaite.

IRVING, J.A.

On the 10th of February, 1904, the legislative campaign came to an end by the passage of an Act under which David Hoggan was declared entitled to his grant, and it was conceded a grant was issued to him shortly after. As the claim for board runs from April, 1897, to April, 1908, it may be convenient to continue the history of the Settlers' Rights litigation. The right of the Provincial Legislature to pass the Act of the 10th of February, 1904, was questioned, and the case ultimately carried to the Privy Council: see *McGregor* v. *Esquimalt and Nanaimo Railway* (1907), A.C. 462. In 1906 Hoggan brought an action for a declaration of title to the minerals, and obtained judgment: see *Esquimalt and Nanaimo Ry. Co.* v. *Hoggan* (1908), 14 B.C. 49.

COURT OF APPEAL

1915

Feb. 26.

LEDINGHAM v. SKINNER

In the Spring of 1897, according to Robert Ledingham, David wanted to pay his board bill from the Fall up to that date, and he offered $20, which sum apparently was accepted in full to that date. The plaintiff then gives this evidence:

"Well he says Bob I haven't got—my wife and I—I haven't got much money and he says, you know I have been to the Privy Council and I have spent all I had there and he says he was trying to do what he could but we came to an arrangement right there that we would not look for any pay until he gained his case, that is he was to pay us well if he won the case, and if he did not win the case we were to be paid anyway.

"The Court: What amount? There was no amount made, that is it. He was to pay us well if he won the case, and if he did not win it he would pay us. Because he hadn't any money, but he had property you see. And we went through the whole conversation—and he couldn't realize very much on his property at that time. You see property was not worth but very little."

That is the contract sued on. The other plaintiff, Mary, gave the following account, the nature of which was to justify the amount of the *per diem* charge:

"Now do you remember a conversation with David Hoggan, in the Spring of 1897? Yes.

"When some arrangement was made. Now, tell us what the conversation was, if you remember it. Well he had been with us then for perhaps a week or so, and he offered us some money, at least he offered my husband, and my husband would not take it, but he left it on the table, and he said, I must make some arrangement—you won't take anything, now, he said, I am going into this case, I think I will be able to fight the thing out, but I haven't any means, any money only a small income, and if you will see me through the case, help me along, he said I will see you are paid when I win the case.

IRVING, J.A.

"Speak louder please. He said he would see we would be paid if he won the case, but whether he won it or not we would be paid anyway; be paid well if he won it, but paid anyway, because you know, he says, I have some property."

After Mary Ledingham had given this and further evidence in support of her husband's claim, she was, at the suggestion of the learned Chief Justice, but on the application of the plaintiffs' counsel, added as a party plaintiff, and the hearing proceeded.

The first question raised before us on the appeal is as to the sufficiency of Mary Ledingham's corroboration to satisfy the statutory rule. Section 11 is as follows:

"In any action or proceeding by or against the heirs, executors, administrators, or assigns of a deceased person, an opposite or interested

party to the action shall not obtain a verdict, judgment, or decision therein, on his own evidence, in respect of any matter, occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence."

It differs from the Nova Scotia statute referred to in *McDonald* v. *McDonald* (1902), 33 S.C.R. 145, but is identical with the Ontario statute dealt with in *Thompson* v. *Coulter* (1903), 34 S.C.R. 261. Mrs. Ledingham being in my opinion an opposite, or at any rate, an interested party, I do not think her evidence can be regarded as corroborative—see also *Vavasseur* v. *Vavasseur* (1909), 25 T.L.R. 250, where two persons made a joint claim, Channell, J. said it was necessary to have independent corroboration in addition to what was supplied by each telling the same story as the other.

The defence is that what board and lodging was afforded by the plaintiffs was to be expected, having regard to the relationship between David Hoggan and Mary Ledingham, and the promises (if made) were made in a general way and Mary Ledingham and her husband looked for their reward not to any contract but to her uncle's generosity: *cf. In re Fickus. Farina* v. *Fickus* (1899), 69 L.J., Ch. 161; (1900), 1 Ch. 331; *Montreal Gas Company* v. *Vasey* (1900), A.C. 595; 69 L.J., P.C. 134. I do not think she can be regarded as an independent witness: *Rawlinson* v. *Scholes* (1898), 79 L.T.N.S. 350. Nor can I consider her evidence corroborative as to his rewarding her, as what she says is consistent with compensation being allowed by his will or otherwise: *per* Lindley, L. J. in *In re Finch. Finch* v. *Finch* (1883), 23 Ch. D. 267, cited by Killam, J. in *Thompson* v. *Coulter* (1903), 34 S.C.R. 261 at p. 264. Nor do I find satisfactory corroborative evidence of a contract in any of the other evidence adduced. If, therefore, the Chief Justice dismissed the action on that ground, or because there were rebutting circumstances, I agree with him. That disposes of the first alleged contract.

IRVING, J.A.

The plaintiffs' second string to that bow was that William, after David's death, agreed to pay the claim. As to this, plaintiff R. L. Ledingham's evidence is not corroborated by any one but his wife's, and her testimony tells a somewhat different tale.

Then as to the claim against William for board and lodging

COURT OF APPEAL

1915

Feb. 26.

LEDINGHAM v. SKINNER

supplied to him. The case rests on the evidence of two discredited witnesses, and I think the judge was justified in dismissing this claim also.

It was argued that as Mary Ledingham had been made a party at the suggestion of the Chief Justice, that the rule laid down in *Vavasseur* v. *Vavasseur, supra,* does not apply. I do not think the plaintiffs can now put forward such an argument in view of the application being made by and in her presence, nor can the Court look at what led up to the amendment. But, assuming there was a promise such as the plaintiff relies on, I am not satisfied that David Hoggan did occupy the room reserved for him for the long period claimed, for the following reasons: (1) The time charged for far exceeds the time occupied by the campaign carried on in Victoria; (2) the evidence of Waddington and Kirkham (who have no interest in this action) satisfies me that David Hoggan was not a continuous visitor at Victoria, but spent nearly all his time in Nanaimo; (3) the letter produced (Exhibit 1) speaks of "being in Victoria for the last week. I came down to meet a niece and nephew, etc." "I am sleeping in Bob's house. They are camping out;" (4) Exhibit J., 24th September, 1905, shews that he was living at Nanaimo and his death occurred at Nanaimo. On the whole I would say that the statement with which Robert Ledingham opened his evidence, *viz.*: that he remained at his house from 1897 till his death in 1908 was untrue, and I am also satisfied by the evidence that the charge of $15 per week was excessive for the accommodation afforded, particularly when it is contrasted with the $20 given by David Hoggan in the Spring of 1897 for what he had received in the winter of 1896-1897.

IRVING, J.A.

I would regard the sum of $700 a very fair remuneration for what they gave David and William, and as William paid Mary Ledingham that sum in November, 1910, I would dismiss the action on that ground. Her explanation as to why he paid her that sum seems to me unsatisfactory. For one reason the sum of $700 is altogether out of proportion to the expense of two women going to California to stay with their uncle.

MARTIN, J.A.: I find myself unable to take the view that the learned trial judge reached a wrong conclusion, and therefore the appeal should be dismissed.

GALLIHER, J.A.: At the close of this case I was prepared to give judgment dismissing the appeal.

Further consideration confirms me in that view.

MCPHILLIPS, J.A.: This appeal is from the judgment of HUNTER, C.J.B.C. and raises a question which it seems to me is concluded by authority and statute law—that is the action is one requiring corroboration.

The learned Chief Justice did not give a written judgment, but counsel state that he proceeded upon the ground of lack of corroboration.

The evidence in the case is at some considerable length and the trial would appear to have extended over a period of three days. In a review of the evidence, which was very exhaustively gone over upon the appeal by counsel for both sides, I cannot bring myself to any other conclusion than that arrived at by the learned Chief Justice, and it is a case which is peculiarly one for the trial judge, in that the evidence is relative to a claimed cause of action against the estate of a deceased person.

The statute law which calls for consideration is to be found in the Evidence Act (R.S.B.C. 1911, Cap. 78), being section 11 thereof. The statute law of British Columbia is in the identical words of the Ontario Act (R.S.O. 1897, Cap. 73, Sec. 10) which received the consideration of the Supreme Court of Canada in *Thompson* v. *Coulter* (1903), 34 S.C.R. 261, where Killam, J., at p. 263, made use of the following language:

MCPHILLIPS, J.A.

"In my opinion this enactment demands corroborative evidence of a material character supporting the case to be proved by such 'opposite or interested party' in order to entitle him to a 'verdict, judgment or decision.' Unless it supports that case, it cannot properly be said to 'corroborate.' A mere scintilla is not sufficient. At the same time the corroborating evidence need not be sufficient in itself to establish the case."

I am of the opinion that there is a lack of corroboration even were the action to be looked at as one by Robert L. Ledingham

COURT OF APPEAL

1915

Feb. 26.

LEDINGHAM v. SKINNER

alone, but if the action is to be looked at as being one by both the husband and wife, Robert L. Ledingham and Mary Ledingham (Mary Ledingham being added as a party plaintiff at the trial), then there is the additional difficulty of establishing corroboration. Mr. Justice Channell in *Vavasseur* v. *Vavasseur* (1909), 25 T.L.R. 250 at p. 252, said:

"That was a very serious difficulty, because the rule with regard to corroboration was very clear and when two people made a joint claim it was necessary to have independent corroboration in addition to what was supplied by each telling the same story as the other. The meaning of the rule was that the Court could not place reliance on the recollection of people in such circumstances without corroboration, not that the Court thought that the witnesses were saying anything untrue."

In my opinion this appeal can be decided upon this point alone—that the action fails by reason of there being the absence of that corroboration which is the prerequisite to the right to judgment being in favour of the plaintiffs.

MCPHILLIPS, J.A.

In arriving at the conclusion which I have—upon this appeal—it is with some very considerable regret, as it is abundantly clear from the evidence that the plaintiffs did give most kindly care to the late William Hoggan, who so long was in delicate health, and were most solicitous for his welfare, and their acts and deeds are to be commended, but unfortunately fail of establishing a cause of action sufficient in law.

In my opinion the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Courtney & Elliott.*

Solicitors for respondents: *Bird, Leighton & Darling.*

TIDY v. CUNNINGHAM.

MORRISON, J.

1915

Feb. 3.

TIDY v. CUNNINGHAM

Negligence—Escape of gas from fractured pipe—Injury to flowers in store of flower vendor—Fracture of pipe caused by third party—Absence of knowledge on part of defendant.

The flowers in the plaintiff's flower store were injured through the escape of gas from a fractured pipe of the defendant. Unknown to the defendant the pipe had been fractured through the operation of a steam-roller by a third party while constructing a road under which the pipe had been laid.

Held, that the defendant was not liable as the fracture was caused without his knowledge by a third party over whom he had no control, the consequence of whose acts he could not reasonably have anticipated.

Rickards v. *Lothian* (1913), A.C. 263, followed.

ACTION tried by MORRISON, J. at New Westminster on the 4th of January, 1915, for damages to flowers in the plaintiff's store through the escape of gas from a broken pipe, a part of a system of gas works owned and previously constructed by the defendant under powers granted by the City of New Westminster. Some time before the cause of action arose a contracting company for the city repaired and improved the street under which the pipe in question had been laid in front of the plaintiff's store. In the performance of their work the contractors used a heavy steam-roller in packing down the road as they laid new material, and later finding that gas was escaping the newly-constructed street was opened up and the fracture in the pipe discovered. Statement

J. P. H. Bole, for plaintiff.

Whiteside, K.C., for defendant.

3rd February, 1915.

MORRISON, J.: The defendant, who owns or controls a gas works in the City of New Westminster, is duly authorized by that city to carry on those works and is empowered to lay pipes, etc., for the supply of gas to patrons. The pipes laid pursuant to these powers were properly laid, and the one in Judgment

MORRISON, J.

1915

Feb. 3.

TIDY v. CUNNINGHAM

question was so laid within a comparatively recent period and, at the time material to this matter, was in good, sound condition. Through no negligence on defendant's part, this pipe sustained a clean fracture and, in consequence, gas escaped, which found its way to the surface of the street under which the pipe is laid and into the flower shop of the plaintiff, whereby he claims he sustained the damage complained of. Just about the time plaintiff discovered gas in and about his premises, the street in question was being repaired or altered or improved by a contracting company for the Corporation of the City of New Westminster, and had utilized a heavy steam-roller in the performance of their work. In carrying on the work in question, it seems the surface of the street had been taken away either wholly or partially and new material laid down, and at certain stages the steam-roller was used over the *locus in quo*. After complaint by the plaintiff to the defendant, both parties drew the City Council's attention to the fact that gas was escaping, and, after some considerable time, the street was opened up, when the fracture was discovered. I find that the fracture was caused, without the knowledge of the defendant, by a third party over whom the defendant had no control and the consequence of whose act the defendant could not reasonably have anticipated: *Nichols* v. *Marsland* (1876), 2 Ex. D. 1, Bramwell, B., and *Box* v. *Jubb* (1879), 4 Ex. D. 76, Kelly, C.B., both quoted by Lord Moulton in delivering the judgment of the Privy Council in *Rickards* v. *Lothian* (1913), A.C. 263 at pp. 278-9. Their Lordships agree with the law as laid down in the judgments above cited, and are of opinion that a defendant is not liable, on the principle of *Fletcher* v. *Rylands* (1866), L.R. 1 Ex. 265; (1868), L.R. 3 H.L. 330, for damages caused by the wrongful act of third parties.

Judgment

I find there was no negligence on defendant's part, and if there was a nuisance, it was not caused by the defendant. I think that "nuisance," as applied to this case, may be taken in the restricted sense referred to by Lord Sumner in the recent case of *Charing Cross, &c., Electricity Co.* v. *London Hydraulic Power Co.* (1914), 83 L.J., K.B. 1352. The present case, I venture to say, is stronger than the illustration there put.

MORRISON, J.

1915

Feb. 3.

TIDY v. CUNNINGHAM

inasmuch as there is no act of the defendant jointly operating to cause the break in the pipe. The above case, as regards the question of nuisance, turns on the fact that the nuisance was caused by the defendant.

The action is dismissed.

Action dismissed.

CARTER v. BELL *ET AL.*

HUNTER, C.J.B.C.

1914

June 23.

COURT OF APPEAL

1915

Feb. 26.

CARTER v. BELL

Mortgage—Action for redemption—Sale by mortgagee under power in mortgage—Purchase by mortgagee on same day—Validity of.

Where, under the power of sale in a mortgage, a mortgagee goes through the form of making a sale of the mortgaged premises to one person who on the same day reconveys to the mortgagee, the sale is invalid and does not affect the interest of the person whose property is sought to be affected by such sale.

APPEAL by defendant from the decision of HUNTER, C.J.B.C. in an action tried at Victoria on the 22nd and 23rd of June, 1914, for the redemption of a mortgage and the taking of accounts. The mortgage in question was executed by the plaintiff's husband in January, 1891, to secure an advance of $4,500. He went to South Africa in 1894, having first conveyed the equity of redemption to his wife, who two months later also purchased the equity of redemption, at a sheriff's sale, of all her husband's interest in the property. She continued to receive the rents from the property until 1899, when the mortgagee took over the collecting of the rents and paid the taxes. In the same year the mortgagee, under the power of sale in the mortgage, conveyed the property to one Mason, who on the same day reconveyed it to the mortgagee. In 1910 the mortgagee died, when the defendant Agnes Bell, who was appointed

Statement

HUNTER, C.J.B.C.

1914

June 23.

COURT OF APPEAL

1915

Feb. 26.

CARTER v. BELL

executrix of his estate, assumed to deal with the land. After the property had been transferred a number of times it was eventually sold in February, 1913, for $36,000. The learned Chief Justice gave judgment allowing the plaintiff to redeem, and ordered all accounts to be taken. The defendant appealed on the grounds that the plaintiff had released her rights, that she had acquiesced in the exercise of the power of sale contained in the mortgage, and that she was barred by laches from claiming relief.

Moresby, for plaintiff.
Mayers, for defendant.

HUNTER, C.J.B.C.: This is a redemption action brought by the wife of the mortgagor: the mortgagor, the plaintiff's husband, left for South Africa some time after the execution of the mortgage deed, and conveyed the equity of redemption to his wife, the plaintiff, in 1894. The plaintiff also purchased the equity of redemption at a sheriff's sale of all her husband's interest. In 1899 the plaintiff, who had been in receipt of the rents of the mortgaged property, ceased to receive them, and the mortgagee commenced to receive the rents and pay the taxes on the property. In the same year the mortgagee went through the form of making a conveyance of the property to one W. H. Mason, who, on the same day, purported to reconvey to the mortgagee. It is of course well settled that a sale by a man to himself, or to another in trust for himself, is invalid, and does not affect the interest of the person whose property is sought to be affected by the invalid sale. In 1901, some two years after the mortgagee had taken possession, there is an account of an interview between the mortgagee and the plaintiff with reference to the plaintiff acquiring a small strip of land adjoining the excepted portion, when the mortgagee is stated to have said to the plaintiff: "You had better pay off the whole mortgage and take the property." Later on a complaint was made by the son of the mortgagee as to an encroachment on the mortgaged property, when the plaintiff expressed her willingness to purchase the portion on which she had been encroaching.

HUNTER, C.J.B.C.

There are three distinct grounds advanced by Mr. *Mayers* as

to why the sale, admittedly invalid in its origin, cannot now be attacked. He relied first on certain evidence which went to shew that a quit-claim deed might have been executed by the plaintiff. The evidence most relied on was that given by Mr. Macdowall, namely, that he had some money to loan and that Bell came to him offering security, and that Mr. Macdowall felt it necessary to satisfy himself of the validity of the security offered and that it was safe for him to advance money upon such security. Then there was the dealing between the mortgagee and Mr. Macdowall, by which it might be inferred that some sum of money had passed from the mortgagee to Mr. Macdowall. I do not think this evidence would justify me in finding that a quit-claim deed had been executed by the plaintiff, as much of the evidence is merely hearsay.

The next ground relied on by the defendant is the acquiescence of the plaintiff. There can be no acquiescence without knowledge, and there is nothing in the evidence that leads me to come to the conclusion that this plaintiff ever had any knowledge that the sale under the power of sale had ever taken place. She denies positively ever having received any notice of the sale or of any intention to sell. Such a sale is, of course, not regarded as a sale by the Court. As far as I can see, there is no evidence to shew that this woman had any knowledge of that transaction. It is, of course, urged that the mortgagee was paying the taxes with her knowledge, but I cannot see why the mortgagor cannot permit the mortgagee to go on paying the taxes and receiving the rents. No conclusion can be arrived at with regard to the expression of willingness by the plaintiff to purchase the small piece of land on which she had encroached. It may be credited to some vague notion on the part of the plaintiff that she had still an interest in the property.

HUNTER, C.J.B.C.

I think that the defence of laches fails. There has been no case cited to me where laches has been imputed to the mortgagor by reason merely of the failure to pay interest or to apply for redemption.

That being my view of the case, I therefore give judgment for the plaintiff for redemption, and dismiss the defendant's counterclaim.

HUNTER, C.J.B.C.

1914

June 23.

COURT OF APPEAL

1915

Feb. 26.

CARTER v. BELL

The appeal was argued at Vancouver on the 5th and 6th of November, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Mayers, for appellant: We say, first, that Mrs. Carter gave a release of her rights by quit claim; second, if she did not actually release her rights, she had notice that her rights were being infringed and she acquiesced in it; third, putting the exercise of the power of sale out of the question, she came too late to obtain relief. As to the first point, the quit-claim deed from Mrs. Carter was lost: see *Watt* v. *Assets Company* (1905), A.C. 317 at p. 329. If we can shew she is not truthful, the evidence given should not rebut the presumption that there was a release of her rights. On the second point, assuming we have not been able to make out an express release, she knew there was a violation of her rights and she took no steps to protect herself, and therefore acquiesced in them: *Duke of Leeds* v. *Earl of Amherst* (1846), 2 Ph. 117 at p. 124; *Rochefoucauld* v. *Boustead* (1897), 1 Ch. 196. The plaintiff acquired title in August, 1894, and she knew she had to pay off before she could gain possession of the land: Halsbury's Laws of England, Vol. 13, p. 171; *Harcourt* v. *White* (1860), 28 Beav. 303 at p. 309. As to applying the Statute of Limitations by analogy, see *Knox* v. *Gye* (1872), L.R. 5 H.L. 656 at p. 674; *In re Sharpe* (1892), 1 Ch. 154 at p. 168. The Court should allow the analogy unless it is inequitable to do so: see *In re Maddever* (1884), 27 Ch. D. 523 at pp. 531-2; *Archbold* v. *Scully* (1861), 9 H.L. Cas. 360 at p. 370; *Lindsay Petroleum Company* v. *Hurd* (1874), L.R. 5 P.C. 221 at p. 239; *Erlanger* v. *New Sombrero Phosphate Company* (1878), 3 App. Cas. 1218 at p. 1279.

Moresby, for respondent: The only question is that of laches; we had possession up to six years ago. There must be adverse possession for 20 years; see *Brooks* v. *Muckleston* (1909), 2 Ch. 519 at p. 522; *Clarke and Chapman* v. *Hart* (1858), 6 H.L. Cas. 633 at p. 656; *De Bussche* v. *Alt* (1878), 8 Ch. D. 286; *Marker* v. *Marker* (1851), 9 Hare 1 at p. 16; *White* v. *Sandon* (1904), 10 B.C. 361; *Cook* v. *Cook* (1914), 19 B.C.

311; *Robertson* v. *Norris* (1858), 1 Giff. 421; *Archbold* v. *Scully* (1861), 9 H.L. Cas. 360 at pp. 383 and 388. The mortgagee had the right to take possession in 1899. We say there should be notice of the sheriff's sale; on the question of notice, see *Buckley* v. *Wilson* (1861), 8 Gr. 566; *Miller* v. *Cook* (1870), L.R. 10 Eq. 641.

HUNTER, C.J.B.C.

1914

June 23.

COURT OF APPEAL

1915

Feb. 26.

CARTER v. BELL

Mayers, in reply: The Court will not enforce a stale demand: see *Ridgway* v. *Newstead* (1861), 3 De G.F. & J. 474. The mortgagor neglected to pay interest for 17 years, and not having brought action for 21 years from the date of the mortgage, she cannot now enforce redemption, quite irrespective of the Statute of Limitations or analogy to it.

Cur. adv. vult.

26th February, 1915.

MACDONALD, C.J.A.: I would dismiss the appeal for the reasons given in the Court below.

MACDONALD, C.J.A.

IRVING, J.A.: Of the three points raised by Mr. *Mayers* on the argument, *viz.*: as to the pretended sale in 1899, the first may be disposed of on the ground that the finding of the learned trial judge ought not to be interfered with.

As to the second ground, that if Mrs. Carter did not release, she had notice, and acquiesced in the mortgagee acting as owner in fee instead of a mere encumbrancer. Here again the conclusion of the learned judge on the facts is of importance.

The following are relied on as acknowledgments made by her after the mortgagee took possession and collected the rents. She asked the late H. P. Bell to let her have a strip of the mortgaged land on the west of her house to be used as a passage way. In 1908, when Blanchard Bell proposed that she should buy from him a strip of land at the back of her lot, she said she could not afford to buy it. In 1913 the same suggestion was made by a Mr. Milbourne and the same answer given. These instances establish, Mr. *Mayers* argues, that she knew that the Bells were claiming as owners, and amount to admissions on her part that she had lost or waived her right to redeem.

IRVING, J.A.

The mortgagee was entitled as of right to possession, and was not bound to give any notice before entering, and there can be

HUNTER, C.J.B.C.

1914

June 23.

COURT OF APPEAL

1915

Feb. 26.

CARTER v. BELL

no doubt that in this case the mortgagee intended to take over the possession, rents and profits, but what is there to shew that she did anything inconsistent with her right to look to Mr. Bell as the mortgagee in possession or that he was not to account? It is sometimes a nice question as to what acts by the mortgagee constitute him a mortgagee in possession: *Noyes* v. *Pollock* (1886), 32 Ch. D. 53; but the acts done by a mortgagee in possession are hardly distinguishable from the acts that would be done by the true owner. She had no right to complain, and there was no definite consent to forego her rights. I hesitate to say that the attitude taken by Mrs. Carter amounted to acquiescence; as to what is acquiescence, see *De Bussche* v. *Alt* (1878), 8 Ch. D. 286 at p. 314.

As to the third ground, that the Court will not grant to the plaintiff her equitable remedy in view of the staleness of her demand: The equity of redemption became vested in her in August, 1894, and she ceased to make payments of interest in 1896 and of taxes in 1898, and the action was not brought until 1914, so that sixteen years have passed by without the plaintiff moving in the matter. As long ago as 1793 it was stated that 20 years' possession was a bar to the equity of redemption of a mortgagor. That rule, which remained in force in England till the Real Property Limitation Act of 1874 was passed, was adopted by the Court of Chancery by analogy to the rules of law, but nevertheless it was recognized that there may be cases, "in which after a length of time, though it may not be pleadable, this Court would hold a bill to come too late": *Pickering* v. *Lord Stamford* (1793), 2 Ves. 272 at p. 280. I agree with Mr. *Mayers's* contention that section 36 of the Statute of Limitations (R.S.B.C. 1911, Cap. 145) preserves the equitable doctrine of acquiescence, but I can see no reason why Mrs. Carter should be deprived of the full time usually allowed to mortgagors to bring their bill to redeem.

IRVING, J.A.

I would dismiss the appeal.

MARTIN, J.A.: I am of opinion that the learned trial judge reached the right conclusion, and therefore the appeal should be dismissed.

MARTIN, J.A.

GALLIHER, J.A.: I agree in the reasons for judgment of the learned Chief Justice below, and would dismiss the appeal.

HUNTER, C.J.B.C.

1914

June 23.

COURT OF APPEAL

1915

Feb. 26.

CARTER v. BELL

McPHILLIPS, J.A.: In my opinion this appeal must be dismissed. The appeal is one from the judgment of HUNTER, C.J.B.C., the action being one to set aside a purported conveyance under power of sale contained in a mortgage, for redemption, and for an account, the judgment being in favour of the plaintiff, the conveyance being declared invalid, redemption decreed, and an account directed, the counterclaim being dismissed.

Upon the argument of the appeal, counsel for the respondent stated that the subsequent sale made by the defendant Agnes Bell, one of the appellants, the successor in title to the late Henry P. Bell under his will, was agreed to as being a due exercise of the power of sale under the mortgage, and that the real question now was the taking of the accounts and the payment to the plaintiff of the amount to be found due upon the footing that the plaintiff was entitled to all the moneys over and above the principal money and interest, and all such other sums as might be found to be due and payable under the provisions of the mortgage. The findings of fact of the learned Chief Justice are conclusive, and are well supported by the evidence.

The defence of laches and acquiescence wholly fails, and is unsupported by any such evidence as would entitle effect being given to any such defence.

There is the merest suggestion of the possibility of there having been a quit-claim deed obtained from the plaintiff whereby the mortgagee became possessed of the estate in the land freed of all right to redeem the same, but it is a most shadowy suggestion, and is not even supported by a scintilla of evidence.

The case is not one, for instance, such as *Watt* v. *Assets Company* (1905), 74 L.J., P.C. 82, cited by counsel for the appellant in his careful and able argument. There the Lord Chancellor (Earl of Halsbury) at p. 85 made use of this language:

"That at this distance of time every intendment should be made in favour of what has been done as being lawfully and properly done, and that the persons who are now insisting upon these rights have lain asleep

HUNTER, C.J.B.C.

1914

June 23.

upon their rights so long that as a matter of fact we know that witnesses have perished, and the opportunities which might have been had if the question had been earlier raised have passed away. We are asked at a distance, in the one case of twenty years, and in the other case of twenty-two years, to rip open a transaction which had apparently been completely disposed of."

COURT OF APPEAL

1915

Feb. 26.

CARTER v. BELL

That is not the present case. It cannot be advanced for a moment, in my opinion, that upon the most indulgent view of the evidence led at the trial, that there ever was a conveyance of the equity of redemption to the mortgagee. The purported sale, declared invalid by the judgment appealed from, was unquestionably invalid, therefore the position is this: not until the year 1910 was there a due exercise of the power of sale (the last payment of any interest upon the mortgage being made in the year 1897). That being the case, how can the claim of the plaintiff to an account be resisted? Here nothing is being "ripped up" save that which is amply proved to have been an invalid conveyance, in truth, nothing but a simulated transaction, *i.e.*, a sale of the mortgaged premises by the mortgagee to himself—a transaction which a Court of Equity will always declare invalid. It would be revolting to the due appreciation of the principles of law "that at this distance of time every intendment should be made in favour of what has been done as being lawfully and properly done" when there is express evidence that that which has been done was unlawfully and improperly done.

MCPHILLIPS, J.A.

The lapse of time, in my opinion, in the present case has worked no injury to the defendant Agnes Bell so far as her legal rights are concerned, although it may appear to do so. The fact is that the right of redemption in the mortgagor and his successor in title, the plaintiff, was always subsisting up to the time of the due exercise of the power of sale in 1910, and then the plaintiff became entitled to the account which has been directed.

Again, referring to the judgment of the Lord Chancellor in *Watt* v. *Assets Company, supra,* the present case is not one coming within what is said by the Lord Chancellor at p. 87:

"They have lain by upon their supposed rights all this time, during which time witnesses have died and the means of explanation have disappeared also to an extent which, to my mind, renders it impossible, or at

all events extremely inexpedient as a matter of law and administration, to allow these things to be ripped open at this distance of time, when both the opportunities of explanation have gone by and when witnesses have passed away."

In the present case the right of redemption always continued. It cannot be said that the plaintiff laid by upon any supposed rights, and it is not a case where the opportunities of explanation have gone by. In truth and in fact, that which was done cannot be supported in law.

In my opinion, no question arises for the consideration of the Statute of Limitations dwelt upon in argument by counsel for the appellant, *Knox* v. *Gye* (1872), L.R. 5 H.L. 656 being cited, where it was held that "where there is a remedy at law, and a correspondent remedy in equity, supplementing that of the common law, and the legal remedy is subject by statute to a limit in point of time, a Court of Equity in affording the correspondent remedy will act by analogy to the statute, and impose on the remedy it affords the same limit as to time." Here, however, we have a cause of action which arises and accrues to the plaintiff by reason of the exercise of the power of sale—a step only exercised in 1910, and as yet a large proportion of the moneys due and payable by the purchasers remain to be paid. Further, it is to be noted that *Knox* v. *Gye, supra,* as well as *Piddocke* v. *Burt* (1893), 63 L.J., Ch. 246; (1894), 1 Ch. 343, were distinguished in *Gordon* v. *Holland* (1913), 82 L.J., P.C. 81, and in my opinion can equally be distinguished and be held to have no application to the present case. Lord Atkinson, in referring to *Knox* v. *Gye, supra,* at p. 88 said:

MCPHILLIPS, J.A.

"The then Lord Chancellor (Lord Hatherley) dissented strongly from this doctrine, and seems to lay it down, that as all the property of a partnership vests by survivorship in a surviving partner, he, as to the share of that property to which the deceased partner would have been entitled, stands to the representative of the deceased in the relation of a trustee."

In the present case the defendant Agnes Bell was in the position of a mortgagee in possession until the effective sale under the power of sale in 1910, and in the relation of a trustee to the mortgagor, and the Statute of Limitations is no bar, the relation of mortgagor and mortgagee being subsisting: see Fisher on Mortgages, 6th (Canadian) Ed., p. 833, par. 1743; *Hood* v. *Easton* (1856), 2 Jur. N.S. 729. Also, in respect of the

HUNTER, C.J.B.C.

1914

June 23.

COURT OF APPEAL

1915

Feb. 26.

CARTER v. BELL

surplus moneys derived upon the exercise of the power of sale, the mortgagee holds the same in trust for the mortgagor and the Statute of Limitations is excluded: see Fisher on Mortgages, p. 494, par. 963; *Banner* v. *Berridge* (1881), 18 Ch. D. 254; *Warner* v. *Jacob* (1882), 20 Ch. D. 220; *In re Bell. Lake* v. *Bell* (1886), 34 Ch. D. 462.

It therefore follows that in my opinion the judgment of the learned Chief Justice is right, and the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Bodwell & Lawson.*

Solicitors for respondent: *Moresby, O'Reilly, Miller & Lowe.*

CLEMENT, J.

1914

May 19.

COURT OF APPEAL

1915

Feb. 26.

COOK v. CANADIAN COLLIERIES (DUNSMUIR), LIMITED.

COOK v. CANADIAN COLLIERIES (DUNSMUIR), LTD.

Negligence—Railway—Operated by coal company on its own lands—Unincorporated—Defective system—Railway Act, R.S.C. 1906, Cap. 37, Sec. 264, Subsec. 1 (c)—British Columbia Railway Act, R.S.B.C. 1911, Cap. 194, Sec. 181, Subsec. 1 (c).

A coal company operated a railway upon which were carried passengers and freight, wholly on its own lands in connection with its mines, the railway not having been incorporated. The plaintiff, while coupling two cars supplied with the "link-and-pin" coupling, was injured.

Held (IRVING, J.A. dissenting), that although the Railway Acts, which require incorporated railways to use the automatic coupler, did not apply to the railway in question, the use of the antiquated and dangerous system of "link-and-pin" coupling by the company constituted negligence.

Decision of CLEMENT, J. affirmed.

Statement

APPEAL by defendant Company from the decision of CLEMENT, J. in an action tried by him without a jury at Victoria on the 19th of May, 1914, for damages for injuries sus-

tained by the plaintiff while in the Company's employ. The plaintiff, while carrying on his duties as a brakeman, was coupling two cars belonging to the defendant Company when he received the injuries complained of. The cars were coupled by means of what are known as "link-and-pin" couplers, which necessitated the plaintiff going between the cars to couple them, and the bar of the brake on one of the cars was bent forward in such a way as to leave less space between when they came together. The cars were on a curve at the time, and the plaintiff did the coupling on the inside of the curve. There was evidence of a rule of the Company that a car must not be coupled from the inside of a curve. The railway was not incorporated under any Act, but was built by the Wellington Colliery Company and operated by them over their own lands, chiefly for carrying coal from the mines to the wharf, a distance of about fourteen miles. The learned trial judge found the defendant guilty of negligence and gave judgment for the plaintiff for $1,500 and costs. The defendant Company appealed, contending that the plaintiff was guilty of contributory negligence, and that the learned trial judge erred in holding that the defendant Company was guilty of negligence in employing cars that were not equipped with automatic couplers.

Statement

Arthur Leighton, for plaintiff.
Maclean, K.C., for defendant.

CLEMENT, J.: As I have worked it out, I think $1,500 the proper judgment for the plaintiff. In this case I think the defendant Company is liable. I find, in the first place, that it was guilty of negligence, in that it had not that due regard for the safety of its employees which the law requires, in keeping on the antiquated system of link-and-pin couplings. We know that both the Provincial and Dominion Legislatures have legislated against the use of this system. This is not conclusive, but I should say that, bearing in mind that the use of the old coupling necessitated a man going between the cars, which is a risky and dangerous thing to do, and that for many years the system has been condemned, if the Company continued on its way with that antiquated and dangerous coupling it is

CLEMENT, J.

CLEMENT, J.

1914

May 19.

COURT OF APPEAL

1915

Feb. 26.

COOK v. CANADIAN COLLIERIES (DUNSMUIR), LTD.

not guarding the safety of its employees in keeping on the use of it.

I do not accept the plaintiff's statement with regard to the fact that the brake was not in order. I decide the case upon this: that, because of the use of this coupling, he had to go between the cars to make the coupling, and that while there in the performance of his duty he was crushed. He is, therefore, entitled to recompense unless he is guilty of contributory negligence. The burden as to that is upon the Company. If they had satisfied me that there is a set rule of the Company, made known to the plaintiff, so that in going between the cars on a curve he was deliberately breaking the rules, the defence might avail, but I have not received evidence of this. The plaintiff knew that there was greater risk—they all knew that there was a certain element of risk when the trains were on a curve—there was a little greater risk in these circumstances. I do not think that the Company ever laid it down a flat-footed rule that men were not to attempt coupling on the inside of a curve in any circumstances whatever. That this was not looked upon as a set rule is seen in the evidence of the conductor himself, who, immediately after this thing happened, went in and coupled the cars in the same way himself. He might have called out to the man if he thought he was getting into a dangerous place, and he did not do so. This contention as to the curve is an after-

CLEMENT, J.

thought. The report made at the time to the railway inspector and to the Government did not contain any suggestion that the man was guilty of negligence in trying to couple on a curve. I therefore cannot find that he was guilty of contributory negligence.

I find it unnecessary to consider whether this is a Company which is liable to the performance of the regulations of the Province. I am inclined to think it is not. It is rather curious that at this date a railway carrying passengers is not a regular railway under the Railway Act.

With regard to the question of damages, I must confess that my own feeling has always been that the proper rule should be not to fill the cup to overflowing, but to fill it up. This person has been hurt through others' negligence, and for that reason I

am inclined to make a fairly liberal allowance for the pain and suffering the man has been put to. The amount I allow is $1,500: $200 for doctor's bill; $112.50 for the hospital bill; the sum of $640 for time and wages lost (the man is practically incapacitated by his injuries to work for eight months), and the balance of the amount is compensation for his pain and suffering. Judgment for the plaintiff, $1,500 and costs.

The appeal was argued at Vancouver on the 12th of November, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Maclean, K.C., for appellant: We were not incorporated under the Railway Act, so that the section with regard to automatic coupling does not apply. The fact that the "link-and-pin" coupling is more dangerous than the automatic coupling does not in itself constitute liability: see *Walsh* v. *Whiteley* (1888), 21 Q.B.D. 371; *Butler* v. *Birnbaum* (1891), 7 T.L.R. 287. There must be a defect in the original construction or subsequent condition of the machine. The plaintiff was guilty of contributory negligence. The accident occurred on a curve in the road. There was a rule of the Company, of which the plaintiff was notified, that coupling shall not be made from the inside of a curve, and it was due to not complying with this rule that the plaintiff was injured: see *Fawcett* v. *C.P.R.* (1901), 8 B.C. 393; *Deyo* v. *Kingston and Pembroke R.W. Co.* (1904), 8 O.L.R. 588.

Argument

Arthur Leighton, for respondent: The old link-and-pin coupling is so antiquated and dangerous that the Court can take cognizance of it, and the trial judge has, owing to the use of this coupling, found negligence: see Beven on Negligence, 3rd Ed., Vol. 1, p. 609. We contend this is a railway and subject to the requirements of the Act: see *Edison* v. *Edmonds* (1896), 4 B.C. 354; *In re East and West India Dock Company* (1888), 38 Ch. D. 576 at pp. 581-2; *Booker* v. *Wellington Colliery Co.* (1902), 9 B.C. 265; *Great Northern Railway Co.* v. *Tahourdin* (1883), 13 Q.B.D. 320 at p. 324; *Scott* v. *Canadian Pacific Ry. Co.* (1909), 19 Man. L.R. 29; *Roylance* v. *Canadian Pacific R.W. Co.* (1908), 8 W.L.R. 399. The fact that this is

CLEMENT, J.

1914

May 19.

COURT OF APPEAL

1915

Feb. 26.

COOK v. CANADIAN COLLIERIES (DUNSMUIR), LTD.

a railway, whether it was incorporated or not, is sufficient to find them guilty of negligence in not having the automatic coupling; the Railway Act says this system must be used: see R.S.B.C. 1911, Cap. 194, Sec. 181, Subsec. 1 (*c*).

Maclean, in reply: Going inside a curve to couple cars was prohibited by the rules under the Railway Act of 1897. He knew it was dangerous, and was guilty of contributory negligence.

Cur. adv. vult.

26th February, 1915.

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

IRVING, J.A.: I would allow the appeal and dismiss the action. This is not a railway within the Dominion or Provincial statute. It was built by the Wellington Colliery Company—a coal company—and was operated by them over their own lands for the purpose of carrying coal from their mines to their wharf, a distance of some twelve miles. A passenger car was usually attached to the train.

IRVING, J.A.

The defendant operates it in the same way and makes reports to the Department of Railways annually, and in these reports states that it is being operated without any charter.

I do not think it can be laid down that every mining company omitting to use automatic couplers is guilty of negligence, and in the absence of such legislation I am unable to say that the defendant was guilty of any negligence.

MARTIN, J.A.: After a careful perusal of all the evidence, I am satisfied that the learned trial judge was justified in the view he took of the facts, and in such case no legal difficulty exists to prevent the plaintiff from holding the judgment entered in his favour.

MARTIN, J.A.

The appeal, therefore, should be dismissed.

GALLIHER, J.A.: I would maintain the judgment of the learned trial judge.

GALLIHER, J.A.

While this is not an incorporated railway company, and the provisions of the Railway Act, R.S.C. 1906, Cap. 37, Sec. 264, Subsec. 1 (*c*), cannot be invoked, yet the defendant is operating a railway carrying passengers and freight, and exposing their workmen to the same dangers as any duly-incorporated railway company.

CLEMENT, J.

1914

May 19.

COURT OF APPEAL

1915

Feb. 26.

COOK v. CANADIAN COLLIERIES (DUNSMUIR), LTD.

The link-and-pin coupling is now a thing of the past in Canada on all operating railways, Parliament, in its wisdom, owing to the attendant danger to employees, having seen fit to legislate abolishing it. It has been so long recognized as dangerous, and as for a considerable number of years safer and better appliances have been in vogue, I hold that the failure to adopt these appliances, and to continue the antiquated system to the greater danger of its employees, is a negligent act on the part of the defendant. It may be said that it is hard to draw the line in such a case, and while on ordinary logging roads as we understand them in this Province, or in underground workings in mines, it might not be reasonable to exact the same degree of modern equipment, yet parties operating as the defendant here is should, I think, be held to be negligent.

GALLIHER, J.A.

McPHILLIPS, J.A.: This is an appeal from the decision of CLEMENT, J. in a negligence action. The learned trial judge was sitting without a jury, and in giving a considered judgment has, by his findings of fact, held that the defendant was guilty of negligence, and absolves the plaintiff from any contributory negligence. The evidence admits of these findings of fact, and, in my opinion, no such case has been made out upon this appeal which would warrant their disturbance.

MCPHILLIPS, J.A.

The couplings in use were certainly not of the most modern kind, but it could not be said that this alone would constitute liability, yet there must be a time when the more modern appliances should be adopted. When we have the almost obsolete couplings and a defective system as well, and the non-enforcement of rules of safety—if any such really existed—a complete case is made out of negligence, for which the appellant must be held to be answerable. The cases which in my opinion support the conclusion to which I have come upon this appeal

CLEMENT, J.

1914

May 19.

COURT OF APPEAL

1915

Feb. 26.

COOK v. CANADIAN COLLIERIES (DUNSMUIR), LTD.

MCPHILLIPS, J.A.

are *Fralick* v. *Grand Trunk Ry. Co.* (1910), 43 S.C.R. 494, Duff, J. at pp. 519-20; *Stone* v. *Canadian Pacific Railway Co.* (1913), 47 S.C.R. 634. It is true this latter case, to a large extent, goes upon statutory duty, but Anglin, J. at p. 656 said:

"A finding of negligence on the part of the defendants is probably involved in the finding of such a defect; but a finding of negligence is not requisite where a breach of statutory duty causing the injury complained of has been established."

It is a case, however, that is most instructive upon the question so strenuously advanced in the present case—that the plaintiff was guilty of contributory negligence—and I would in particular refer upon this point to the judgment of Anglin, J. at pp. 660-62; and *Carrigan* v. *Granby* (1911), 16 B.C. 157.

I do not find it necessary to express an opinion upon the question as to whether the appellant is subject to the Railway Act (R.S.B.C. 1911, Cap. 194).

The appeal, therefore, should, in my opinion, be dismissed.

Appeal dismissed, Irving, J.A. dissenting.

Solicitors for appellant: *Elliott, Maclean & Shandley.*
Solicitor for respondent: *Arthur Leighton.*

UNION ASSURANCE COMPANY AND THE SISTERS OF ST. ANN v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

GREGORY, J.

1914

Sept. 3.

COURT OF APPEAL

1915

Feb. 26.

UNION ASSURANCE CO. v. B.C. ELECTRIC RY. CO.

Fire insurance—Loss through negligence of third party—Assignment of damages to insurance company—Right of company to sue—Laws Declaratory Act, R.S.B.C. 1911, Cap. 133, Sec. 2, Subsec. (25)—Consolidated Railway Company's Act, 1896, B.C. Stats. 1896, Cap. 55, Secs. 44 and 60.

Owing to the crossing of the high and low-voltage wires of the defendant Company, the convent of St. Ann, at Victoria, was burnt, and the loss sustained was paid to the proprietors on a policy held in the plaintiff Company. The proprietors then assigned, in writing, all their rights against the defendant Company to the plaintiff Company, but notice of the assignment was not given to the defendant Company. The plaintiff Company brought action in its own name within six months from the date of the fire, and after the expiration of the six months the Sisters of St. Ann were added as co-plaintiffs by an order made without prejudice to the defendant's right to take advantage of the limitation clause (section 60) in the Consolidated Railway Company's Act, 1896. It was held at the trial that although insurers could not by mere force of subrogation sue in their own name, the right to so sue was conferred by an assignment under subsection (25) of section 2 of the Laws Declaratory Act.

Held, on appeal (reversing the decision of GREGORY, J.), that as no written notice of the assignment to the defendant had been proved, the plaintiff Company was not entitled to the benefit of the provisions of the Laws Declaratory Act, and must sue in the name of the assignors.

Held, further, that the operation of section 44 of the Consolidated Railway Company's Act, 1896, merely imposes a statutory duty on the Company and does not create contractual relations between the Company and its customers.

In this case, however, the Sisters of St. Ann not having been made parties within the six months' limitation under section 60, the action must fail.

Lyles v. *Southend-on-Sea Corporation* (1905), 2 K.B. 1, followed.

APPEAL by defendant from a decision of GREGORY, J. in an action tried by him at Victoria on the 28th and 29th of April, 1914, for damages alleged to have been caused by the defendant

Statement

GREGORY, J.

1914

Sept. 3.

COURT OF APPEAL

1915

Feb. 26.

UNION ASSURANCE CO. v. B.C. ELECTRIC RY. CO.

Statement

Company maintaining a live high-voltage electric wire in a negligent and unlawful manner, whereby St. Ann's Convent (insured by the plaintiff Company) was set on fire and damaged. Some years ago the convent operated its own electric lighting system from a private dynamo. Later the convent became connected with the Company's system, and the allegation was that the connecting or service wires of the Company were of so high a voltage, and were so negligently placed, as to be liable to cause, and did cause a fire, by coming in contact with the convent wires, destroying its electric light service and damaging the building to the extent of $1,000 odd. The defence was that the installation of the wire and apparatus in the convent was defective and not in accordance with the municipal by-laws; that a certain fuse-wire in a false block, or safety device, was burnt out at some time and replaced by a copper wire heavier than the other copper wires in the building; that the said fuse or false block was not in any way under the control of the defendant Company, and that such action constituted contributory negligence on the part of the convent authorities. The defendant also depended on its statutory limitation of six months within which the action claiming damages should have been brought; that the plaintiff Company was not licensed to carry on a fire-insurance business in British Columbia, not having obtained a licence from the Provincial Inspector of Fire Insurance; that in any event the damage suffered did not exceed $100, and that the action should have been brought by the convent authorities.

Crease, K.C. (*Hankey,* with him), for plaintiffs.
Harold B. Robertson (*A. D. King,* with him), for defendant.

3rd September, 1914.

GREGORY, J.

GREGORY, J.: I have most carefully read and considered all the cases referred to by both the plaintiffs and defendant, and speaking generally, I quite agree with the defendant's contention that this is in principle an action of tort, and that a claim for unliquidated damages for a tort is not assignable (*Defries* v. *Milne* (1913), 1 Ch. 98), but I am unable to distinguish the case from that of *King* v. *Victoria Insurance Company* (1896),

A.C. 250. Here, as there, there has been a loss under a policy of insurance; the loss was honestly paid by the insuring Company as falling within the terms of its policy, and the Judicial Committee of the Privy Council, while admitting the principle that the Company's right to be subrogated to remedies of the assured did not enable it to sue in its own name, held that in the circumstances of that case it might sue in its own name by virtue of the assignment it had taken from the assured, aided by section 5, subsection (6) of the Queensland Judicature Act (40 Vict., c. 84), which, it was stated, corresponded with the English Judicature Act of 1873, section 25, subsection (6), which is identical with section 2, subsection (25) of the Laws Declaratory Act, R.S.B.C. 1911, Cap. 133.

Here also we have an assignment to the plaintiff Company.

In these circumstances it is unnecessary to consider the questions arising from the defence of the Statute of Limitations, being section 60 of the defendant's Act of incorporation, B.C. Stats. 1896, Cap. 55.

Defendant made no attempt to prove the defence of contributory negligence, etc., set up, and in fact moved for a nonsuit on the ground that there was no evidence to shew how the fire originated. I cannot resist the conclusion that the fire arose through the crossing of defendant's high and low-voltage wires, as stated by the fire chief.

Sister Mary Ann shews that the system had been working satisfactorily for years, and Mr. Tripp admits the crossing of the wires and the current carried by them. In the absence of technical evidence to shew that this could not cause the fire, I feel justified in inferring that it did, especially when supported, as it is, by the evidence of the fire chief.

There will be judgment for the plaintiff, and a reference to the registrar to ascertain the amount of damages. Liberty to apply for directions to govern the registrar in his inquiry.

The appeal was argued at Vancouver on the 6th of November, 1914, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

GREGORY, J.

1914

Sept. 3.

COURT OF APPEAL

1915

Feb. 26.

UNION ASSURANCE CO. v. B.C. ELECTRIC RY. CO.

Harold B. Robertson, for appellant (defendant): In 1897 the St. Ann's Convent installed its own plant and supplied its own power. In 1901 the B.C. Electric began to supply them with electricity. There was no express contract proved. We, however, admit we supplied power and they paid for it. The fire occurred on the 23rd of December, 1912. The action was commenced on the 21st of January, 1913, but the Sisters of St. Ann were not made party plaintiffs until the 2nd of April, 1914. The order so adding them was made subject to the rights of the defendant to the benefit of section 60 of the Consolidated Railway Company's Act, 1896. The trial judge gave judgment for the Assurance Company and dismissed the action of the Sisters of St. Ann, following *King* v. *Victoria Insurance Company* (1896), A.C. 250.

The Sisters of St. Ann had, by deed of subrogation, assigned all their rights to the Union Assurance Company, but no notice of the assignment was given the defendant Company, and as long as no notice was given, we have a good defence against the Assurance Company. We have three defences: first, there was no notice of the assignment; second, there is no proof of negligence on the part of the defendant Company; third, the action is barred by section 60 of the Consolidated Railway Company's Act, 1896. In the case of an equitable assignment the assignee must make the assignor a party. The Union Assurance Company never had a cause of action, and the judgment was given in its favour: see *Simpson* v. *Thomson* (1877), 3 App. Cas. 279; Halsbury's Laws of England, Vol. 17, p. 518, pars. 1023-4. There is no negligence shewn at all. After the fire the wires were ripped out, and the only evidence for the plaintiffs is that the wires were found crossed, but more than this must be shewn: see *McElmon* v. *B.C. Electric Ry. Co.* (1913), 18 B.C. 522. As to the action being barred by section 60 of the Consolidated Railway Company's Act, 1896, see *British Columbia Electric Ry. Co.* v. *Crompton* (1910), 43 S.C.R. 1; *Taylor* v. *Manchester, Sheffield, and Lincolnshire Railway Co.* (1895), 1 Q.B. 134; *Lyles* v. *Southend-on-Sea Corporation* (1905), 2 K.B. 1; *Sayers* v. *B.C. Electric Ry. Co.* (1906), 12 B.C. 102.

Argument

Crease, K.C., for respondents (plaintiffs): As to the *onus probandi,* if there is enough evidence to call on the defence, and the defence gives no evidence, the plaintiff has made his case: *Newberry* v. *Bristol Tramway and Carriage Company (Limited)* (1912), 29 T.L.R. 177; *Byrne* v. *Boadle* (1863), 2 H. & C. 721; *Scott* v. *London Dock Co.* (1865), 3 H. & C. 596 at p. 600; *Longman* v. *Cottingham* (1913), 18 B.C. 184; 48 S.C.R. 542. By the deed of subrogation the assignee has all the rights of the assignor and can bring the action in his own name: see *Dell* v. *Saunders* (1914), 19 B.C. 500; *Castellain* v. *Preston* (1883), 11 Q.B.D. 380. This is an equitable assignment of a legal chose in action: see *Burnand* v. *Rodocanachi* (1882), 7 App. Cas. 333. On the question of the necessity of bringing the action in the name of the assignor, see *Tolhurst* v. *Associated Portland Cement Manufacturers (1900) Ltd.* (1903), A.C. 414 at p. 420.

Argument

Robertson, in reply.

Cur. adv. vult.

26th February, 1915.

MACDONALD, C.J.A.: The plaintiff Company insured the Sisters of St. Ann against loss by fire. The defendant was, at and prior to the time of the fire in the Sisters' convent out of which the plaintiff Company's claim arises, supplying electric current to light the convent. The plaintiff Company made good to the Sisters the damage, and obtained from them, in writing, an assignment of their rights against the defendant, and thereupon this action was commenced in the plaintiff Company's own name within six months from the date of the fire. Subsequently, but more than six months after the date of the fire, the Sisters of St. Ann were added as co-plaintiffs, but without prejudice to the defendant's right to take advantage of the limitation clause in its special Act. The learned judge who tried the action gave judgment in favour of the plaintiff Company, and directed a reference to ascertain the damages, and dismissed the action so far as the Sisters of St. Ann were concerned, with costs.

MACDONALD, C.J.A.

The defendant appealed and the Sisters of St. Ann cross-appealed. Defendant's grounds of appeal may be shortly stated as follows: (1) that the claim of the Sisters was not assignable;

GREGORY, J.

1914

Sept. 3.

COURT OF APPEAL

1915

Feb. 26.

UNION ASSURANCE CO. v. B.C. ELECTRIC RY. CO.

(2) that the plaintiff Company had no right of action in its own name; (3) that the action in the Sisters' name was barred by section 60 of the Consolidated Railway Company's Act, 1896, being Cap. 55, B.C. Statutes of that year; (4) that the plaintiff Company's claim was also barred; and (5) that there was no legal evidence of negligence on defendant's part.

By their cross-appeal the Sisters claim to be reinstated, and to have judgment in their favour if it should be held that their co-plaintiff could not sustain the judgment.

King v. *Victoria Insurance Company* (1896), A.C. 250, disposes of the first ground in favour of the plaintiffs. That case also bears on the second ground of appeal. It was held, under a contract of assignment or subrogation not distinguishable in its bearing on the point at issue from the one here, that the insurance company could recover from the tort feasor. In that case, notice in writing of the assignment was given to the defendant, bringing it within the operation of a statute identical with subsection (25) of section 2 of the Laws Declaratory Act, Cap. 133, R.S.B.C. 1911, which enables an assignee who has brought himself within that statute to sue in his own name. In the case at bar, while the assignment was in writing, no notice in writing to the defendant was proved, and, therefore, the plaintiff Company is not entitled to the benefit of the statute. But there was an equitable assignment, and the failure to give notice merely affected the manner of recovery. Instead of suing in its own name, the plaintiff Company must sue in the name of the assignors: *Dell* v. *Saunders* (1914), 19 B.C. 500.

MACDONALD, C.J.A.

The learned judge appears to have been under the erroneous impression that a legal assignment, in pursuance of the Act, had been shewn in this case. This may account for his having dismissed the Sisters and retained the plaintiff Company.

But apart from the assignment, upon payment of the loss, the plaintiff Company was in law subrogated to the rights of the Sisters and entitled to bring this action in their (the Sisters) name: *Simpson* v. *Thomson* (1877), 3 App. Cas. 279.

The facts of the case at bar, with one exception, are identical with the facts in *British Columbia Electric Ry. Co.* v. *Crompton*

(1910), 43 S.C.R. 1. The defendant is the same; the legislation affecting the case is the same; each in its facts falls within section 44 of the said Consolidated Railway Company's Act, 1896, which, after providing that it shall be lawful for the Company to contract for the supply of electricity to consumers for lighting purposes, declares that—

"The company shall from time to time 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."

The section then proceeds to further provide that the Company, before complying with the request, may require security for the cost of making the connection, for the payment of rates, and for rent of instruments.

In this case, the contract (if any) for the supply of electric current is an implied one, arising wholly from a request for the service and compliance therewith by the defendant, and payment of the rates from time to time by the Sisters in the ordinary course of business. In *Crompton's* case (and herein lies the distinction) it was the mother of the plaintiff who applied for and was given the service, not the plaintiff himself, who was an infant living with his mother. In each case the injury was the result of the defendant's negligence, assuming for the moment that they were negligent in this case, in permitting a wire charged with a high voltage to come in contact with a low-voltage service wire leading into the premises of the customer. The units of voltage in these respective wires were not proved, but the wires were spoken of throughout the evidence as the high-voltage wire and the low-voltage wire, or in terms of similar significance. The fact that there was no real dispute about the voltage in each perhaps accounts for the want of more definite evidence upon the point.

MACDONALD, C.J.A.

The circumstances, therefore, in these two cases are distinguishable only in this: that in *Crompton's* case the plaintiff was, as the majority of the Court held, not the customer, and that, therefore, no contractual relationship existed between him and the defendant, whereas in this case the Sisters of St. Ann were the customers, and if no contractual relationship existed between them and the defendant, it is because of the effect of section 44.

The defendant is not by law obliged to carry passengers. If it

GREGORY, J.

1914

Sept. 3.

COURT OF APPEAL

1915

Feb. 26.

UNION ASSURANCE CO. v. B.C. ELECTRIC RY. CO.

MACDONALD, C.J.A.

contracts to carry a passenger it is subject to the common-law obligations imposed upon carriers of passengers. To such a case section 60 has been held to be inapplicable: *Sayers* v. *B.C. Electric Ry. Co.* (1906), 12 B.C. 102. Where there is no contractual relationship between the plaintiff and this defendant, and the injury is the result of defendant's breach of duty towards the plaintiff in operating its works, whether the tramway or the electrical supply branch thereof, the section is applicable: *British Columbia Electric Ry. Co.* v. *Crompton, supra.*

These authorities narrow the case down to the inquiry as to the effect of section 44 on the legal relationship of the parties. Apart from the section, on the facts of this case a contract, I think, would clearly be implied. The defendant's contention, for which it claims the authority of *Lyles* v. *Southend-on-Sea Corporation* (1905), 2 K.B. 1, is that as the statute required them to supply the service to an applicant whose premises are within 50 yards of their main supply wire, their compliance with the request of the Sisters of St. Ann did not constitute a contract, and that this action is, therefore, one for "indemnity for damage or injury sustained . . . . by reason of the works or operations of the Company," to quote from section 60, and expressly within its protection. The Court of Appeal distinguished *Palmer* v. *Grand Junction Railway Co.* (1839), 4 M. & W. 749; and *Carpue* v. *London Railway Co.* (1844), 5 Q.B. 747, on the ground that the Acts of incorporation of the defendants in those cases did not require the companies, but merely enabled them, to become carriers if and when they elected to do so, and that, hence, the actions were for failure in their duties as carriers under contract, express or implied, and were not for "any act done in pursuance or execution or intended execution of any Act of Parliament" (their special Acts) so as to entitle them to the protection of the Public Authorities Protection Act, 1893, from which I have just quoted, whereas in the case before them they thought that because the defendant's Light Railways Order, which had the force of a statute, required it to provide a public passenger service on its tramways under penalty for default therein, the action was one arising out of an act done in pursuance of its said Light Railways Order, and must be com-

menced within the time limited by the Public Authorities Protection Act, 1893. In other words, that an obligation was imposed beyond that which at common law attaches to carriers of passengers, *viz.*: the obligation to carry passengers whether they wished to or not, and that, hence, the relationship between the carrier and the passenger was not merely contractual in its inception.

GREGORY, J.

1914

Sept. 3.

COURT OF APPEAL

1915

Feb. 26.

I think the doctrine of *Lyles* v. *Southend-on-Sea Corporation, supra,* must be applied to this case.

I can see no essential difference in principle between the two. There the defendants were under a statutory duty to accept Lyles as a passenger. Here the defendant is under a like duty to supply the Sisters of St. Ann with electricity. In each case the obligation to perform the duty without negligence is an obligation imposed by the common law. If, therefore, the action in *Lyles's* case was one commenced against the defendants for negligence in connection with an act done in obedience to the statutory mandate to carry the passenger, I cannot see any escape from the conclusion that this action was commenced for damages sustained by defendant's negligence in relation to the works or operations of the defendant. There appears to me to be no more nor less of the element of contract in the one than in the other, and what is perhaps of more importance, there is in the one just as clearly as in the other the initial statutory obligation.

UNION ASSURANCE CO. *v.* B.C. ELECTRIC RY. CO.

MACDONALD, C.J.A.

As the plaintiff Company cannot support this action in its own name, and as the Sisters of St. Ann are, in my view of the section, barred, it follows that the appeal should be allowed and the cross-appeal dismissed.

It has thus become unnecessary to consider the 4th and 5th grounds of appeal.

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

IRVING, J.A.

MARTIN, J.A.: I agree with the judgment of the Chief Justice, allowing the appeal for the reasons stated, only adding by way of precaution, in case the matter should go higher, that I do not wish it to be understood that there is not much also to be said in favour of another ground of appeal, *viz.*: that no

MARTIN, J.A.

GREGORY, J.

1914

Sept. 3.

COURT OF APPEAL

1915

Feb. 26.

UNION ASSURANCE CO. v. B.C. ELECTRIC RY. CO.

GALLIHER, J.A.

negligence has in any event been established, the evidence, *e.g.*, as to the current, which was given in *British Columbia Electric Ry. Co.* v. *Crompton* (1910), 43 S.C.R. 1 at p. 15, having been omitted in this case.

GALLIHER, J.A.: I think this is an action arising out of tort, and as the plaintiff failed to comply with the provisions of subsection (25) of section 2 of the Laws Declaratory Act, R.S.B.C. 1911, Cap. 133, no notice in writing having been given of the assignment, the plaintiff Company cannot maintain the action in its own name.

When the Sisters of St. Ann were added as a party it was too late, as the action was then barred by section 60, Cap. 55, B.C. Statutes, 1896: *British Columbia Electric Ry. Co.* v. *Crompton* (1910), 43 S.C.R. 1.

The appeal should be allowed.

Appeal allowed and cross-appeal dismissed.

Solicitors for appellant: *Barnard, Robertson, Heisterman & Tait.*

Solicitors for respondents: *Crease & Crease.*

NEPAGE, MCKENNY AND COMPANY v. PINNER & MCLELLAN AND VICTORIA OPERA HOUSE COMPANY, LIMITED, *ET AL.*

COURT OF APPEAL

1915

Feb. 26.

NEPAGE, MCKENNY & CO. v. PINNER & MCLELLAN

Mechanic's lien—Where lien attaches—Completion of contract—Sub-contractor—Nothing due from owner to contractor—Mechanics' Lien Act, R.S.B.C. 1911, Cap. 154.

The lien of a wage-earner under a daily hiring attaches on the completion of the day's work, and so from day to day. The lien of a contractor or sub-contractor attaches when he has completed his contract, or, if the contract provides for interim payments on account, a lien attaches when each payment becomes due or payable to the extent of the amount thereof.

Where a sub-contractor undertakes to do a certain work and supply materials for a lump sum, without any stipulation as to payment before completion, his lien attaches only on completion of his work and if there is no money then due from the owner to the contractor, the sub-contractor's lien fails by virtue of section 8 of the Mechanics' Lien Act.

Decision of LAMPMAN, Co. J. affirmed.

APPEAL from the decision of LAMPMAN, Co. J., in an action tried by him at Victoria on the 7th of May, 1914, to enforce a mechanic's lien on a sub-contract for the installation of an electric plant in the Victoria Opera House. The Opera House Company had let a contract for the erection of their opera house to the defendants Pinner & McLellan, who in turn sub-contracted to the plaintiffs. On the 28th of January, 1914, when the building was nearing completion, the owners paid the contractors $50,000, it being estimated that there would be about $15,000 due the contractors when the building was completed. The sub-contract provided for payments by the contractors during the progress of the work, but there was no evidence that anything was due or unpaid under the terms thereof on the 28th of January, or that the plaintiffs had completed the work under their sub-contract on that date, the evidence shewing that the sub-contract was in fact completed shortly before the filing of the lien on the 17th of February following. The contractors abandoned

Statement

COURT OF APPEAL

1915

Feb. 26.

NEPAGE, MCKENNY & CO. v. PINNER & MCLELLAN

the work on the building immediately after the $50,000 payment was made, and it appeared from the evidence that there was nothing due or owing by the owners to the contractors after that payment was made. The learned trial judge gave judgment for the amount claimed against the contractors but dismissed the claim for the enforcement of the mechanic's lien. The plaintiffs appealed.

The appeal was argued at Vancouver on the 11th of November, 1914, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

McDiarmid, for appellants: The plaintiffs are sub-contractors and the action is on two liens, one for $7,190.33 based on the contract with the contractors and the second for $477.76 for extras ordered by the Opera House Company from the plaintiffs without the intervention of the main contractors. On the trial we abandoned the second lien, and as it appeared that a $4,000 note, with another item of $120, had been paid we only asked for judgment for $3,070.33.

Argument

Moresby, on the same side: We contend the lien attaches on the commencement of the work. The plaintiffs finished their contract on the 26th of January, 1914, and the contractors were paid $50,000 in notes by the owners two days later. The lien was filed on the 17th of February, 1914. When the payment was made the owners had knowledge of the sub-contractors' claim. We say the lien attaches when the work is commenced and the owner with the knowledge of the sub-contractors' claims should not have paid the contractors; having done so they are liable to the sub-contractors. The Alberta Act is the same as ours except that in our Act there is the word "payable" whereas in the Alberta Act it is "owing and payable": see *Swanson* v. *Mollison* (1907), 6 W.L.R. 678; *Ross* v. *Gorman* (1908), 1 Alta. L.R. 516; (1908), 8 W.L.R. 413; *B.C. Mills, Timber & Trading Co.* v. *Horrobin* (1907), 12 B.C. 426; *Lemon* v. *Dunsmuir* (1907), 5 W.L.R. 505; *Gorman* v. *Henderson* (1908), 8 W.L.R. 422; *Van Stone* v. *Stillwell & Bierce Manfg. Co.* (1891), 142 U.S. 128. On the question of a lien attaching see *McNamara* v. *Kirkland* (1891), 18 A.R. 271 at p. 276;

Travis v. *Breckenridge-Lund Lumber and Coal Co.* (1910), 43 S.C.R. 59; *Fuller* v. *Turner and Beech* (1913), 18 B.C. 69; *Rosio et al.* v. *Beech et al., ib.* 73; *Fitzgerald* v. *Williamson, ib.* 322 at p. 325. As to the necessity of giving notice that we intend to claim a lien, it is not necessary for the plaintiff as a sub-contractor supplying material to give notice: see *Irvin* v. *Victoria Home Construction and Investment Co.* (1913), 18 B.C. 318; *Hazell* v. *Standard Milk Co.* (1913), 5 W.W.R. 758; *Smith Co.* v. *Sissiboo Pulp and Paper Co., Ltd.* (1903), 36 N.S. 348; (1904), 35 S.C.R. 93.

Crease, K.C., for respondents, Victoria Opera House Company, Pemberton and Wright: The point raised as to section 8 of the Act and referred to in *B.C. Mills, Timber and Trading Co.* v. *Horrobin* (1907), 12 B.C. 426, and *Lemon* v. *Dunsmuir* (1907), 5 W.L.R. 505, was not raised in the pleadings or in the Court below. We say the lien does not attach until the affidavit is filed: see *Edmonds* v. *Tiernan* (1892), 21 S.C.R. 406. [He also referred to *Farrell* v. *Gallagher* (1911), 23 O.L.R. 130 at p. 139; *Smith* v. *Bernhart* (1909), 11 W.L.R. 623; *Leroy* v. *Smith* (1901), 8 B.C. 293; *Davidson* v. *Francis* (1902), 14 Man. L.R. 141; *Tharsis Sulphur and Copper Company* v. *M'Elroy & Sons* (1878), 3 App. Cas. 1040; *Champion* v. *World Building Limited* (1914), 20 B.C. 156; *Harvey* v. *Brewer* (1904), 178 N.Y. 5; 70 N.E. 73; Wallace on Mechanics' Liens, 2nd Ed., 363; Halsbury's Laws of England, Vol. 3, p. 210, par. 418; Hudson on Building Contracts, 4th Ed., Vol. 1, p. 366.] Argument

M. B. Jackson, for respondent Hanington, referred to *Currier* v. *Friedrick* (1875), 22 Gr. 243; *Fairclough* v. *Smith* (1901), 13 Man. L.R. 509; *Oldfield* v. *Barbour* (1888), 12 Pr. 554; *Lundy* v. *Henderson* (1908), 9 W.L.R. 327; *Brown* v. *Allan & Jones* (1913), 18 B.C. 326.

Moresby, in reply.

Cur. adv. vult.

26th February, 1915.

MACDONALD, C.J.A.: The plaintiffs claim a mechanic's lien against the property of the Victoria Opera House Company, Limited, as owners, and others as encumbrancers. In the view MACDONALD, C.J.A.

COURT OF APPEAL

1915

Feb. 26.

NEPAGE, MCKENNY & CO. v. PINNER & MCLELLAN

I take of the case no question arises with respect to the encumbrancers. The Opera House Company let an entire contract for the erection of their opera house to the defendants Pinner & McLellan, with whom plaintiffs contracted for the installation of the electric plant for the lump sum of $14,000. When the opera house was nearing completion, namely on the 28th of January, 1914, the owners made a payment of $50,000 to the contractors, leaving a balance of what the contractors claim would be due them on completion of about $15,000.

There is no evidence that on the 28th of January the plaintiffs had completed the work under their sub-contract. We were referred to an item in a time-slip dated the 26th of January as evidence of the last work done on the sub-contract, but that time-slip is not verified, nor is there any evidence that in fact that item was the last item of work done under the sub-contract. I must therefore accept the only real evidence of the fact of completion, and it is to be found in the plaintiffs' letter of the 16th of February, in which they declare that they had finished the work, and the certificate of the owners' architect of the same date verified that claim. The fact therefore is not disputed that on that date the plaintiffs had completed their sub-contract and the extra work which they had undertaken, and which is not in question in this appeal.

MACDONALD, C.J.A.

The said sub-contract provides for payments by the contractors during the progress of the work, and there is no evidence that anything was due or unpaid under the terms thereof on the 28th of January.

Upon being paid the said sum of $50,000, the contractors abandoned the work, and the building, it is admitted, is not yet completed. It is not seriously contended therefore that there was after the payment of the 28th of January anything due or payable by the owners to the contractors.

These facts lead to the question did a lien attach in favour of the plaintiffs before the $50,000 was paid to the contractors? If so, then I think it would be enforceable notwithstanding that at the time of the filing of the lien in question in this action, namely, the 17th of February, 1914, nothing was then due or payable by the owners to the contractors.

As I read the Mechanics' Lien Act, the lien of a wage-earner under a daily hiring would attach on the completion of the day's work, and so from day to day. The lien of a contractor or sub-contractor would attach when he had completed his contract, or if the contract provided for interim payments on account, a lien would attach when each payment became due or payable to the extent of the amount thereof. In the case of the sub-contract in question, aside from the provision for progress payments on account, no part of the contract price might ever become payable. Until the contract should be substantially completed the payment of the price would be contingent. I think a lien cannot attach in respect of money not payable, and which may never become due or payable. In the absence therefore of evidence that either the whole or some part of the plaintiffs' contract price was at the time of the payment to the contractors of the said sum of $50,000 due or payable to the plaintiffs, in other words, that their right to it was no longer contingent, the plaintiffs cannot resort to that sum or any part of that sum as being a sum payable from the owner to the contractors in respect of which a lien in plaintiffs' favour attached.

MACDONALD, C.J.A.

On the 16th of February, when a lien might have attached had there been moneys payable by the owners to the contractors, there were none such, hence the plaintiffs cannot in my opinion succeed. The appeal should be dismissed.

GALLIHER, J.A.: The plaintiffs here are sub-contractors for the electrical wiring and fixtures in the Victoria Opera House, against which property they have filed a lien. Their contract with the contractors provided (article 9) that they should be paid upon architects' certificates 75 per cent. monthly as the work progressed. No certificates were issued except the final certificate of acceptance, dated the 16th of February, 1914, so that at the time the $50,000 was paid by the Opera House Company to the contractors on the 28th of January, 1914, there were no outstanding progress certificates issued by the architects shewing any amounts payable to the sub-contractors, in fact the architects say they had nothing to do with the sub-contractors as to issuing certificates.

GALLIHER, J.A.

COURT OF APPEAL

1915

Feb. 26.

NEPAGE, MCKENNY & CO. *v.* PINNER & MCLELLAN

GALLIHER, J.A.

In the statement given the Opera House Company by the contractors, dated the 21st of January, 1914, and upon which the sum of $50,000 was advanced to the contractors on the 28th of January, there is nothing to shew that there was any money due these sub-contractors unless the item No. 4, $2,194, electrical extras, refers to the plaintiffs, but even if that is so the plaintiffs abandoned their appeal as to extras.

In the evidence of Mr. Matson and Mr. Elliott, two of the directors of the Opera House Company, they admit that the sum paid ($50,000) was upon the representation of the contractors that they must have money to pay off the sub-contractors who were waiting at their door, as the bank would not advance them any more, and it was upon these representations that the money was advanced. This payment of $50,000 was, as I view it, an acknowledgment by the Opera House Company that on the date January 28th, 1914, they owed that amount to the contractors, the balance being left for adjustment. Now if the plaintiffs' lien had attached at or prior to the making of this payment they are entitled to have it enforced, as there was on that date moneys in the hands of the Company due the contractors more than sufficient to cover plaintiffs' claim.

Where a sub-contractor undertakes to do certain work and supply materials for a lump sum without any stipulation as to payment before completion, I take it his lien would attach only on completion of his work, and if there was no money then due from the owner to the contractor under our Mechanics' Lien Act, section 8, his lien must fail.

That was decided by this Court in *Fuller* v. *Turner and Beech* (1913), 18 B.C. 69; and *Rosio et al.* v. *Beech et al., ib.* 73

The affidavit of McKenny of the plaintiffs' firm shews that up to the 12th of December, 1913, they had received on account of their contract $8,280, and as there is no evidence before us of any estimates of work done under the contract up to that time, it may be that this amount represented the full 75 per cent. of the value of the work done, so that I fail to find evidence that there were moneys due plaintiffs under progress estimates, but if the plaintiffs have shewn in their evidence that the work

under their contract was completed (I exclude extras) before the payment over of the $50,000 on the 28th of January, 1914, then the lien for the balance unpaid would attach.

If the question had been asked plaintiffs' witnesses: Was the work done under your sub-contract (not including extras) completed before payment over to the contractor on January 28th? there would have been direct evidence one way or the other, but instead of this the Court is left to wade through a mass of tangled evidence and asked to find from that whether it was so completed. On the 16th of February, 1914, Messrs. NePage, McKenny & Co. wrote to Messrs. Rochfort & Sankey as follows:

"We beg to state that we have finished the electrical installation work on the Royal Victoria Theatre, according to plans and specifications; also all extras ordered through yourselves and the agents of the Victoria Theatre Company. If at any future date inferior materials, or defective work, under our contract, should appear, we shall, on notice from yourselves or the Victoria Opera House Co. make same good at our expense. Hoping to receive your written acceptance of the job, we are," etc.

and the architects' certificate in answer is as follows:

"Gentlemen: This is to certify that we have inspected the electrical installation in the Royal Victoria Theatre, and hereby accept same as satisfactory, in accordance with your letter to us of even date."

Standing alone these point to a completion on the 16th of February, 1914, but if there is sufficient other evidence to shew that notwithstanding these were dated as above (as a matter of fact the work under plaintiffs' main contract was completed before the 28th of January, 1914), then their lien should attach.

GALLIHER, J.A.

The only evidence we have been directed to is where in the statement filed, Exhibit 14, there is eight hours' work charged to job No. 683 (which is sworn to as the job number under the contract, the other numbers having reference to extras) and eight hours' work to the same number on the 26th of the same month. Counsel states that this was the last work done under the contract, but none of the witnesses have said so, and we are asked to infer that such is the case simply because there appears in the material before us no later entry of work charged to that number. I think it would be dangerous to so assume, and that the plaintiffs have failed in shewing that

COURT OF APPEAL

1915

Feb. 26.

their work under the contract was completed, or that there was anything due them, so that their lien would attach at the time the $50,000 was paid over.

The plaintiffs' appeal must fail.

NEPAGE, MCKENNY & CO. v. PINNER & MCLELLAN

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal must be dismissed. I entirely agree with the learned trial judge. It is amply clear upon the evidence that there is no sum due or payable to the contractors, and further, the case is one of non-completion of contract by the contractors, and section 8 of the Mechanics' Lien Act (Cap. 154, R.S.B.C. 1911) precludes the establishment of the claimed lien. The cases which in my opinion support the conclusion at which I have arrived are the following: *Smith Co.* v. *Sissiboo Pulp and Paper Co., Ltd.* (1904), 35 S.C.R. 93; *Farrell* v. *Gallagher* (1911), 23 O.L.R. 130; *Fuller* v. *Turner and Beech* (1913), 18 B.C. 69; *Rosio et al.* v. *Beech et al., ib.* 73; *Fitzgerald* v. *Williamson, ib.* 322.

Appeal dismissed.

Solicitor for appellants: *F. A. McDiarmid.*

Solicitors for respondents (Opera House Company, Pemberton and Wright): *Crease & Crease.*

Solicitors for respondent (Hanington): *Jackson & Baker.*

RITCHIE CONTRACTING AND SUPPLY COMPANY, LIMITED v. BROWN *ET AL.*

COURT OF APPEAL

1915

Feb. 26.

RITCHIE CONTRACTING AND SUPPLY CO. v. BROWN

Interpleader—Right of appeal—County Court Rules, 1912, Order XIII., rr. 7, 10—County Courts Act, R.S.B.C. 1911, Cap. 53, Sec. 116—Seizure of motor-car under execution—Validity of as against mortgagee—Defective chattel mortgage—Apparent possession.

By virtue of section 116 of the County Courts Act there is the right of appeal without leave from an order of a County Court judge disposing of an interpleader action on the merits under Order XIII., r. 7, of the County Court Rules, 1912, where the amount involved is $100 or over. Order X., r. 13 being inconsistent with the Act, the Act prevails (McPHILLIPS, J.A. dissenting).

The seizure by the sheriff of a chattel while in the lawful possession of a judgment debtor as apparent owner is valid as against a mortgagee under a defective chattel mortgage, who had not actual possession. Diligence by the mortgagee in endeavouring to obtain possession is of no avail.

Ex parte Jay. In re Blenkhorn (1874), 9 Chy. App. 697, followed.

APPEAL by the claimant from the judgment of GRANT, Co. J. upon the hearing of an interpleader issue ordered by consent to be tried summarily under Order XIII., r. 7 of the County Court Rules. The Ritchie Contracting and Supply Company recovered judgment against the defendant Bratt, and on the 27th of March, 1914, caused a motor-car to be seized under a writ of execution when in the garage of a third party, where it had been left for repairs. The defendant Bratt, the former owner, mortgaged the car to the defendant Brown on the 9th of November, 1913, to secure an indebtedness of $800. About the 10th of November, Brown took possession of the car and kept it in his own garage. On the 22nd of December, Bratt asked Brown for the use of the car, and on promising to bring it back he was allowed to take it away. After keeping and using the car for a few days he brought it for repairs to a garage on 13th Avenue, where it remained until seized by the sheriff, as already stated. It was held at the trial that the chattel mortgage was bad owing to a defective affidavit of *bona fides,* and

Statement

COURT OF APPEAL

1915

Feb. 26.

RITCHIE CONTRACTING AND SUPPLY CO. v. BROWN

Statement

that the claim by possession could not be maintained, as Brown had voluntarily parted with and allowed the debtor to hold himself out as the ostensible owner of the car. The plaintiff appealed on the grounds that the learned judge erred in holding that the chattel mortgage was not valid, and in not finding that the car was seized while in the possession of the claimant. On the appeal the respondent raised the preliminary objection that the interpleader action having been tried and disposed of on the merits by the learned trial judge, pursuant to the power given by Order XIII., r. 7 of the County Court Rules, 1912, and as no leave had been given to appeal by the judge under Order XIII., r. 10 of said rules, there was no right of appeal.

The appeal was argued at Vancouver on the 25th of November, 1914, before MACDONALD, C.J.A., IRVING and MCPHILLIPS, JJ.A.

Charles Macdonald, for appellant.

W. H. D. Ladner, for respondent (plaintiff), took the preliminary objection that the defendant had no right of appeal, the action being one of interpleader, tried and disposed of on the merits under Order XIII., r. 7 of the County Court Rules, 1912. There is no appeal unless by special leave of the judge, and no leave was granted: see Order XIII.

Argument

Macdonald, contra: Rule 10, relied on by the respondent, commences with the words "except where otherwise provided by statute." We contend there is an absolute right of appeal under section 116 (*d*) of the County Courts Act (R.S.B.C. 1911, Cap. 53). Where a rule is inconsistent with a statutory provision, the statute prevails. [He cited *Van Laun & Co.* v. *Baring Brothers & Co.* (1903), 2 K.B. 277; *In re Tarn* (1893), 2 Ch. 280; *Robinson* v. *Tucker* (1884), 14 Q.B.D. 371; *Dawson* v. *Fox* (1885), *ib.* 377.]

[Judgment on the preliminary objection was reserved.]

Macdonald, on the merits: On the strength of the chattel mortgage Brown took possession of the motor-car, which covers any defect in the chattel mortgage. He kept it in his own garage. Shortly before Christmas Bratt asked for the loan of the car, and while he was using it the car was damaged. Bratt

then took it to a repairing garage, where it was later seized by the sheriff. We contend that the motor-car was still in the possession of Brown and was not subject to seizure by the sheriff.

Ladner, for respondent: Brown and Bratt were mixed up in a number of business transactions, and the motor-car was in the repair garage for over three months to the knowledge of Brown, the costs of repair not having been paid. On the facts, it was held in the Court below that Brown's right under possession had gone upon Bratt taking the car away.

Macdonald, in reply, referred to *Brackman et al.* v. *McLaughlin* (1894), 3 B.C. 265; *Ex parte Morrison; Re Westray* (1880), 42 L.T.N.S. 158; *Robinson* v. *Briggs* (1870), L.R. 6 Ex. 1; *Bell* v. *Lafferty* (1894), 3 Terr. L.R. 263; *Ex parte Saffery. In re Brenner* (1881), 16 Ch. D. 668; Halsbury's Laws of England, Vol. 3, p. 57.

Argument

Cur. adv. vult.

26th February, 1915.

MACDONALD, C.J.A.: A preliminary objection was taken at the hearing of this appeal that as the interpleader action had been tried by the learned judge and disposed of on the merits, pursuant to power given in that behalf by Order XIII., r. 7 of the County Court Rules, 1912, and as no leave to appeal was given by the learned judge, the appeal should be quashed. The respondent relies on r. 10 of said Order XIII. in support of this contention.

The English Common Law Procedure Act, 1860 (23 & 24 Vict., c. 126), Secs. 14 and 15, like our County Court Rules 7 and 8, Order XIII., enabled a judge to dispose summarily of claims in interpleader matters, and section 17 of the same Act provided that:

MACDONALD, C.J.A.

"The judgment in any such action or issue as may be directed by the Court or judge in any interpleader proceedings, and the decision of the Court or judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them."

Although all the other provisions of the Common Law Procedure Act, including said sections 14 and 15, were repealed, section 17, already quoted, was allowed to remain in force. Sections 14 and 15 now appear in the form of Rules of the

COURT OF APPEAL

1915

Feb. 26.

RITCHIE CONTRACTING AND SUPPLY CO. v. BROWN

Supreme Court, Order LVII., rr. 8 and 9, and correspond to said County Court Rules 7 and 8. But while said section 17 remained unrepealed, it was, with certain changes, incorporated in the Rules of Court, where it appears as r. 11, Order LVII., in the same words as our County Court Rule 10, Order XIII.

The effect of these rules and statutes on the right of appeal has been considered in a number of cases, including *Waterhouse* v. *Gilbert* (1885), 15 Q.B.D. 569; *In re Tarn* (1893), 2 Ch. 280; *Lyon* v. *Morris* (1887), 19 Q.B.D. 139; *Bryant* v. *Reading* (1886), 17 Q.B.D. 128; *Van Laun & Co.* v. *Baring Brothers & Co.* (1903), 2 K.B. 277; *Cox* v. *Bowen* (1911), 2 K.B. 611; *Mason* v. *Bolton's Library, Limited* (1913), 1 K.B. 83.

Lindley, L.J., in *In re Tarn, supra,* speaks of rule 11 at p. 284 as follows:

> "Rule 11 is difficult to work out in practice; but the introductory words make the rule not applicable where it would be inconsistent with any statutory provisions as to the finality of the order. We have then to look out of the rules into the statutes; and when we look at the statutes we find that an order made summarily by a judge in interpleader proceedings is not appealable."

In this Province the statute law applicable to a case like this is materially different from that of England. We have no statutory provision such as section 17 of the Common Law Procedure Act, which takes away the right of appeal, but on the contrary we have section 116 of the County Courts Act, which gives a right of appeal from all judgments or orders, whether final or interlocutory, in interpleader proceedings, where the amount involved is $100 or upwards. As to such judgments or orders, it is "otherwise provided by statute" that they shall not be final, but may be appealed without leave. It would, therefore, follow that leave need be obtained only where the amount involved is less than $100.

MACDONALD, C.J.A.

The value of the property involved in this appeal is above that sum, and, hence, the preliminary objection must be disallowed, with costs.

On the merits I concur in the conclusion and reason therefor of my brother IRVING.

IRVING, J.A.: I agree with the opinion just read that the motion to quash should be dismissed.

The plaintiff Company having recovered judgment against Bratt, the claimant, and caused a motor-car to be seized under the warrant of execution, Charles Brown put in a claim to the car under a chattel mortgage, and in the alternative upon having taken actual possession of the car.

The sheriff obtained an interpleader order, and the learned County Court judge held the chattel mortgage was bad because of a defective affidavit, and he found that whatever possession the claimant might have had for a short time after the execution of the chattel mortgage of the 4th of November he had parted with voluntarily, on or about the 25th of December, and allowed the debtor to hold himself out from the 25th of December till the 27th of March as the ostensible owner of the car.

Brown now appeals on the ground that the possession taken cures the defects in the chattel mortgage. His contention is that the car was not in possession, or apparent possession, of Bratt. When the mortgage was given the car was kept in the Tudhope Garage on Granville Street. After the mortgage was given it was put into the claimant's garage on 14th Avenue. Just before Christmas, about the 22nd of December, Bratt obtained permission to use the car, as he had some friends who were coming over for Christmas. He took it away, and the inference I draw is that he kept it and used it for some time. Bratt promised to return it to the claimant, but no time for its return was specified. It does not appear that it was ever returned to the claimant's garage. The claimant says he knew nothing about the car till some time in January, when he learned it was in a public garage on 13th Avenue, where it had been placed for repairs, having, I infer, been damaged while in Bratt's possession. At any rate, the claimant was no party to the ordering of the repairs, nor to the placing the car in the 13th Avenue garage. It stayed there until the seizure, the claimant taking the position it was the duty of the man who damaged the car to put it in good condition, and "put it back again," that is, into his garage on 14th Avenue.

Our section defining apparent possession is taken from the

COURT OF APPEAL

1915

Feb. 26.

RITCHIE CONTRACTING AND SUPPLY CO. v. BROWN

English Bills of Sale Acts, 1854 and 1878 (41 & 42 Vict., c. 31, s. 4), which were intended to prevent false credit being given to people allowed to remain in possession of goods which apparently are theirs, the ownership in which they have parted with. That, I think, was what was done in this case. Bratt was permitted by the claimant to use and enjoy the car apparently as owner from the 22nd of December, certainly until the time of the discovery of the car in the 13th Avenue garage. As to the possession of the car after the interview between the claimant and the proprietors, the case raises a nicer question. Here we have third persons in possession—who had received it from Bratt; but those third persons, though indifferent to the ownership of the car, never attorned, or agreed to hold the car as agent for the claimant. There could not be concurrent possession of the car, so I think the third parties must be regarded as the holders for the person who left the car with them.

IRVING, J.A.

According to the general rule that one who has recovered property from another as his bailee, or agent, or servant, must restore or account for that property to him from whom he received it, the *obiter dicta* in reference to the meaning of the word possession under the Bills of Sale Act, reported in *Ancona* v. *Rogers* (1876), 1 Ex. D. 285 at pp. 292 and 293, are against the claimant: and see *Ex parte Newsham; Re Wood* (1879), 40 L.T.N.S. 104.

The leading case on apparent possession is *Ex parte Jay. In re Blenkhorn* (1874), 9 Chy. App. 697. It is there laid down that if the mortgagee does not actually get possession, diligence in attempting to get it will not help him. Bratt having undoubted possession, I think it must be incumbent on the claimants to regain possession—to do something more than merely discuss with the third party the terms on which he might remove the car.

I would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This is an appeal from the judgment of GRANT, Co. J. upon the hearing of an interpleader matter ordered by consent to be tried summarily under Order XXVI., r. 7.

In the argument, reference was made to the County Court Rules, 1905, Order XXVI., rr. 7 and 10; the County Courts Act (R.S.B.C. 1911, Cap. 53), Secs. 116 (*d*), 119, and 165; and the Court of Appeal Act (R.S.B.C. 1911, Cap. 51), Sec. 6 (3), (4), and it was urged that there was the right of appeal notwithstanding that it was admitted that no special leave to appeal had been obtained.

In my opinion, Marginal Rule 461 of the County Court Rules, 1905 (Order XXVI., r. 10), which has the force of statute law (see sections 162 and 165 of the County Courts Act), is conclusive, and no right of appeal can be claimed in the present case unless leave be first had and obtained. It would seem to me that there was, in the present case, a decision of the judge in a summary way, although it is true an order was made directing the summary hearing—a quite unnecessary order, but not to my mind of such potency as to change the character of the hearing—and that which is appealed from is the summary disposition of the whole matter, which, in my opinion, is only appealable with leave: *Van Laun & Co.* v. *Baring Brothers & Co.* (1903), 72 L.J., K.B. 756.

The case which is absolutely in point—and it determines the further point that even with leave there is no appeal in England, by reason of section 17 of the Common Law Procedure Act, 1860 (Imperial)—is *Harbottle* v. *Roberts* (1905), 74 L.J., K.B. 310. It was in the case pointed out by counsel for the claimant, who took the preliminary objection, "that no appeal lay," that "the order of Bray, J. did not actually decide the claim summarily, but directed that it should be so decided." In the present case the order of the 20th of April, 1914, made by the learned judge, recites that it is an order by consent, and that the question as to whether at the time of the seizure the goods were the property of the claimant, as against the execution creditor, should be tried summarily on the 23rd of April, 1914, and was so disposed of on that date. See the judgment of Collins, M.R. in *Harbottle* v. *Roberts, supra,* at p. 311.

MCPHILLIPS, J.A.

It is true the Common Law Procedure Act, 1860 (Imperial), Sec. 17, cannot be said to be the law with us, but the statute law was equally effective as to the point under consideration (English

COURT OF APPEAL

1915

Feb. 26.

RITCHIE CONTRACTING AND SUPPLY CO. v. BROWN

Law Act, R.S.B.C. 1911, Cap. 75), and where there was consent, as in the present case, and the matter being disposed of summarily, there can be no appeal: *Curlewis* v. *Pocock* (1836), 5 Dowl. P.C. 381; *Harrison* v. *Wright* (1845), 13 M. & W. 816; and *Shortridge* v. *Young* (1843), 12 M. & W. 5.

Quite apart from the Interpleader Act (1 & 2 Will. IV., c. 58), and to the perhaps somewhat reasonable contention that it is now inapplicable, in my opinion the statute law as we have it, and the rules, which have the force of statute law, preclude an appeal in the present case.

I admit that the question is, indeed, one of complexity, and the decisions which have been given from time to time have given rise to understandable variance of opinion. However, upon the facts of the present case, the consent itself to a summary disposition of the matter is conclusive, and in my opinion there is no appeal.

MCPHILLIPS, J.A.

Appeal dismissed.

Solicitor for appellant: *Arthur M. Whiteside.*

Solicitors for respondent: *Bowser, Reid & Wallbridge.*

Solicitor for the sheriff for the County of Vancouver (respondent): *D. G. Marshall.*

CITY OF NEW WESTMINSTER v. THE "MAAGEN."

MARTIN, LO. J.A.

1915

March 5.

CITY OF NEW WESTMINSTER v. THE "MAAGEN"

Admiralty law—Exchequer Court—Jurisdiction—Collision with bridge—Negligence of ship.

A ship may be sued and condemned in damages in the Admiralty side of the Exchequer Court by a municipality whose bridge over a tidal and navigable river has been injured by the ship colliding with it through careless navigation amounting to negligence.

ACTION tried by MARTIN, Lo.J.A. at Vancouver on the 3rd and 4th of March, 1915, brought by the City of New Westminster against the steam tug "Maagen" for damages caused by the collision of the ship with the plaintiff's bridge at Lulu Island on June 26th and June 29th, 1913. The facts are set out fully in the judgment. Statement

McQuarrie (*Cassady,* with him), for plaintiff.
Woodworth, for defendant.

5th March, 1915.

MARTIN, Lo.J.A.: This is an action by the City of New Westminster against the steam tug Maagen for damages caused by the collision of that ship with the plaintiff's bridge at Lulu Island on the 26th and 29th of June, 1913. Though the damages claimed are small in amount yet in principle they are of considerable importance as they raise the question of the obstruction of the navigation of the North Arm of the Fraser River by the said bridge, which river is a tidal and navigable one at that point, and for a consideration of the general public rights therein reference may be made to the cases in this Court of *Kennedy* v. *The Surrey* (1905), 10 Ex. C.R. 29; 11 B.C. 499; *City of New Westminster* v. *Steamship Maagen* (1912), 14 Ex. C.R. 323; 18 B.C. 441; and *Graham* v. *The Ship E. Mayfield* (1913), 14 Ex. C.R. 331. It is first alleged that said bridge is not properly constructed, it being said to be set at such a wrong angle to the current of the river that it tends to cause ships to strike against it. With Judgment

MARTIN, LO. J.A.

1915

March 5.

CITY OF NEW WEST-MINSTER v. THE "MAAGEN"

respect to this defence it is sufficient to say that the evidence to the contrary was so weighty that it was in effect abandoned and I only notice it to record the fact that this is the second time such an allegation has been made with the like results: see the prior decision of this Court between the same parties on 30th November, 1912, already cited.

Then it is further alleged that at the time of the first collision, on 26th June, the ship was not to blame because the master was confused in his bearings and temporarily blinded at the critical moment by a jet of water which was discharged upon him by a pipe from the floor level of the bridge while he was passing through its channel on the northerly, or city, side going down stream, and in so doing trying to keep as close as possible to his starboard side to allow for the set of the current, there being lashed to his port bow a scow 84 x 32.6 feet, laden with about 250-300 tons of gravel. A good deal of evidence was given on this point and to elucidate it I took a view of the bridge and saw it in operation and the water being discharged through the six-inch "blow-off" pipe from the main level of the bridge, which throws a strong jet of water upstream for a distance of about 80 feet into the river below and at right angles to the bridge. This pipe is not in ordinary use, only being used in connection with the emergency 8-inch pipe on the bridge, but at the time in question it was in use, having been laid in November, 1912, and used till 1913. The mouth of it is about 20 feet above ordinary high tide and the stream of water in gradually falling that distance "feathers" a good deal. I have reached the conclusion that if a fairly strong wind were blowing from any one of several points of the compass the result might well be that the feathering of the water and its tendency to obscure the bearings of the bridge would confuse an ordinarily prudent and careful navigator, though usually it would not have that effect. In the present case, without going into unnecessary details, I am of the opinion that the evidence of the master of the tug as to the force and direction of the wind and water on that day should be credited to the extent at least of raising such a doubt in my mind that

Judgment

MARTIN, LO. J.A.

1915

March 5.

CITY OF NEW WESTMINSTER v. THE "MAAGEN"

I would not be justified in finding him guilty of negligence for any damage caused by the first collision.

But that does not relieve him from the consequences of the second collision three days later, because it is not alleged that the wind increased or deflected the spray on that occasion, and no other valid excuse for the collision has been set up, and I have no doubt it was caused by bad navigation. The position taken for the defence is that the scow simply scraped along the draw protection pier and did no damage, but I am unable to take that view of the matter in the face of the evidence of two witnesses to the contrary, and I have come to the conclusion that the second collision materially added to the damage already done at the same spot. It is difficult in the circumstances to say how much this amounted to, the whole damage being only $182.90. I feel great reluctance in adding to the cost of this litigation by directing a reference to ascertain such additional damage, the cost of which would be out of all proportion to the small amount to be ascertained, and from the nature of the case it would be very unlikely that any more evidence would be forthcoming to assist the Registrar in arriving at a conclusion than is now before me. The matter is one of those which frequently arise wherein it is impossible to assess damages with exactitude (*cf. Jones* v. *Canadian Pacific Railway* (1913), 83 L.J., P.C. 13; 13 D.L.R. 900 at pp. 906-9), but nevertheless the same attempt must be made as a jury would make, and I therefore feel disposed to direct that the damages should be assessed at one third of the whole amount, which I think will meet the justice of the case, and for which amount judgment will be entered for the plaintiff with costs.

Judgment

Judgment for plaintiff.

COURT OF APPEAL

1915

Feb. 26.

WESTHOLME LUMBER CO. v. ST. JAMES LIMITED

THE WESTHOLME LUMBER COMPANY, LIMITED, AND THE BANK OF MONTREAL v. ST. JAMES LIMITED.

Building contract—Non-completion within prescribed time—Demurrage—Penalty on liquidated damages—Discrepancy between contract and specifications—Repugnancy.

Where there is a provision in a building contract for the payment of demurrage by the contractor for every day exceeding the date fixed by the contract for completion, with the further provision that the time be extended upon the ordering of additional work, the contractor is liable for the number of days delay, less the time allowed for the additional work.

Where there is an inconsistency between the contract and the specifications as to the time from which the work under the contract is to commence to run, there is a repugnancy, and the first (the contract) shall prevail.

Where the power is reserved to the owner to make alterations or additions, he may reasonably exercise such right up to the last minute of the completion of the work.

Statement

APPEAL by plaintiffs from the decision of CLEMENT, J. in an action tried by him at Victoria on the 31st of March and the 1st to the 4th of April, 1914. The action arose out of a contract for the construction of a six-storey and basement reinforced concrete hotel building. Under the terms of the contract the defendants, as owners, were to do the preliminary excavation work, and the plaintiffs, the contractors, were to erect and complete the building. The work was to be done under the direction of architects whose decision as to construction and meaning of the drawings and specifications was final. The owners reserved the right to make alterations or additions, the amount to be fixed therefor to be stated in the orders authorizing such work. The contract price was $74,121, subject to additions or alterations according to changes made as provided in the contract. The work was to be completed within 160 days after completion of the excavation, or such additional time as the architects would allow for unforeseen delays or the perform-

ance of additional work ordered by the owners. The specifications contained a clause that the owners would pay a bonus of $50 per day for each day that the building was completed before the expiration of the time limit, and the contractor would pay a demurrage of $50 per day for each day required to complete the building after the time limit. The architect allowed 64 days extension for unforeseen delays; he fixed the 23rd of February as the date of completion of the excavation and the 15th of October, 1912, as the date upon which the work should be completed, but it was not actually completed until the 31st of December following. Although arbitration was provided for in the contract in case of dispute, the proceedings thereunder proved abortive, and the plaintiff sued for a balance of $18,670.87, $74,652.64 having been paid on the contract during construction, he claiming $18,670.51 for extras. The defendants admitted $10,793.41 for extras, but claimed, by way of counterclaim, that under the terms of the contract they were entitled to charge $3,200 for demurrage, owing to 64 days delay in the completion of the contract, at $50 a day, and they paid into Court $8,000 as the balance due under the contract. In addition to the work under the original contract, which was dated the 17th of January, 1912, the plaintiffs were authorized, by letter dated the 29th of January, to complete the excavation, which the owners had commenced but failed to complete. This they did, but it was not actually finished until the 9th of March. The contract work was started on the 23rd of February, but the trial judge found it was not interfered with by the excavation work that was going on at the same time; also on the 31st of May they were authorized to build a seven instead of a six-storey building. An inconsistency appeared between the contract and the specifications, the contract reciting that the work was to be completed within 160 days from "the completion of the excavation," whereas the specifications recited "from the signing of the contract." The learned trial judge held the plaintiffs were entitled to a balance of $7,979.42; he would not allow interest on said balance from the date of completion of the building until judgment, and he allowed the defendants' claim for demurrage. The plaintiffs appealed on the ground

Statement

COURT OF APPEAL

1915

Feb. 26.

WESTHOLME LUMBER CO. v. ST. JAMES LIMITED

that owing to the wording with reference to the time limit in the contract being inconsistent with that used in the specifications, the condition as to penalties was void, also that the addition of extras ordered by the architect destroyed the time clause as far as penalties were concerned, and in any event, they had not been allowed enough for extras and were charged 14 days too much for demurrage, as the excavation was not completed until the 9th of March.

The appeal was argued at Vancouver on the 12th and 13th of November, 1914, before MACDONALD, C.J.A., IRVING and MCPHILLIPS, JJ.A.

Argument

A. H. MacNeill, K.C. (*R. M. Macdonald,* with him), for appellants: The contract and the specifications do not agree as to the time limit, and the large number of extras ordered prevents the enforcement of the penalties, the whole question being illusory and ambiguous: see Hudson on Building Contracts, 3rd Ed., Vol. 1, p. 524; *Kemp* v. *Rose* (1858), 1 Giff. 258; *Dodd* v. *Churton* (1897), 1 Q.B. 562; Norton on Deeds, p. 81. Where an agreement is unintelligible it is void, and in this case it is not a repugnancy but an ambiguity: see *In re Vince. Ex parte Baxter* (1892), 2 Q.B. 478. The rule in the construction of a will does not apply here. On the question of vagueness or uncertainty of a contract, see *Guthing* v. *Lynn* (1831), 2 B. & Ad. 232; *Davies* v. *Davies* (1887), 36 Ch. D. 359; *Taylor* v. *Portington* (1855), 7 De G.M. & G. 328; *Coles* v. *Hulme* (1828), 8 B. & C. 568; *Holme* v. *Guppy* (1838), 3 M. & W. 387; *Bush* v. *Whitehaven Trustees* (1888), 52 J.P. 392. The contractors came across an old drain in the course of excavation. This caused considerable delay, for which the owners were responsible, and the excavation was completed by the plaintiffs under another contract. How can it be said that the clause in the specifications is prior to the clause in the contract? [He referred to *Watling* v. *Lewis* (1911), 80 L.J., Ch. 242; *In re Tewkesbury Gas Co., ib.* 590]. Defendants must make their case clear before they can enforce a penalty. As to the question of the architect consulting only one of the parties to the contract, see *Bristol Corporation* v. *John Aird & Co.* (1913), 82 L.J., K.B. 684.

COURT OF APPEAL

1915

Feb. 26.

WESTHOLME LUMBER CO. v. ST. JAMES LIMITED

Harold B. Robertson, for respondents: On the question of the variation in the contract see *Solly* v. *Forbes* (1820), 2 Br. & B. 38. Ambiguity cannot arise where there are two clear statements. There is a repugnancy here, in which case the first shall be received and the latter rejected: see Beal's Cardinal Rules of Legal Interpretation, 2nd Ed., 189; *Doe, Lessee of Leicester and Others* (1809), 2 Taunt. 109 at p. 113; *In re Webber's Settlement* (1850), 19 L.J., Ch. 445 at p. 446; *Lloyd* v. *Lloyd* (1837), 2 Myl. & Cr. 193 at pp. 203-4; *Dodd* v. *Churton* (1897), 1 Q.B. 562; *McLeod* v. *Wilson* (1897), 2 Terr. L.R. 312 at p. 321; Hudson on Building Contracts, 4th Ed., 523-4. On the question of ordering extras after due date for completion, see Hudson, *supra,* p. 540.

Argument

MacNeill, in reply.

Cur. adv. vult.

26th February, 1915.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal for the reasons given by my brother IRVING.

IRVING, J.A.

IRVING, J.A.: The owner having exercised his alleged right to deduct penalties for a delay in the completion of the work, this action was brought to recover the balance due in payment for the work.

The plaintiffs' main contentions are: (1) that owing to the wording with reference to the time limit in the contract being inconsistent with those used in the specifications, the condition as to penalties was void; and (2) that in any event, the addition of extras ordered by the architect destroyed the time clause so far as penalties were concerned.

As I have reached the conclusion that the discrepancy is of no importance, for reasons which I shall give later, I shall, on the assumption that the term in the contract as to the time clauses prevails, deal with the second point.

The plaintiffs, by a contract dated the 17th of January, 1912, contracted to erect and complete for the defendants a six-storey and basement reinforced concrete hotel building. The defendants were to do the preliminary or general excavation work. The owners reserved the right to make any alterations or addi-

COURT OF APPEAL

1915

Feb. 26.

WESTHOLME LUMBER CO. v. ST. JAMES LIMITED

tions. The amount to be paid therefor was to be stated in the orders authorizing such alterations or additions. In the event of disagreement, the amount was to be determined by arbitration. By article 2 the work was to be done under the direction of architects, whose decision as to the construction and meaning of the drawings and specifications should be final. By article 9 the price was fixed at $74,121, subject to additions and deductions as in the contract provided, to be paid upon certificates of the architect. By article 6 the reinforced concrete frame and the roof were to be completed within 70 days after completion of the excavation. The date of completion of the excavation was the 23rd of February. The entire work was to be completed within 160 working days after completion of the excavation. This date the architect ultimately fixed as the 15th of October, but it was not completed till the end of December.

Article 7 was as follows:

"Art. 7. Should the contractors be delayed in the prosecution or completion of the work, by the act [this word, in my opinion, having regard to the owner's power to make additions and alterations, would include the giving of orders for such alterations and additions], neglect or default of the owners, of the architects, or of any other contractor employed by the owners upon the work, or by any damage caused by fire or other casualty for which the contractors are not responsible, or by combined action of workmen in no wise caused by or resulting from default or collusion on the part of the contractors, 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 the causes aforesaid, which extended period shall be determined and fixed by the architects, but no such allowance shall be made unless a claim therefor is presented in writing to the architects within forty-eight hours of the occurrence of such delay."

IRVING, J.A.

In the general conditions of the specifications provision was also made for an extension of the time limit, at the architect's discretion, in the event of a delay occurring (a) through a general strike of mechanics employed on the works, or (b) on account of a prolonged spell of inclement weather.

Under article 7 and these conditions, the architect allowed 64 days extension for one cause or another, on application by the plaintiffs.

"Art. 8. The owners agree to provide all labour and material essential to the conduct of the work not included in this contract in such manner as not to delay its progress, and in the event of failure to do so, thereby

causing loss to the contractors, agree that they will reimburse the contractors for such loss, and the contractors agree that if they shall delay the progress of the work so as to cause loss for which the owners shall become liable, then they shall reimburse the owners for such loss. Should the owners and contractors fail to agree as to the amount of loss comprehended in this article, the determination of the amount shall be referred to arbitration as provided in article 12 of this contract."

"Art. 3. No alterations shall be made in the work except upon written order of the architects, the amount to be paid by the owners or allowed by the contractors by virtue of such alterations to be stated in said order. Should the owners and contractors not agree as to amount to be paid or allowed, the work shall go on under the order required above, and in case of failure to agree, the determination of said amount shall be referred to arbitration, as provided for in article 12 of this contract."

Arbitration was provided for by article 12, but the arbitration proceedings proved abortive and the plaintiffs thereupon sued (1) for $18,138.87, the balance they claimed, made up as follows: the $74,121, and $12,304.86 for additional work performed and additional material supplied, and certain other matters, bringing their total claim up to $92,791.51, less credits, $74,652.64; and (2) for damages for breach of contract. The defendants admitted that work had been done to the extent of $84,914.41, and paid into Court $8,000, being the balance due after deducting (1) the before-mentioned credits allowed by the plaintiffs, and (2) a further sum of $3,200, which they claimed to deduct as demurrage for 64 days at $50 per day, *i.e.*, from the 16th of October to the 31st of December.

IRVING, J.A.

This charge of demurrage was based on the following clauses in the specifications:

"The building shall be turned over to the owners, broom clean and complete in every detail, within 160 working days after the signing of the contract.

"The owners will pay a bonus of $50 dollars per day for each and every day that the building is completed before the expiration of the time limit.

"The contractor shall pay a demurrage of $50 dollars per day for each and every day required to complete the building over and above the time limit."

In addition to the contract of the 17th of January, 1912, the plaintiffs were authorized, by letter dated the 29th of January, to complete the excavation which the owners had already commenced, and on the 31st of May, 1912, the plaintiffs were authorized to proceed with the additional work and material

COURT OF APPEAL

1915

Feb. 26.

WESTHOLME LUMBER CO. v. ST. JAMES LIMITED

required to make the roof of the six-storey building into a new (or seven-storey) building, according to specifications prepared by the architects.

The learned judge found that according to the architects' certificate, 18th April, 1913, the plaintiffs were entitled to $7,907.72, and also, by admission in pleadings, to a further sum of $71.70, and as the total, $7,979.42, was $20.58 less than the amount the defendants had paid into Court, judgment was given on that basis. He declined to allow interest on $7,979.42 from the date of completion to judgment. No appeal was taken from this refusal of interest.

The learned judge apparently thought the word demurrage was to be read as and for liquidated damages, and that as there was an extension of time provided for, to be granted by the architects in the event of extra work being ordered, he allowed the deduction. He fixed the actual completion of the excavation as the 23rd of February, and of the building as 31st of December, and held the days claimed for demurrage were properly charged at 64 days.

The points taken before us in connection with the extra work were: (1) the extras had destroyed the time limit, so far as the penalties were concerned, and (2), in any event, the plaintiffs had not been allowed enough for extras and had been charged 14 days too much for demurrage, as, according to the plaintiffs' case, the excavation was not finished till the 9th of March.

IRVING, J.A.

Mr. *MacNeill* contended that although this "demurrage" might be liquidated damages (see on this point *Clydebank Engineering and Shipbuilding Company* v. *Don Jose Ramos Yzquierdo y Castaneda* (1905), A.C. 6), the penalty clause must be construed strictly, for the exact contract, citing *Dodd* v. *Churton* (1897), 1 Q.B. 562; 66 L.J., Q.B. 177, and that as the date of completion of excavation was arbitrarily fixed by the architect before, as he contended, it had been in fact completed, the plaintiffs were relieved from the penalties for delay. That contention is not supported by the facts. The facts in connection with the basement and its completion are these: there were three kinds of excavations to be made, (1) the preliminary or general, which was to be done by the owners; (2)

sub-basement, which was an extra; and (3) the elevator pit and footings, which were in the contract. The general excavation work was committed to plaintiffs' care on the 29th of January, 1912. On the 20th of February they undertook to do extra work (No. 2), and asked for 6 days extension of time on the contract on that account.

The architects told them to go ahead and formally, on the 22nd of February, 1912, accepted their offer, and then informed them that they had granted an extension and that the time fixed for the starting of the contract would now be the 23rd of February. The general excavation was then complete, but this sub-basement extra work was continued for some time after the 23rd of February, and was done by them in conjunction with their other (No. 3) contract work. That this combined sub-basement extra and No. 3 contract was not completed till the 9th of March is true, but I think there was evidence from which the judge could reach the conclusion that the general excavation (No. 1) was finished on the 22nd of February.

Howe v. *Guppy* (1838), 3 M. & W. 387, was a case where the owner sought to enforce the provision for penalties where a portion of the delay in the completion of the work was due to his default; but as in that case the delay was caused by the owner and there was nothing to shew they had entered into a new contract to perform the work at four and a half months ending at a later date, the parties were at large, and it was held that the contractors should forfeit nothing for the delay. The delay here not being the fault of the defendants, that case can have no application particularly in view of article 7.

IRVING, J.A.

The memorandum kept by the plaintiffs' foreman shews that on the 23rd of February they "started the contract at noon to-day." Further, there was no claim made under article 8 for any delay on the part of the owner in respect of the general excavation.

With regard to the contention that the extras destroyed the provisions relating to the time limit, it must be conceded by the defendants that the extras were very heavy, including $6,800 for the additional storey ordered on the 31st of May, 1913. At that date the 160 days were running. The archi-

COURT OF APPEAL

1915

Feb. 26.

WESTHOLME LUMBER CO. v. ST. JAMES LIMITED

tects thought that this extra could be made a part of the general contract and by allowing twenty additional days for this work (as well as the additional time required to procure re-enforcing steel) hold the contractors to the condition as to demurrage. For this the architect relied on articles 2, 3 and 7.

Mr. *MacNeill* argues that as the addition to a six-storey building of a new storey was quite beyond the intention of the parties to the contract, the architect could not by extending the time prevent the order for this alteration from operating as a waiver by the owner of his right to penalties. By the order of the 31st of May, 1912, authorizing this new work, the architect wrote that this work was to be a part of the general contract and fixed the price and extended the time for completion on that basis. The plaintiffs did not object to the work being added, but sought and obtained a variation in the specifications. I think what was written in this connection satisfied the condition in the specifications that additional cost for extra work, changes, alterations or deductions, shall be agreed on and a written agreement effected. The cases are discussed in *Dodd* v. *Churton, supra,* and in my opinion this contract by virtue of article 7 falls within the class referred to at p. 524 of Hudson on Building Contracts (see also *McLeod* v. *Wilson* (1897), 2 Terr. L.R. 312, a decision by Scott, J.).

IRVING, J.A.

Then assuming the principle is determined against him Mr. *MacNeill* contends in detail, that allowance was not made for the time in obtaining the steel. This complaint rests wholly on the evidence of the architects, who say that although they said they would be delayed no time was asked for under article 8. It is quite possible that the changes which were made at the plaintiffs' request obviated any delay on that account; at any rate no claim was made under article 8, and I can see no ground for saying that the plaintiffs are now entitled to an allowance.

As to the strike of the marble setters, the condition already set out provides for an extension of time through a general strike of the mechanics employed on the works. The strike relied on by the plaintiffs took place at Tacoma, and in any event the giving of an extension was a matter entirely in the

discretion of the architect. The last objection under this head is that after the 15th of October, 1912, the date fixed for completion when the time was already running against the plaintiff for penalties, the architects gave orders for additional extra work. By the conditions in the specifications the owner had reserved the right to make any alterations or additions. No doubt this power ought to be reasonably exercised, but if exercised reasonably the power would be exercisable up to the last minute of the completion of the work: see the opinion of Phillimore, J. in *Sattin* v. *Poole* (1901), Hudson's Building Contracts, Vol. 2, p. 306 and pp. 314-15; and it was a matter that could be met by a further extension of time. The orders complained of were given long before the other work was finished.

Taking up the second main contention that the contract was void so far as demurrage was concerned for uncertainty by reason of the inconsistency, between the contract and specifications, as to whether the 160 days for completion was to count from the completion of the excavation (23rd February) or the signing of the contract, Mr. *MacNeill* contended that it was an ambiguity, but an ambiguity I think is where one expression is capable of two meanings.

There is a repugnancy, as I understand it, where one clear clause contradicts another clause equally clear. In a deed where there is a repugnancy the rule is the first shall prevail, but in a will the second: *Doe, Lessee of Leicester and others* (1809), 2 Taunt. 113; cited in Beal, 2nd Ed., at p. 189.

IRVING, J.A.

In my view of the matter it matters not whether this is ambiguity or repugnancy, because the plaintiffs elected to regard the time of the completion of the excavation as the starting point; and the question fought out at the trial was whether the excavation was completed on the 9th of March as the plaintiffs contend, or the 23rd of February as the defendants contend.

If the matter were to be determined on the question whether this is a repugnancy or an ambiguity, I would decide that the repugnancy rule is applicable, but I would determine it on another ground—the 6th article of the contract fixes the time

COURT OF APPEAL

1915

Feb. 26.

WESTHOLME LUMBER CO. v. ST. JAMES LIMITED

for completion with particularity; the object of the clause in the specifications is to prescribe the condition of the building when completed, that is, "broom clean" and "complete in every detail." The addition of the words which create the discrepancy, *viz.*: "within 160 days after the signing of the contract" are superfluous and may be rejected. The function of the clause would be performed if the sentence ended at the word "detail." The addition of the discrepant words does not set out fully the time limit, because the time limit was not to be 160 working days, but 160 working days plus such allowances of time as should be made by the architect on the contractors' application.

The foundation of common sense upon which the maxim *falsa demonstratio non nocet* with reference to parcels rests will, I think, support my view. Here we have the contract which renders certain what is intended to be the time limit and the erroneous statement in the specifications of that time limit cannot alter it.

IRVING, J.A.

The plaintiffs rely on *In re Vince. Ex parte Baxter* (1892), 2 Q.B. 478; 61 L.J., Q.B. 836. The intention in that case of the parties could not be determined, and the agreement was unintelligible, and other cases relating to vague, indefinite and illusory contracts. Those cases have no application when the intention of the parties is clear and definitely expressed.

I would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This is an appeal from the judgment of CLEMENT, J. in a building contract action, tried by him without a jury. The evidence is at great length yet the case may be considered and passed upon in appeal without the discussion in detail of any of the evidence—viewing it as I do—that is—that it is essentially a case to be determined upon the facts as adduced at the trial and no questions of law in my opinion arise to in any way warrant the disturbance of the findings of fact of the learned trial judge.

The action was launched for moneys due and payable by the defendants to the plaintiffs upon a building contract, and $18,138.87 was claimed. The learned judge found to be due to the plaintiffs the sum of $7,979.42, and it is from this judg-

ment the appeal is taken by the plaintiffs, the main contentions advanced being that extras were not allowed for and that the allowances made for penalties on account of delay in completion of the building as provided in the contract were wrongly allowed and should not have been deducted from the plaintiffs' claim.

The learned judge did not arrive at the same conclusion as was arrived at in *Bush* v. *Whitehaven Trustees* (1888), 52 J.P. 392, *i.e.*, that the case was one which, owing to the circumstances, would not admit of the application of the conditions of the contract, but that the conditions of the contract were applicable, and I cannot see any reasonable ground upon which to differ with the learned judge.

The learned counsel for the appellants in his able argument strenuously maintained that there was such ambiguity in the contract that the penalties for delays could not be allowed, that is that article 6 of the contract provided that the building was to be completed within 160 days after the completion of the excavation, which work was to be done by the owners, whilst under the specifications and general conditions forming a part of the contract the building was to be completed in every detail within 160 working days after the signing of the contract. In my opinion these provisions must be looked upon as being repugnant to each other. Article 6 is contained in the contract itself and should, in my opinion, prevail. Further, it is manifest that that was the real intention—the intention being plainly ascertainable from the contents of the deed. How unfair to the contractor it would be to have the computation commence from the signing of the contract when construction could not be begun until the excavation was carried out, and this work was to be done by the owners.

MCPHILLIPS, J.A.

In *Walker* v. *Giles* (1848), 6 C.B. 662 (77 R.R. 425), this work was to be done by the owners.

"As the different parts of the deed are inconsistent with each other, the question is, to which part effect ought to be given. There is no doubt, that, applying the approved rules of construction to this instrument, effect ought to be given to that part which is calculated to carry into effect the real intention, and that part which would defeat it should be rejected: and so construing the deed, the Court is of opinion that the latter part,

COURT OF APPEAL

1915

Feb. 26.

WESTHOLME LUMBER CO. v. ST. JAMES LIMITED

importing a present demise . . . . cannot have that effect, without defeating the intention of the parties."

Seaman's Case (1611), Godb. 166; *Parkhurst* v. *Smith* (1742), Willes 327 at p. 332.

Holme v. *Guppy* (1838), 3 M. & W. 387; 49 R.R. 647, was strongly relied upon on the part of the appellants as being an authority which disentitled the penalties or demurrage being allowed, but it will be observed that that case proceeded upon the fact that the promisee had rendered performance of the contract within the time stipulated impossible. Parke, B. at p. 389, said:

"Then it appears that they were disabled by the act of the defendant from the performance of that contract; and there are clear authorities, that if the party be prevented, by the refusal of the other contracting party, from completing the contract within the time limited, he is not liable in law for the default."

Lodder v. *Slowey* (1904), A.C. 442, 453; 73 L.J., P.C. 82. Further, the contract now under consideration in this present case in article 7 makes special provision with regard to extending time for the completion of the work consequent upon any delay caused by the owners, and it would appear that all proper allowances were made in this regard, or at any rate all asked for, twenty days in all further time being given for completion.

MCPHILLIPS, J.A.

Then *Dodd* v. *Churton* (1897), 1 Q.B. 563; 66 L.J., Q.B. 477, was cited as being an authority which would govern in the determination of this appeal. In my opinion, however, the case falls within the principle defined in *Jones* v. *St. John's College, Oxford* (1870), L.R. 6 Q.B. 115 at p. 124; 40 L.J., Q.B. 80. Lush, J. at p. 85-6 in the Law Journal report said:

"The universal rule is that no stipulation can be implied which is at variance with the express terms of the contract. The express undertaking on the part of the plaintiffs here is to complete the works within a specified time or pay a penalty; they have not complied with their undertaking, and therefore they must pay the penalty."

Steel v. *Bell* (1900), 38 S.L.R. 217, is a Scots case, and *Jones* v. *St. John's College, Oxford, supra,* and *Dodd* v. *Churton, supra,* were both referred to. Under the terms of the contract there under consideration the whole work was to be "entirely completed" by the 1st of May, 1897, under a penalty of 10s. per day. It was proved that extra work was ordered

during the progress of the operations and that even some of this extra work was ordered after the 1st of May, 1897, and it was held (Lord Young doubting) "that the fact that some of the extra work had been ordered after May 1st, 1897, did not of itself prevent the enforcement of the penalty clause; that the onus had not been discharged of shewing that the extra work had been the cause of delay in completing the work; and that the penalty was rightly entitled to be deducted": Emden's Building Contracts, 4th Ed., at pp. 186-7.

In *McLeod* v. *Wilson* (1897), 2 Terr. L.R. 312, Scott, J. had under consideration a contract of somewhat similar terms, and it was held as set forth in the head-note that "a provision in a building contract for liquidated damages for non-completion within the prescribed time, subject expressly to a further reasonable length of time for delays caused by changes in the plans and specifications is not discharged by delays caused by such changes"; and see *per* Scott, J. at p. 321.

Some argument was addressed to the question as to whether the demurrage of $50 per day could be looked upon as liquidated damages—it not being stated to be liquidated damages—yet that statement has been held not to be conclusive—*Law* v. *Local Board of Redditch* (1892), 1 Q.B. 127; *Strickland* v. *Williams* (1899), 1 Q.B. 382. *Cape of Good Hope Commissioner of Works* v. *Hills* (1906), 22 T.L.R. 589, was a case in the Privy Council. Sir Arthur Wilson at p. 590 said:

MCPHILLIPS, J.A.

"The criterion of whether a sum—be it called penalty or damages—was truly liquidated damages, and as such not to be interfered with by the Court, or was truly a penalty which covered the damage if proved, but did not assess it, was to be found in whether the sum stipulated for could or could not be regarded as 'a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation.' The *indicia* of that question would vary according to circumstances. Enormous disparity of the sum to any conceivable loss would point one way, while the fact of the payment being in terms proportionate to the loss would point the other. But the circumstances must be taken as a whole, and must be viewed as at the time the bargain was made. Applying that principle to the present case their Lordships were unable to come to the conclusion that the sum here could be taken as a genuine pre-estimate of loss."

Bearing in mind this canon of construction as determined by the Privy Council, in my opinion, upon the facts of the

COURT OF APPEAL

1915

Feb. 26.

WESTHOLME LUMBER CO. v. ST. JAMES LIMITED

present case, the demurrage of $50 per day can be taken "as a genuine pre-estimate of loss," and the learned trial judge properly allowed it.

I think, therefore, that the judgment of the learned trial judge was right, and that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *MacNeill, Bird & Macdonald.*

Solicitors for respondents: *Barnard, Robertson, Heisterman & Tait.*

THOMPSON, CO. J.

1914

May 12.

COURT OF APPEAL

1915

April 6.

PYE v. McCLURE

PYE v. McCLURE.

Agistment—Death of animal—Negligence—Onus of proof on agister.

Where a pony is given into the sole care of an agister, and dies while in his charge, the onus is upon him to shew that the death of the pony was not due to his negligence.

APPEAL by defendant from the decision of THOMPSON, Co. J. in an action tried by him at Cranbrook on the 7th of May, 1914. The defendant entered into an agreement with the plaintiff's father whereby in consideration of the sum of $15 he agreed to take the plaintiff's pony and feed and care for it during the winter months of 1912-1913. He took the pony to his ranch and in February, 1913, it died. The plaintiff, a minor, who sued by his father as his next friend, claimed damages owing to the defendant's neglect in not taking proper

Statement

care of the pony. The learned trial judge held that on the evidence the defendant did not use such care and diligence as a prudent or careful man would exercise in relation to his own property and gave judgment for the plaintiff.

Mecredy, for plaintiff.
A. B. Macdonald, for defendant.

12th May, 1914.

THOMPSON, Co.J.: The plaintiff is suing by his father, his next friend. In the Fall of 1911 the plaintiff's father, as I believe, arranged with the defendant to send a pony to the defendant's ranch, the defendant agreeing for the sum of $15 to take the pony to graze and to let it have the use of the hay on the premises and to give it the run of the barn. Both parties practically agree as to what the agreement was. I regret that there were so many aspersions on the part of both parties in the action of perjury against the other. The stories of all parties were to my mind perfectly consistent, especially considering the length of time that has elapsed since the occurrence took place. The pony was taken to the ranch by someone and subsequently removed to the defendant's ranch near Cranbrook. On the defendant's ranch there was undoubtedly good grazing; the hay that the defendant provided for the use of the animal was undoubtedly not of even a fair quality. I certainly believe the witness Milne as to this fact. The pony died and some time later was discovered by the defendant's foreman, Dickson, who informed the defendant, who then informed the plaintiff's father.

The contract was one of agistment and when the animal was not forthcoming the onus was then cast upon the defendant to shew that he was not guilty of negligence. The degree of negligence for which he is liable is ordinary negligence. In other words, the defendant must be able to shew that he looked after the animal with the same degree of care and attention which he would give to his own: Halsbury's Laws of England, Vol. 1, p. 387, on the subject of Animals, par. 842, and pp. 544 and 545, on the subject of Bailment. The defendant is, of course, responsible for the acts of his servants.

THOMPSON, CO. J.

1914

May 12.

COURT OF APPEAL

1915

April 6.

PYE v. MCCLURE

The plaintiff says that the animal died from starvation. The defendant says that the animal was suffering from either mange or lice when he got him and was generally in a run-down condition. His death being undoubtedly accelerated, if not brought about entirely, by mange or lice, he is unable to say which. I believe that there was plenty of food for the animal and I am more disposed to believe that the animal died from this complaint of which he was suffering, together with the exposure natural to a hard winter than that he died of starvation. Taking, therefore, the test laid down in Halsbury, p. 545, that the defendant "should use such care and diligence as a prudent or careful man would exercise in relation to his own property," and also taking into consideration the fact in allowing a horse to run in pasture suffering from this disease, the defendant was guilty of an infraction of a statutory duty. I do not think he could possibly have given it the care and attention which a prudent man would give his own animals. Mr. *Macdonald* points out the small compensation which he was receiving. With that, of course, I have nothing to do, but my impression is that he has fallen into the error of considering the contract merely as one by which the defendant allowed the plaintiff the use of his pasture. Both parties, however, agree on the terms of the contract and it was undoubtedly one of agistment. Taking the defendant's own story, his foreman was undoubtedly guilty of negligence in not attending to the animal or in not calling his master's attention to it. The defendant was guilty of negligence, not only through his employee, Dickson, but in himself in that he suspected the animal was suffering from mange and yet took no care of it, apparently leaving everything to his foreman.

THOMPSON, CO. J.

As to the value of the animal, I know, of course, that it is difficult to get a pony of this breed in this country. I think a fair valuation, considering the animal's condition and the difficulty of getting another one of the same breed, a Shetland breed, a fair compensation would be $100. I direct payment therefor for the sum of $100 and costs.

In giving this judgment, I am taking into consideration any counterclaims that the defendant might have.

The appeal was argued at Vancouver on the 18th of December, 1914, before IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

M. A. Macdonald, for appellant: It is the duty of the plaintiff to establish negligence against the defendant. We are only concerned with the contract. If there was exceptionally bad weather, and extra precautions were required in caring for the animal, he must prove this to be a term of the contract and he has not done so.

Darling, for respondent: The horse died and the defendant contracted to look after it. The burden is on the defendant to shew that he took proper care of the animal, and not having done so it is a proper inference for the judge to find the defendant guilty of negligence: see *Smith* v. *Cook* (1875), 1 Q.B.D. 79; *Broadwater* v. *Blot* (1817), Holt, N.P. 547; 17 R.R. 677; Halsbury's Laws of England, Vol. 1, p. 387, par. 842.

Argument

Cur. adv. vult.

6th April, 1915.

IRVING, J.A.: I would dismiss the appeal. *Pratt* v. *Waddington* (1911), 23 O.L.R. 178, shews that the onus was on the defendant, and in my opinion he has not satisfied it.

IRVING, J.A.

An agister owes, at least, some duty to the owner of a horse turned out, and failure to find the body for six weeks after is evidence from which negligence could be presumed.

MARTIN, J.A.: After a consideration of all the evidence, which I have carefully read over since the argument, I have reached the conclusion, after some hesitation, that the judgment should be affirmed, though there are certain portions of it that I cannot, with all respect, accede to, and it is not wholly consistent. But the two points of the case that tell most against the defendant are (1) that he made a misleading report of the pony's condition, thereby putting the plaintiff off his guard for the necessity of proper attention to the animal, which was not doing well, probably chiefly because of its having been infested by lice when in the plaintiff's possession; and (2) the haystack

MARTIN, J.A.

THOMPSON, CO. J.
1914
May 12.
COURT OF APPEAL
1915
April 6.
PYE v. MCCLURE

(which it was admittedly contemplated the pony should have the use of) was not fit nourishment for a horse. In these two respects the defendant failed in his duty on the special agreement made between the parties, which was not entirely the ordinary one of agistment (as to which *cf.* Oliphant on Horses, 6th Ed., 242), but in one respect (the representation that the hay was "good") something more. The case has given me some difficulty in deciding, but on the two essential points of fact which the judge has directly or inferentially found in favour of the plaintiff I cannot bring myself to say he has been clearly wrong, so the judgment should not be disturbed.

GALLIHER, J.A.: The evidence, to my mind, establishes that the defendant fulfilled his express contract with the plaintiff, and unless it was incumbent on the defendant, when he ascertained that the animal was suffering from an ailment, to treat it therefor, this appeal should be allowed.

The defendant, before he took the animal to graze, was suspicious that it had mange, but was assured by the plaintiff that it had not, and that he (the plaintiff) had been treating it with medicine procured from a veterinary for an itching at the root of the tail.

GALLIHER, J.A.

The plaintiff turned the animal over to the defendant as one in good condition, to be allowed the run of the defendant's premises during the winter. In February the animal was found dead on the premises, the plaintiff claiming it died from starvation, the defendant's theory being that it was afflicted with lice, which naturally weakened its condition and rendered it more susceptible to the rigors of winter. Whether the animal died of starvation or not, it was not, as I view the evidence, from the lack of food available on the range, or from lack of shelter.

The defendant and his foreman say the animal had lice, and if we accept that, it becomes a question whether the defendant, knowing this, is liable because he did not treat the animal. When the foreman discovered this it certainly would have been a simple matter to have applied kerosene, as he did to his own cow, which he alleges caught lice from this animal. Had the defendant or his foreman not known of this affliction, I should

have thought that under the contract and the method of grazing horses or cattle on the ranges in this country the defendant would not be liable, but having that knowledge and neglecting to apply the simple and inexpensive remedy or, at all events, to inform the plaintiff of the animal's condition, constitutes negligence for which the defendant is responsible.

THOMPSON, CO. J.

1914

May 12.

COURT OF APPEAL

1915

April 6.

I would sustain the learned trial judge, but on different grounds.

McPHILLIPS, J.A.: In my opinion this appeal should be dismissed. The onus, which was upon the defendant, was not satisfactorily proved, *i.e.*, to prove that the death of the pony did not arise by reason of his neglect to use such care as a prudent or careful man would exercise in regard to his own property. Upon the evidence it is clear that there was absolute disregard of the welfare of the pony and the absence of reasonable care, the hay which had to be turned to during inclement weather for fodder was not fit for food, the pony died at the haystack, and it can reasonably be said, because of the want of food fit to sustain life: see *Mackenzie* v. *Cox* (1840), 9 Car. & P. 632; 62 R.R. 762; *Reeve* v. *Palmer* (1858), 5 C.B.N.S. 84; *Smith* v. *Cook* (1875), 45 L.J., Q.B. 122. In *Phipps* v. *New Claridge's Hotel* (1905), 22 T.L.R. 49 at p. 50, Bray, J. said

PYE v. McCLURE

McPHILLIPS, J.A.

"that he was of opinion that when it was once proved that this dog was placed in the defendants' custody as an ordinary bailment, it was their duty to shew some circumstances which negatived the idea of negligence on their part. No such evidence had been placed before him. The story which their witnesses told was one he could not accept, and he must therefore hold that they had not proved that reasonable care was taken, and must come to the conclusion that there was negligence on their part."

The judgment of the learned trial judge, therefore, in my opinion, should be affirmed.

Appeal dismissed.

Solicitor for appellant: *A. B. Macdonald.*
Solicitor for respondent: *T. T. Mecredy.*

COURT OF APPEAL

1915

Feb. 26.

OLYMPIC STONE CONSTRUCTION COMPANY, LIMITED, v. MOMSEN & ROWE AND BROLEY & MARTIN.

OLYMPIC STONE CONSTRUCTION CO. v. MOMSEN & ROWE

Sale of goods—Tug-boat—Unregistered—Necessity of written instrument—"Barter" or "sale."

Where a boat is not registered and it is not shewn that she ought to have been registered, a written instrument is not essential to the validity of her sale.

Where the consideration for the transfer of the property in goods consists partly of goods and partly of money, the transaction is a sale and not a barter.

Per IRVING, J.A.: A general manager of a company who barters the company's property when authorized by resolution only to sell, may, by virtue of his powers as general manager, bind the Company apart from the written authority.

APPEAL from the decision of GREGORY, J. in an action tried at Victoria, on the 19th of October, 1914, for the return of the tug-boat "Rip Rap" from the defendants Broley & Martin and for damages as against the defendants Momsen & Rowe for selling or purporting to sell said tug-boat without authority. The plaintiff Company had purchased through the defendants, Momsen & Rowe, ship brokers, the tug-boat "Rip Rap," paying $1,350 in cash and giving two notes of $812.50 each, Momsen & Rowe holding a lien on the tug and her engines to secure the payment of the notes. When the first note came due, the Company, not being able to pay, passed a resolution authorizing Mr. Bowman, president and general manager of the Company, to transfer the Company's interest in the boat to any parties who might purchase. Notice of the resolution was given Momsen & Rowe. Bowman took the boat from Victoria to New Westminster, where, in conjunction with Momsen & Rowe, there was arranged a deal with the defendants Broley & Martin whereby the boat was delivered over to them for the sum of $3,000, Momsen & Rowe to receive $1,000 cash and

Statement

to accept for the balance of the payment ($2,000) certain machinery, namely, one hoisting engine valued at $1,500, one swing gear at $245, and one set of derrick timbers and derrick irons at $500, the arrangement including the privilege to the purchasers of exchanging the engine in the boat for a larger one through Momsen & Rowe at a specified price. The trial judge dismissed the action. The plaintiff Company appealed on the ground that the transaction was in fact a barter and not a sale and was therefore beyond the authority given Bowman by the Company, that Bowman had no power to authorize Momsen & Rowe to act in any capacity for the Company, and on other grounds.

Statement

The appeal was argued at Vancouver on the 18th of November, 1914, before IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

D. S. Tait, for appellant: Bowman was authorized to make a sale but instead he made a barter to Broley & Martin. He had no power to delegate his authority to Momsen & Rowe. An agent has no right to deviate one step outside his authority and when he does the principal is not bound: see Bowstead on Agency, 5th Ed., 94. He had no authority to barter: see *Guerreiro* v. *Peile* (1820), 3 B. & Ald. 616. A ship is not a chattel capable of being sold in market overt: see *Hooper* v. *Gumm* (1867), 2 Chy. App. 282.

Argument

Bodwell, K.C. for respondents Broley & Martin: The trial judge found on the facts that Bowman made a sale to Broley & Martin and the ship was delivered. Bowman was general manager of the Company, also a director. The evidence shews he was authorized to make the sale, so whether he had the power as an officer of the Company has no bearing on the case. A transfer of an unregistered ship does not require any writing. The only interest the Company had in the boat was in the hull and certain improvements; they could not pay for the machinery so that their only recourse was to sell the boat: *Saxty* v. *Wilkin* (1843), 11 M. & W. 622; Blackburn on Sale, 3rd Ed., 8; *Hands* v. *Burton* (1808), 9 East 349; Halsbury's Laws of England, Vol. 25, p. 109, par. 216. Where a price is fixed

COURT OF APPEAL

1915

Feb. 26.

OLYMPIC STONE CONSTRUCTION CO. v. MOMSEN & ROWE

for machinery it is a sale and not a barter. On the question of a sale of a ship in market overt, see *Union Bank of London* v. *Lenanton* (1878), 3 C.P.D. 243; *Benyon* v. *Cresswell* (1848), 12 Q.B. 899; *Hubbard* v. *Johnstone* (1810), 3 Taunt. 177 at p. 205; Merchant Shipping Act, 1894 (57 & 58 Vict., c. 60), Sec. 24; *Batthyany* v. *Bouch* (1881), 4 Asp. M.C. 380.

E. A. Lucas, for respondents Momsen & Rowe.

Tait, in reply: Agents have no right to barter unless specially authorized. Authorization to make a sale does not include the right to barter: see *Biggs* v. *Evans* (1894), 1 Q.B. 88; *Macnutt et al.* v. *Shaffner* (1901), 34 N.S. 402; Abbott on Merchant Ships and Seamen, 14th Ed., pp. 1 and 2.

Cur. adv. vult.

26th February, 1915.

IRVING, J.A.: Plaintiff (an incorporated company) was the owner of a tug-boat, Rip Rap.

Momsen & Rowe were ship and yacht brokers dealing in boats and had a lien on the Rip Rap and her engine to secure the payment of two notes for $1,625. When on the 10th of November, 1913, the first of the two notes became due, Momsen & Rowe sent an agent (Maxon) to interview the plaintiff Company, and at or after the interview Maxon said that he thought the boat would suit Messrs. Broley & Martin, who were carrying on business on the Fraser River, and the following resolution was then passed:

"It was moved and seconded that Mr. Bowman be empowered to make, sign and transfer the Company's interest and title to any parties who may hereafter purchase the Company's boat. All copies of papers in connection therewith to be forwarded to the Company's office at Victoria and any monies received by Mr. Bowman to be paid into the Company's account at the Bank of Toronto, Victoria, and also that this motion in no way permits Mr. Bowman to enter into any agreements that may endanger the Company's interests except and for the sole purpose of effecting the sale of the boat. Carried."

IRVING, J.A.

Notice of this resolution was furnished to the defendants Momsen & Rowe by handing a copy to Maxon.

Bowman and Maxon took the Rip Rap from Victoria, where she was lying, to the Fraser River and shewed her to the other defendants Broley & Martin. Broley & Martin were willing to buy her, but they had not sufficient cash; a three-handed

deal was then arranged by which Momsen & Rowe gave possession of the boat to Broley & Martin on the terms set out in the following document:

"Received from Messrs. Broley & Martin an accepted draft for $1,000 (one thousand) as part payment on gas tug powered with a 35 H. Corliss engine. Sale price of tug to be $3,000 (three thousand dollars) clear from all debts. Momsen & Rowe agree to accept for balance of payment of $2,000 (two thousand dollars) certain machinery as described, shewn to, and passed on by Mr. Bowman of the Olympic Stone Construction Co. of Victoria, said machinery to contain the following prices:

"One hoisting engine ($1,500) 2 years old used only 3 months; one swing gear ($245) 2 years old, never used; one set of derrick timbers framed, and derrick irons complete ($500) 3 months old, never used; all to be free from all debts, liens, mortgages, etc., and all of which are in first class condition and located at Cranes's ship yard, New Westminster.

'In the event of Messrs. Broley & Martin wishing to exchange their 35 H. Corliss engine for a larger one, Messrs. Momsen & Rowe agree to take back same within a period of 12 months from date, provided said engine is in perfect running order, and allow Messrs. Broley & Martin the list price of said engine less 10% (ten) to be applied on part of purchase price on a larger Corliss engine when purchased from Momsen & Rowe."

It will be observed that Momsen & Rowe did not forget their own interests in this contract, under which they received the whole $1,000 payable in cash.

On the 30th of April, 1914, the plaintiff brought this action claiming as against the defendants Broley & Martin the return of the Rip Rap, and as against the defendants Momsen & Rowe damages for selling the boat without authority. Momsen & Rowe counterclaimed for the $1,625. This counterclaim was dismissed without costs and without prejudice to the right of the defendants Momsen & Rowe (or the bank which held the notes) to bring a fresh action in respect of the $1,625. Judgment was given in the original action against the plaintiff and from that judgment this appeal is taken.

IRVING, J.A.

Bearing in mind the fact that the defendants Momsen & Rowe were interested in the boat, and that they held two notes made by the plaintiff for the price of the engine, the terms of the resolution, in my opinion, call for a sale for cash, and no authority was given to Bowman to make the barter which was carried through by Momsen & Rowe. The inquiry addressed by Martin to Bowman as to his authority shews that he appreciated the applicability of the doctrine of *caveat emptor*.

COURT OF APPEAL

1915

Feb. 26.

OLYMPIC STONE CONSTRUCTION CO. v. MOMSEN & ROWE

The difference between a sale and a barter is well known and need not be enlarged upon. The cases cited by Mr. *Bodwell* will not justify us in calling an authority to an agent to sell an authority to barter. The legal effect of a contract of sale may be the same as that of a contract of barter, but the authority for one is not an authority for the other. The plain reading of the authority given to Bowman was to sell for cash.

The implied authority of a factor does not include an authority to barter: *Guerreiro* v. *Peile* (1820), 3 B. & Ald. 616; nor to delegate his authority: *Cockran* v. *Irlam* (1814), 2 M. & S. 301; *Solly* v. *Rathbone, ib.* 298.

Apart from the written authority, I think we must hold that Bowman, who was the Company's general manager, had power to bind the Company: see *Doctor* v. *People's Trust Co.* (1913), 18 B.C. 382; and clauses (h) and (o) of the Company's powers and the power of delegation in section 91 of Table A in the First Schedule to the Companies Act, and therefore the plaintiffs are not entitled to recover.

IRVING, J.A.

The boat being unregistered, might be transferred without a document in writing. The cases cited by Mr. *Bodwell* establish that point.

I would dismiss the appeal.

MARTIN, J.A.: As to the point of this transaction being a sale or a barter, I am of the opinion that on the facts the learned judge below was justified in holding it to be the former: *Hands* v. *Barton* (1808), 9 East 349; *Saxty* v. *Wilkin* (1843), 11 M. & W. 623; Halsbury's Laws of England, Vol. 25, p. 109, par. 216. The case of *Guerreiro* v. *Peile* (1820), 3 B. & Ald. 616, is of no assistance to the plaintiff in determining this question because there the transaction was stated in the written note to be "considered a barter transaction," therefore it was not open to the parties to treat it otherwise.

MARTIN, J.A.

Then as to there being a necessity for a written transfer of the vessel. It is admitted that she was not registered and it is not proved that she ought to have been, which the plaintiff should have done if he wished to bring her within the Act; otherwise a written instrument is not essential—*Benyon* v.

Cresswell (1848), 12 Q.B. 899; *cf.* Erle, J. Of this case it is said in MacLachlan on Merchant Shipping, 5th Ed., 32, that it is

". . . . a decision which clearly implies that at common law the legal property in a ship may be transferred without a bill of sale; and there is no reason to suppose that the provisions of the Sale of Goods Act, 1893, with regard to the transfer of property as between buyer and seller do not apply to ships, except in cases where the Merchant Shipping Act makes a bill of sale necessary."

And *cf. Batthyany* v. *Bouch* (1881), 4 Asp. M.C. 380; 50 L.J., Q.B. 421, as to the Act of 1854 not applying to an agreement to transfer a registered ship but to the instrument of transfer itself, and that such an agreement may be enforced by an order for specific performance: *cf.* Act of 1894, Sec. 24 *et seq.*

MARTIN, J.A.

Applying the foregoing conclusion to the facts found by the learned trial judge (which finding is supported by the evidence) it follows that the appeal should be dismissed.

GALLIHER, J.A.: I am with some regret, I may say, forced to the conclusion that this appeal must be dismissed.

I think upon the evidence and the authorities that Bowman had power to make the deal, which in the circumstances seems to me not to have been in the best interests of the Company.

GALLIHER, J.A.

MCPHILLIPS, J.A.: This is an appeal from the decision of GREGORY, J., and in my opinion the learned trial judge came to the right conclusion.

The action called in question the sale of an unregistered tugboat called the "Rip Rap." A sale was authorized by a resolution of the board of directors, and Mr. Bowman, the managing director of the plaintiff Company, was authorized to effect the sale and execute the necessary transfer of title thereof. The learned trial judge has expressly found that the sale was made with the authority of the managing director, and with this finding I cannot find any good reason to disagree.

The evidence adduced at the trial to establish the plaintiff's case is most unsatisfactory, yet it is impossible to take any other view of it than that arrived at by the learned judge. It was very strongly argued by counsel for the appellant that

COURT OF APPEAL

1915

Feb. 26.

OLYMPIC STONE CONSTRUCTION CO. v. MOMSEN & ROWE

the present case was one which should have been determined upon the principle as laid down in *Guerreiro* v. *Peile* (1820), 3 B. & Ald. 616 (22 R.R. 500), that is that the managing director had no authority to sell or authorize a sale save for money, and that the transaction was one of barter and that therefore no property passed. In my opinion the transaction was not one of barter. What is barter? In Stroud's Judicial Dictionary, 2nd Ed., Vol. 1, at p. 168, we find the following:

"'This word [barter] is used by us for the exchange of wares for wares' (Termes de la Ley: Cowel)."

Chalmers's Sale of Goods, 7th Ed., p. 5:

"Where the consideration for the transfer of the property in goods from one person to another consists of other goods, the contract is not a contract of sale, but is a contract of exchange or barter (Bullen & Leake, Prec. of Plead., 3rd Ed., p. 151; *Harrison* v. *Luke* (1845), 14 M. & W. 139; French Civil Code, art. 1702). But if the consideration for such transfer consists partly of goods and partly of money, it seems that the contract is a contract of sale (*Aldridge* v. *Johnson* (1857), 26 L.J., Q.B. 296; *Sheldon* v. *Cox* (1824), 3 B. & C. 420, where the goods had been delivered and the action was brought for the money balance . . . .)."

Aldridge v. *Johnson, supra,* was a case where 32 bullocks valued at £6 apiece were to be exchanged for 100 quarters of barley at £2 per quarter, the difference to be paid in cash, and the contract was treated as a contract of sale.

MCPHILLIPS, J.A.

Then in *The South Australian Insurance Co.* v. *Rendell* (1869), L.R. 3 P.C. 101, the question as to what constituted a sale as compared with a bailment was considered and Sir Joseph Napier at p. 108 said:

"The law seems to be concisely and accurately stated by Sir William Jones in the passages cited by Mr. Mellish from his treatise on Bailments, pp. 64 and 102 [3rd Ed.]. Wherever there is a delivery of property on a contract for an equivalent in money or some other valuable commodity, and not for the return of this identical subject matter in its original or an altered form, this is a transfer of property for value—it is a sale and not a bailment."

And at p. 113 further said:

"It comes to this, that where goods are delivered upon a contract for a valuable consideration, whether in money or money's worth, then the property passes."

In the present case the transaction was clearly in view of what has been declared to be the law a sale, not a barter. The terms of the sale were $1,000 and machinery valued at $2,000.

and there was sufficient acceptance and receipt to oust any possible contention on the part of the plaintiffs—based upon the Statute of Frauds—and the property passed.

In my opinion therefore the learned trial judge arrived at the right conclusion and the judgment should be affirmed and the appeal dismissed.

Appeal dismissed.

Solicitors for appellant: *Tait, Brandon & Hall.*

Solicitors for respondents (Momsen & Rowe): *Lucas, Lucas, Bucke & Wood.*

Solicitors for respondents (Broley & Martin): *Bourne & McDonald.*

IN RE KWONG YICK TAI.

Practice—Court of Appeal—Jurisdiction—Court of Appeal Act, R.S.B.C. 1911, Cap. 51.

No appeal lies to the Court of Appeal from the refusal of a writ of *certiorari* in respect of a summary conviction under the Criminal Code.

Semble, while an appeal may lie in a like case in civil proceedings, in virtue of the Provincial statutes it cannot be held to do so in a criminal cause or matter.

APPEAL by accused from an order made by HUNTER, C.J.B.C., at Vancouver, on the 23rd of December, 1915, dismissing an application for a writ of *certiorari* to remove into the Supreme Court for the purpose of having quashed a certain conviction for keeping a common gaming-house. The usual grounds of objection were given as to excess of jurisdiction, want of evidence and non-disclosure of any offence having in law been committed, but the only ground on which the Chief Justice

Statement

COURT OF APPEAL

1915

April 6.

IN RE KWONG YICK TAI

dismissed the application for the writ was because the notice of motion therefor was signed by a member of the private firm of practitioners in which the Attorney-General is a partner.

The appeal was argued at Victoria on the 18th of January, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Ritchie, K.C., for accused: We are asking the Court to review a decision of the Chief Justice on an application for a writ of *certiorari*. Prior to 1897 the late Full Court had power to review such an order and under section 6 of the Court of Appeal Act the present Court of Appeal has the same power. [He referred to *McKelvey* v. *Le Roi* (1901), 8 B.C. 268; *Rex* v. *Carroll* (1909), 14 B.C. 116; *Rex* v. *Harvie* (1913), 18 B.C. 5; *In re Robert Evan Sproule* (1886), 12 S.C.R. 140; *Pike* v. *Davis* (1840), 8 D.P.C. 387; *Re Rice* (1888), 20 N.S. 437; *Rex* v. *Tanghe* (1904), 10 B.C. 297; *Rex* v. *Ferguson* (1911), 16 B.C. 287.] Where there is a revision of the statutes and a date is changed in the revision, the revision must be adhered to. On the question of the Attorney-General's partner issuing the notice, the prisoner has a right to employ whom he sees fit. The Attorney-General has nothing to do with a summary proceeding and it is not a ground for saying the notice is an irregularity. There is no law against it. The Attorney-General's duties are set out in section 3, Cap. 15, R.S.B.C. 1911: see *The Queen* v. *Lord* (1850), 12 Q.B. 757.

Argument

Martin, K.C. (*Griffin*, with him), for the magistrate: There is no appeal in this case: see *In re Tiderington* (1912), 17 B.C. 81; *The Attorney-General* v. *Sillem and Others* (1864), 10 H.L. Cas. 704. The word "procedure" in the Act does not include "appeal": see *Rex* v. *Carroll* (1909), 14 B.C. 116. Where there is an evident mistake in the printing of the statute as there was in this case in reading 1897 instead of 1907 the Court will take judicial notice of the error: see Maxwell on Statutes, 5th Ed., 407. This mistake is plain from the history of the legislation: see *Winter* v. *Gault Brothers, Limited* (1913), 18 B.C. 487; *In re Twigg's Estate. Twigg* v. *Black* (1892), 1 Ch. 579; *In re Boothroyd* (1846), 15 L.J., M.C. 57. The

enforcement of the Criminal Code is exclusively in the jurisdiction of the Province. The Attorney-General is an officer of the Court and it is the duty of the Court to see that the conduct of criminal proceedings are kept pure. We contend it is a maladministration of office for the Attorney-General's partner to appear on behalf of a prisoner. Such a thing as the Attorney-General being engaged in the defence of a prisoner has never happened in England or any of the Provinces.

Argument

Ritchie, in reply, referred to Short & Mellor's Crown Office Practice, 2nd Ed., 48; *The Queen* v. *Justices of Surrey* (1844), 5 Q.B. 506.

Cur. adv. vult.

6th April, 1915.

MACDONALD, C.J.A.: The appeal should be quashed.

The accused was convicted under the Criminal Code and applied in the Court below for an order for a writ of *certiorari,* which was refused, and from that refusal he is appealing to this Court.

No right of appeal from such an order is given by the Criminal Code or any other Dominion statute. While an appeal may lie in a like case in civil proceedings in virtue of Provincial statutes, it cannot be held to do so in a criminal cause or matter.

It was urged by Mr. *Ritchie* that the late Full Court had, prior to May, 1897, power to review an order such as the one in question, and that all the jurisdiction which that Court enjoyed on the 25th of April, 1897, was by section 6 of the Court of Appeal Act conferred on the Court of Appeal, and that hence this Court has power to review the said order. This contention, assuming it to be relevant, is founded on a clerical error in the revision of the statutes. Reference to the original roll will shew that the date is not the 25th of April, 1897, but the date of the passing of the Court of Appeal Act, namely, 25th of April, 1907.

MACDONALD, C.J.A.

This Court is merely an appellate Court and has no original jurisdiction except that set forth in the Act, which jurisdiction is confined to matters incidental to the hearing and determina-

COURT OF APPEAL

1915

April 6.

IN RE KWONG YICK TAI

tion of appeals. As we have no jurisdiction to entertain this appeal I refrain from expressing any opinion concerning the merits of the case.

IRVING, J.A.: I agree with the Chief Justice.

MARTIN, J.A.: In my opinion this Court has no jurisdiction to entertain this appeal and therefore it should be quashed.

GALLIHER, J.A.

GALLIHER, J.A.: I am of the opinion that we have no jurisdiction to entertain this appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree with the Chief Justice.

Appeal quashed.

GREGORY, J.

1914

Sept. 21.

RE BANKERS TRUST AND BARNSLEY.

Company law—Winding up—Issue of preference shares—Non-compliance with articles of association—Holders not liable as contributories.

COURT OF APPEAL

1915

Feb. 26.

RE BANKERS TRUST AND BARNSLEY

A company was incorporated with a capital stock of common shares; subsequently it was reorganized, the stock being divided into preference and common stock. Later, without any authority from the shareholders, the directors, by resolution, increased the capital stock of the company by the creation of new shares. The shareholders afterwards passed a resolution in the same terms as that passed by the directors. Under the articles of association of the company, the directors could only pass such a resolution as above with the sanction of a special resolution of the company in general meeting first had and obtained. New preference shares were issued under these resolutions and later the company went into liquidation. An application by the liquidator to place a shareholder on the list of contributories to whom 50 of the new preference shares had been issued, was dismissed.

Held, on appeal, that the holders of shares issued as preference shares were not liable as contributories, since the directors had no power to

pass a resolution to create new shares without having first obtained the sanction of the shareholders.

Re Pakenham Pork Packing Co. (1906), 12 O.L.R. 100, followed.

Order of GREGORY, J. affirmed.

GREGORY, J.

1914

Sept. 21.

COURT OF APPEAL

1915

Feb. 26.

RE BANKERS TRUST AND BARNSLEY

APPEAL from an order of GREGORY, J. made at chambers in Victoria on the 21st of September, 1914, on an application to settle the list of contributories in winding-up proceedings. The facts are set out fully in the reasons for judgment of GREGORY, J.

Maclean, K.C., and *Twigg,* for the application.

Harold B. Robertson, and *Mayers, contra.*

GREGORY, J.: This is an application to settle the list of contributories in winding-up proceedings.

The liquidator seeks to place on the list, as holders of 10 per cent. preference shares, a large number of persons who made application therefor, and to some of whom certificates were actually issued. On behalf of these persons it has been objected that the Company never legally created, issued or allotted any such shares. For the purpose of simplifying future proceedings, it has been agreed that this question should first be settled, leaving it open to the liquidator hereafter to shew that any particular individual is estopped on the ground of acquiescence, delay, or otherwise, from setting up this defence.

GREGORY, J.

As originally incorporated, the capital stock of the Company, then called the Prince Rupert Savings & Trust Company, Ltd., consisted of 60,000 ordinary shares of $5 each—$300,000. This capital was reorganized (by special resolution passed on the 9th of August, 1910, and confirmed on the 24th of August, 1910) as follows:

8,000	preference shares (10%) of $25 each....	$200,000
3,400	ordinary shares of $25 each.....	85,000
15,000	ordinary shares of $1 each.....	15,000
26,400		$300,000

When this reorganization took place, 13,247 of the original $5 shares had, according to the recital in the special resolution, been subscribed for and issued, and were then fully paid up;

GREGORY, J.

1914

Sept. 21.

COURT OF APPEAL

1915

Feb. 26.

RE BANKERS TRUST AND BARNSLEY

but the holders thereof, apparently in order to perfect the reorganization of the capital, surrendered them (receiving new shares in lieu thereof). Subsequently an attempt was made to increase the capital of the Company from $300,000 to $2,000,000 by the following resolutions, and no others:

1. "24th July, 1912. Resolution of the Directors—That the capital stock of the company be increased to two million dollars by the creation of sixty-eight thousand (68,000) new shares of $25 each, and that the directors be authorized to take such steps as may be necessary for the purpose of giving effect to this resolution, and that the secretary call an extraordinary general meeting of the shareholders on Monday the 12th day of August, 1912, at 3 p.m. . . . ."

2. 12th August, 1912. Special resolution by the shareholders in identically the same terms as that of the directors passed on the 24th of July, 1912, but omitting the directions to the secretary.

3. 27th August, 1912. Shareholders confirmed the special resolution.

It is in connection with shares issued under the authority of these resolutions that the present question has arisen. It is to be noted that none of these resolutions purport to create any "preference" shares in so many words, and it is also to be noted that there is no resolution authorizing the shares to be issued, or allotting the same. The creation and issue of new shares is regulated by the following articles of association:

GREGORY, J.

"Art. 5. The directors may with the sanction of a special resolution of the company in general meeting first had and obtained, divide, create and issue any part of the share capital as well initial as increased, into and in several classes, and may attach thereto respectively any preferential, deferred, qualified, or special rights, privileges or conditions."

The directors have taken no such steps, nor have they been authorized to do so by any special resolution.

"Art. 45. The company may in general meeting from time to time by special resolution increase the capital by the creation of new shares of such amount as may be deemed expedient."

This the Company has done, by its special resolution of the 12th of August, 1912—the previous resolution of the 24th of July, 1912, by the directors, was valueless—the directors having no initial authority to increase capital.

"Art. 46. The new shares shall be issued upon such terms and conditions and with such rights and privileges annexed thereto as by the special resolution creating the same shall be directed, and in particular such shares

may be issued with a preferential or qualified right to dividends, and in the distribution of assets of the company, and with a special or without any right of voting, and if no directions be given by such special resolution or subsequently, they shall be dealt with by the directors as if they were part of the original capital."

GREGORY, J.
1914
Sept. 21.
COURT OF APPEAL
1915
Feb. 26.
RE BANKERS TRUST AND BARNSLEY

It is argued that the shares in question were issued by the directors as preference shares under the authority of article 46. But the answer to this contention is that the special resolution creating the new shares made no reference to their being preference shares—and the directors never issued, allotted or dealt with them in any way whatever; there is absolutely no resolution of the directors on the subject. It is true that certificates have been actually handed out, but that was the act of the secretary, authorized, presumably, only by the president, who had no such authority. The certificates indicate that the shares were to be paid for by instalments, but it is impossible to find any authority for this in the records of the Company or its directors. As the special resolution creating the shares gave no directions, etc., the shares were, under article 46, to be dealt with by the directors "as if they were part of the original capital." In the original capital there were no preference shares, and if it is claimed that the capital as reorganized by the special resolution of the 9th of August, 1910, is now to be treated as the original capital, we receive no help, for by that resolution both ordinary and preferred shares of $25 each were created.

GREGORY, J.

It seems to me quite clear that no new preference shares have been duly created, issued or allotted, and that the case falls within the principles enunciated in *Koffyfontein Mines, Limited* v. *Mosely* (1911), A.C. 409; *Re Pakenham Pork Packing Co.* (1906), 12 O.L.R. 100.

The appeal was argued at Vancouver on the 10th and 11th of November, 1914, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Maclean, K.C., for appellant (applicant): The case turns on how the $1,700,000 issue was made. We contend it is preference stock. On August 12th, 1912, the shareholders, at a general meeting, increased the stock to $2,000,000 (the original

Argument

GREGORY, J.
1914
Sept. 21.
COURT OF APPEAL
1915
Feb. 26.
RE BANKERS TRUST AND BARNSLEY

stock being $300,000), adding 68,000 shares at $25 each, and the directors were, under the resolution, to take such steps as were necessary to give effect to it. The directors then proceeded to deal with these shares as preference stock. Barnsley had no shares in the original lot; he was only interested in the new issue. The directors did not pass a resolution formally, but they dealt with and sold the shares as preference shares: see *In re London India Rubber Company* (1868), L.R. 5 Eq. 519. We say they are *de facto* preferred shares but not *de jure,* and when a man takes preferred shares and the company is wound up, he cannot get out of his liability on account of an irregularity in the construction of the shares: *In re Miller's Dale and Ashwood Dale Lime Company* (1885), 31 Ch. D. 211; *Tennent* v. *City of Glasgow Bank* (1879), 4 App. Cas. 615 at p. 621; *Oakes* v. *Turquand and Harding* (1867), L.R. 2 H.L. 325; *Koffyfontein Mines, Limited* v. *Mosely* (1911), A.C. 409; *Re Pakenham Pork Packing Co.* (1906), 12 O.L.R. 100. As long as what is done is within the powers of the Company, the contributor cannot complain.

Argument

H. W. R. Moore, for the creditors: On a question of law it can be argued that a shareholder is bound to know the company's standing and when he has received his allotment of shares he knew how matters stood, and he cannot repudiate the liability on the winding up of the company: see *Richmond's Case, and Painter's Case* (1858), 4 K. & J. 305; *Campbell's Case* (1873), 9 Chy. App. 1 at p. 15; *Muirhead* v. *Forth and North Sea Steamboat Mutual Insurance Association* (1894), A.C. 72 at p. 81; *Ho Tung* v. *Man On Insurance Company* (1902), A.C. 232.

Harold B. Robertson, for respondent Barnsley: This was common stock and nothing more. No preference shares were ever created. It is not a question of irregularity, but in regard to a subject-matter that was never in existence: *Beck's Case* (1874), 9 Chy. App. 392; Halsbury's Laws of England, Vol. 5, p. 499, par. 848. The doctrine of estoppel only applies after a valid allotment has been made. In the case of acquiescence we could not succeed if the stock was validly issued, but in this case it was not. Reference was made to

In re Scottish Petroleum Company (1883), 23 Ch. D. 413; *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459; *Baillie's Case* (1898), 1 Ch. 110. Where a contract is obtained by fraud it is only voidable, but in this case it is void *ab initio*: *Oakes* v. *Turquand and Harding* (1867), 36 L.J., Ch. 949; *In re Miller's Dale and Ashwood Dale Lime Company* (1885), 31 Ch. D. 211.

Maclean, in reply: Under article 46 they could deal with this as preference stock, which they did.

Cur. adv. vult.

26th February, 1915.

MACDONALD, C.J.A.: I agree with the conclusion arrived at by the learned trial judge and, therefore, would dismiss the appeal.

IRVING, J.A.: The learned trial judge came to the conclusion that this case came within the principle of *Re Pakenham Pork Packing Co.* (1906), 12 O.L.R. 100. I agree with him.

The effect of the 46th article on the resolution of the 12th of August, 1912, was, in my opinion, to create so many more common shares, the "original issue" in 1909 being all common shares.

Mr. Barnsley's application was for preference shares, and as there were no preference shares to allot to him there was no meeting of the minds, and, therefore, no contract. Had he searched the memorandum and articles of association, as he was bound to do (*Oakes* v. *Turquand and Harding* (1867), L.R. 2 H.L. 325; 36 L.J., Ch. 949), he would have learned that the Company had power to issue preference shares. He would not have learned from those documents that all the preference shares had been allotted before he made his application. That fact he could only learn by going through the books of the Company, but he was not bound to examine them.

IRVING, J.A.

The creditors are entitled from the date of the winding-up order to be regarded as being, to the extent of their claims, purchasers for value of the Company's rights against its members, but they can have no greater rights than the Company has. You cannot fix upon a person any engagement larger, or other,

GREGORY, J.

1914

Sept. 21.

COURT OF APPEAL

1915

Feb. 26.

RE BANKERS TRUST AND BARNSLEY

than that he entered into. Barnsley never knowingly agreed to accept common shares.

The cases cited on behalf of the liquidator are instances of applicants being held liable, on voidable contracts, on the ground of acquiescence, because they knew or ought to have known: see *Beck's Case* (1874), 9 Chy. App. 392; 43 L.J., Ch. 531; but those cases have no application in deciding a case of mistake and no acquiescence.

I would dismiss the appeal.

MARTIN, J.A.: Briefly, in my opinion, the combined effect of articles 5 and 46, as applied to the question before us, is that in default of any "directions" being given under article 46 as to the new shares, the directors can only deal with them as common stock under the "original capital," unless they obtain the sanction of the Company by special resolution under article 5, which was not done. These facts, it is contended, bring this case within the decision of the Ontario Court of Appeal in the very similar case of *Re Pakenham Pork Packing Co.* (1906), 12 O.L.R. 100, and I am unable to distinguish that case in principle, because it is stated therein, p. 109, that

MARTIN, J.A.

"The by-law and the subsequent sanction of the shareholders are the essential elements of the power to create the preference stock. The power is not otherwise conferred, nor is it inherent in the directors of the company. It is not a question of mere form, for the form in this instance is matter of substance. In this case there was a complete failure to comply with the provision of the Act as regards the passing of a by-law, the first prerequisite to the creation of preference stock."

It is true that section 22 of the Ontario Companies Act, after giving the directors power to create and issue preference stock by by-law, provides that no such by-law shall have any force or effect whatever unless it has been unanimously sanctioned by a vote of the shareholders at a general meeting duly called for that purpose, but in my opinion, acts of directors which are wholly unauthorized, unless performed in compliance with the articles, stand on no higher a plane than those which are declared by the Act to be ineffective because of non-compliance.

In some respects this is a weaker case than *Pakenham's,* because there, at least, the unanimous consent of a meeting had

been obtained to create preference stock of a fully prescribed nature, and though the matter had been irregularly brought before it, as it was not a meeting called for the special purpose, yet, still there was some justification for the belief of the directors that the company approved their intended course, though the directors failed to observe the Act and pass a by-law and get it sanctioned. But in the case at bar the directors never even attempted to create any preference stock of the new capital, or to define its nature or privileges, or to obtain any sanction therefor, but simply presumed to deal with it all as "ten per cent. preferred shares," without any further definition thereof (whatever that uncertain language may be held to mean), though the nature and various privileges of the original preferred shares had been clearly defined by them. It may be, as alluded to in *Pakenham's* case at pp. 108-9, that the Company could not repudiate these shares as against certain holders, but that is no answer to the objection of Barnsley to being placed on the list of contributories, and on the facts I find no difficulty in saying, as the Court said in that case, p. 109:

MARTIN, J.A.

"Here there is no acquiescence, delay, or conduct on [Barnsley's] part to estop him from alleging and shewing that at the time when he made his application, and thenceforth until the liquidation proceedings, the company were not in a position to give him that for which he applied. There was no concluded contract, and he never received or became the holder of shares of the nature and quality specified in his application or any others."

It may be, as suggested, that the Ontario Court of Appeal came to an erroneous conclusion in that case, but I prefer to follow it, leaving it for a higher tribunal to finally determine the question.

For these reasons I think the appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: I concur in the reasons for judgment of my brother IRVING.

Appeal dismissed.

Solicitor for appellant: *H. Despard Twigg.*
Solicitor for respondent: *E. C. Mayers.*

MURPHY, J.

1914

Sept. 24.

COURT OF APPEAL

1915

Feb. 26.

COLUMBIA BITULITHIC v. VANCOUVER LUMBER CO.

COLUMBIA BITULITHIC, LIMITED v. VANCOUVER LUMBER COMPANY, LIMITED, *ET AL.*

Company law—Powers given by charter—Power to lend—"Incidental"—Chattel mortgage given as security—Ultra vires—Affidavit of bona fides—Sworn before solicitor for both parties.

Where the memorandum of association of a trading company does not expressly give the power to lend, but includes a clause "generally to do all acts and things necessary or convenient to carry out and perform all acts above enumerated and all acts incidental thereto":—

Held, per IRVING and GALLIHER, JJ.A. (MCPHILLIPS, J.A. dissenting), that the lending of money and undertaking to make future advances on a mortgage is not incidental to any of the purposes mentioned in the memorandum of association; it is *ultra vires* of the company and the mortgage is void.

Held, further, that the question of what is "incidental" to the powers of a company must be determined by fair implication from the powers expressly conferred, and the omission from the memorandum of association of express power to lend is of significance in determining the question of "incidental" power.

Semble, that although a chattel mortgage given to a company to secure an *ultra vires* loan is void, the mortgagee may have the right to recover its own moneys from the mortgagor by a tracing order or a decree for rescission, or both.

Per MARTIN, J.A.: When a County Court is the depository of a chattel mortgage, rule 309 of the County Court Rules applies, and a chattel mortgage is void where the affidavit of *bona fides* is sworn before the solicitor of the party on whose behalf the affidavit is to be used; this rule applies where the solicitor acts for both mortgagor and mortgagee.

Decision of MURPHY, J. affirmed.

Statement

APPEAL by plaintiff from the decision of MURPHY, J. in an action tried by him at Vancouver on the 24th of September, 1914. The facts from which the action arose are that the defendant, The Vancouver Lumber Company, recovered judgment in an undefended action against the Scott Goldie Quarry, Limited, as acceptors of certain bills of exchange, and on the 8th of January, 1914, the sheriff, under a writ of *fi. fa.*, seized

MURPHY, J.

1914

Sept. 24.

COURT OF APPEAL

1915

Feb. 26.

COLUMBIA BITULITHIC v. VANCOUVER LUMBER CO.

the goods to which the plaintiff, the Columbia Bitulithic, Limited, claimed title under a chattel mortgage given on the 16th of August, 1913,. to secure advances up to the sum of $50,000. The Burrard Lumber Company also claimed as a judgment creditor. The sheriff interpleaded, and in pursuance of an order of GREGORY, J. of the 3rd of February, 1914, the parties were ordered to proceed to the trial of an issue in the Supreme Court, the Columbia Bitulithic, Limited, being made the plaintiff, and the Vancouver Lumber Company and certain other creditors of the Scott Goldie Quarry, Limited, the defendants.

The issue directed to be tried was whether at the time of the seizure by the sheriff the goods seized were the property of the Columbia Bitulithic, Limited, as against the Vancouver Lumber Company. The Columbia Bitulithic, Limited, was a large shareholder in the Scott Goldie Quarry, Limited, and at the request of the directors of the Scott Goldie Quarry, Limited, advanced them money from time to time, amounting in the aggregate to over $40,000, for which was taken as security the chattel mortgage in question.

Statement

Bodwell, K.C., for plaintiff.
Davis, K.C., and *Housser*, for defendants.

MURPHY, J.: I feel bound by the decision in *Carter Dewar Crowe Co.* v. *Columbia Bitulithic Co.* (1914), [20 B.C. 37]; 6 W.W.R. 1215, to hold the transaction out of which the chattel mortgage arose to have been *ultra vires* of the plaintiff Company. They have no more authority under their corporate powers to make enormous loans than they had to guarantee debts, and I cannot see how the one act can be held any more incidental to their business than the other. The reason for the reluctance frequently expressed to imply a power in a company to become a surety is given in *Union Bank of Canada* v. *A. McKillop & Sons, Limited* (1913), 30 O.L.R. 87 at p. 99 by Hodgins, J.A., delivering the unanimous judgment of the Court of Appeal as being

MURPHY, J.

"because the result of a guarantee against the debts of another company is to put the assets of the guaranteeing company in peril for liabilities

MURPHY, J. incurred in the carrying on of a business in which the guarantor is not directly interested, and whose engagements it has no means of controlling."

1914

Sept. 24.

COURT OF APPEAL

1915

Feb. 26.

COLUMBIA BITULITHIC v. VANCOUVER LUMBER CO.

By the mortgage in question here an amount of cash assets equal to the total authorized capital of the plaintiff Company was placed in the hands of a company in which it was no more directly interested than was the McKillop Company in the case cited, in the West Lorne Waggon Co., that company holding some shares in the waggon company just as plaintiff Company here does in the Scott Goldie Quarry, Limited, and just as clearly the plaintiff Company had no means of controlling the engagements of the Scott Goldie Quarry, Limited. If *ultra vires,* the transaction can give rise to no debt, legal or equitable: *In re Birkbeck Permanent Benefit Building Society* (1912), 81 L.J., Ch. 769, affirmed, as to this, in *Sinclair* v. *Brougham* (1914), A.C. 398. These cases shew that equitable rights do arise from *ultra vires* contracts, but evidence in those was not led and, as I understand the action, could not be. The whole basis of these proceedings is contract, and, according to the authorities cited, no contract can exist. Securities given to cover an *ultra vires* contract cannot be retained as a matter of contract although they may be effective when equities are shewn, to the extent of such equities: *Brooks & Co.* v. *Blackburn Benefit Society* (1884), 9 App. Cas. 857, affirming the decision of the Court of Appeal (1882), 22 Ch. D. 61.

MURPHY, J.

No such equities were proven before me. Further, if there is no legal or equitable debt, how can this chattel mortgage be held good as against creditors, since putting it on its highest ground, it is intended as a security for a debt which must be verified by an affidavit of *bona fides?* When the Bills of Sale Act requires that with respect to such chattel mortgage the affiant must state "that the grantor is justly and truly indebted to the grantee," this statement, I think, must mean a debt which is either legal or equitable. If so, the requirements of the Bills of Sale Act have not in reality been complied with, and could not be, and the chattel mortgage is void against the defendant. The issue is decided in favour of the defendant.

The appeal was argued at Vancouver on the 17th of Novem-

ber, 1914, before IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Bodwell, K.C., for appellant (plaintiff): The point at issue is the validity of a chattel mortgage given by the Scott Goldie Quarry, Limited, to the Columbia Bitulithic, Limited, for moneys advanced. We contend, first, that the Company had power to lend the money. They have all the powers set out in the memorandum of association and incidental thereto, and unless the power to lend is prohibited by the common law, or in express terms in the articles, the word "incidental" should receive a liberal construction: see *Attorney-General* v. *Great Eastern Railway Co.* (1880), 5 App. Cas. 473 at p. 478; *Ashbury Railway, Carriage and Iron Co.* v. *Riche* (1875), L.R. 7 H.L. 653; *Union Bank of Canada* v. *A. McKillop & Sons, Limited* (1913), 30 O.L.R. 87. Even assuming that it was *ultra vires* of the Company to lend, it does not follow that the mortgage is bad and that the security cannot be enforced after one party has received the full benefit of a contract; they are estopped from setting up that they are relieved from their liability by reason of the servants of the Company going beyond their powers in lending them the Company's money: see *In re Coltman, Coltman* v. *Coltman* (1881), 19 Ch. D. 64 at p. 69; *Stevens* v. *Gourley* (1859), 1 F. & F. 498; *Great Eastern Railway Co.* v. *Turner* (1872), 8 Chy. App. 149; *Sinclair* v. *Brougham* (1914), A.C. 398; *Whitney Arms Co.* v. *Barlow et al.* (1875), 63 N.Y. 62; *City of Buffalo* v. *Balcom* (1892), 32 N.E. 7 at p. 8; *Starin* v. *Staten Island R.T.R. Co.* (1889), 19 N.E. 670; *Mayor, etc., of the City of New York* v. *Sonneborn* (1889), 21 N.E. 121 at p. 122. The point in this case is that the contract is executed: see *Bernardin* v. *The Municipality of North Dufferin* (1891), 19 S.C.R. 581 at pp. 589 to 600; *In re Birkbeck Permanent Benefit Building Society* (1912), 81 L.J., Ch. 769 at p. 786.

Argument

As to the affidavit of *bona fides* attached to the bill of sale being taken in the office of the solicitors for both Companies: In the case of *Baker* v. *Ambrose* (1896), 2 Q.B. 372, it was held that the bill of sale was void because the Bills of Sale Act in

MURPHY, J.
1914
Sept. 24.
COURT OF APPEAL
1915
Feb. 26.
COLUMBIA BITULITHIC v. VANCOUVER LUMBER CO.

England is a proceeding in Court, but in the case of *Vernon* v. *Cooke* (1880), 49 L.J., Q.B. 767, the affidavit was held to be good where the solicitor was acting for both parties. Our Act is a proceeding under the Lieutenant-Governor in council from beginning to end, whereas in England it is a rule of the Court.

Davis, K.C., for respondents (defendants): There are three points to be considered: first, the transaction is *ultra vires* of the plaintiff Company; second, in consequence of this, the secretary of the Company has no power to make the affidavit of *bona fides* without which the bill of sale is void; third, the affidavit was sworn before the solicitor acting for the plaintiff Company. The statutory powers of the Company do not include the right to lend money. There is, therefore, no debt, and there must be a debt before there can be a bill of sale: see the *Birkbeck* case, *supra.* The secretary of the Company made the affidavit of *bona fides,* and he has no power to verify an illegal transaction. On the question of the affidavit being sworn before a commissioner acting as solicitor for one of the parties, see *In re Bagley* (1910), 80 L.J., K.B. 168.

Argument

Bodwell, in reply.

Cur. adv. vult.

26th February, 1915.

IRVING, J.A.: In *Carter Dewar Crowe Co.* v. *Columbia Bitulithic Co.* (1914), 20 B.C. 37, this Court held a guarantee given by the Columbia Bitulithic, Limited, for the convenience of the Scott Goldie Quarry, Limited, was *ultra vires.*

The defendants in this action, having recovered a judgment against the Scott Goldie Quarry, Limited, the grantors of a chattel mortgage dated the 16th of August, 1913, seized the goods and chattels mentioned in the mortgage. The plaintiffs thereupon claimed the goods as theirs under the said mortgage, and an issue, which came on to be heard by Mr. Justice MURPHY, was directed.

IRVING, J.A.

That learned judge, who felt that he was bound by our decision in the *Carter* case, *supra,* was of the opinion that the transaction of loan was *ultra vires* of the Company, and that, as it was a proceeding which neither the directors nor the Company

had authority to make, the issue must be decided in defendants' favour.

MURPHY, J.

1914

Sept. 24.

COURT OF APPEAL

1915

Feb. 26.

COLUMBIA BITULITHIC v. VANCOUVER LUMBER CO.

Mr. *Bodwell* draws a distinction between a lending on the security of a mortgage (that is this case) and the giving of a guarantee (as in the *Carter* case), and contends that what was done in this case was "incidental" to the powers of the Company: *Ashbury Railway, Carriage and Iron Co.* v. *Riche* (1875), L.R. 7 H.L. 653; 44 L.J., Ex. 185, construing incidental as "reasonably" incidental, in accordance with the opinion of Selwyn, L.C. in *Attorney-General* v. *Great Eastern Railway Co.* (1880), 5 App. Cas. 473. The word "incidental" was discussed in *Amalgamated Society of Railway Servants* v. *Osborne* (1910), A.C. 473; 79 L.J., Ch. 87, and means nothing more than " by fair implication."

In *Union Bank of Canada* v. *A. McKillop & Sons, Limited* (1913), 30 O.L.R. 87, a number of cases relating to guarantees by a trading company are collected. It is not necessary that further reference should be made to them.

In my opinion, the lending of money and undertaking to make future advances on mortgage is not incidental to any of the purposes mentioned in the plaintiff's memorandum. The power to lend is quite a common power to insert, and its omission from the memorandum is of the utmost significance in the case of a trading company.

IRVING, J.A.

There seems to be no golden rule by which you can determine all cases as to what is incidental except this: Is what has been done, and is now objected to, reasonably incidental to the business authorized by the memorandum? This rule—almost no rule, it is so simple—is perfectly plain; the difficulty lies in its application. We are warned not to give way to the argument that because what has been done assists or would be convenient to the Company: see *Attorney-General* v. *Mersey Railway* (1907), A.C. 415. I do not think anybody reading the memorandum would say that lending the money of the Company was incidental to any of the matters mentioned in the memorandum of the Company. Since that pungent judgment was delivered, the words "incidental powers," or whatever equivalent language is used, must be read strictly: see *Attorney-General* v.

MURPHY, J.

1914

Sept. 24.

COURT OF APPEAL

1915

Feb. 26.

COLUMBIA BITULITHIC v. VANCOUVER LUMBER CO.

West Gloucestershire Water Company (1909), 2 Ch. 338 at p. 343.

Mr. *Bodwell,* on the assumption that his first point is bad, then argued that the chattel mortgage given to secure the loan was not necessarily bad, and that it would support the plaintiff's claim against the seizure. His main authority was *In re Coltman, Coltman* v. *Coltman* (1881), 19 Ch. D. 64; 51 L.J., Ch. 3. That was a case on a promissory note given to the trustees of a friendly society to secure £300. The defendants' contention was that, as the trustees were not authorized to make a loan to anybody other than a member of the society, the loan was an illegal act and, therefore, the society could not recover.

The Court of Appeal, however, thought that although the trustees had no authority to make the loan, the majority of the members could have done so, and therefore the loan was not illegal, and the plaintiffs could recover. So far as I can find, that case has never been overruled. The right of the lender to recover, notwithstanding there has been a breach of trust on his part, seems well established: *cf.* the case of *Ernest* v. *Croysdill* (1860), 29 L.J., Ch. 580.

IRVING, J.A.

In the present case the plaintiff Company may have the right to recover their own money from the Scott Goldie Quarry, Limited, by a tracing order, or a decree for rescission, or both, but that is quite a different thing to being able to hold as their own property something which was mortgaged to them when they parted with their money. That something could only become theirs by virtue of a contract, and it is that particular contract that they were not authorized to enter into.

The consideration for it was wanting and, therefore, I reach the conclusion that the security is void.

I would dismiss the appeal.

MARTIN, J.A.: Apart from other questions, an objection is raised to the validity of the chattel mortgage on which the plaintiff relies, and it should, I think, be determined at the outset, because if the objection is sustained that is an end of the matter.

MARTIN, J.A.

Section 8 of the Bills of Sale Act provides that the bill of

sale "be registered by the filing of such bill of sale or copy thereof, as the case may be, together with such affidavits as are herein required, in the County Court registry of such county or place [as specified] . . . . in the office of the registrar of the County Court at Victoria," or as the case may be. And the following proviso is at the end of the section:

"Provided, however, that the Lieutenant-Governor in Council may from time to time subdivide or alter the said districts, and provide for the registration of bills of sale in the office of any Registrar of a County Court for a district or at a place different from those above mentioned."

Rule 309 of the County Court Rules, 1905, is as follows:

"An affidavit shall not be filed or used which has been sworn before any person who was at the time of the swearing of the same the solicitor acting for the party on whose behalf such affidavit is to be used, or the agent, partner or clerk of such solicitor, or who is the party himself."

Rule 536 (Order XXXVIII., r. 16) of the English Supreme Court Rules is the same as our Supreme Court rule 536, and is this:

"No affidavit shall be sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used, or before any agent or correspondent of such solicitor, or before the party himself."

Upon that rule, and the English Bills of Sale Act, 1878, it was decided by Wright, J. in *Baker* v. *Ambrose* (1896), 2 Q.B. 372 at p. 374, that "I must hold that the Rules of the Supreme Court generally apply to bills of sale," and therefore a bill of sale was void because the affidavit of due execution was sworn before the solicitor for the defendant in that action, who was the grantee under the bill of sale, as the plaintiff Company is in this action. That decision has been affirmed by the unanimous decision of the Court of Appeal in *In re Bagley* (1910), 80 L.J., K.B. 168, quite apart from the proviso in the English Commissioners for Oaths Act, 1889 (52 Vict., c. 10), Sec. 1 (which is not to be found in our Evidence Act, Cap. 78, wherein the powers of commissioners for taking affidavits are dealt with by section 61 *et seq.*), the Master of the Rolls saying, p. 171:

MARTIN, J.A.

". . . . I feel no doubt that under rule 16 of Order XXXVIII. the same objection applies as under the general language of the Act to this so-called affidavit, that it was sworn before a person who had no authority —that in fact it was a proceeding *coram non judice*."

The prohibition in our County Court rule is stronger than in the English rule, as it says that the affidavit shall not even "be

MURPHY, J.

1914

Sept. 24.

COURT OF APPEAL

1915

Feb. 26.

COLUMBIA BITULITHIC v. VANCOUVER LUMBER CO.

MARTIN, J.A.

filed" if sworn contrary to it, so, to escape from these decisions, it was argued that the affidavit was not filed or used in the Court at all in the true sense, and a distinction in principle is sought to be drawn between the masters of the Supreme Court of Judicature, who, under section 13 of the English Act, are the appointed officers with whom bills of sale are to be filed, and the registrars of the various County Courts, who are the appointed officers for that purpose under section 8 of our Act. The affidavit in England may be sworn before a master or commissioner only (section 17); here, before a registrar, or commissioner, and several other persons—section 24. After a careful perusal of both Acts, and the cases decided thereon, I am unable to perceive any such distinction, and it is clear to me that the governing factor in the decisions is that once the document is filed in a Court then the rules of that Court apply to it, and nothing turns on the particular officer who is required to perform the duties in connection with the registration. In each case there is a registrar, who is required to keep a principal book, called a register (and an index book), giving the information of a similar character as set out in section 13 and Schedule B in the English Act, and sections 21 and 25 and Schedule C in our Act, the only difference being that our register gives further information in two respects. Power is given to a judge of the Supreme Court in each case to rectify the register (*cf.* English section 14 and our section 21), but our section also provides that in addition to the rectification of the register itself, an office copy of the order "shall be annexed to the bill of sale or any copy thereof, as the case may be, and registered therewith." Furthermore, by section 12 of our Act, either a judge of the Supreme or County Court may make an order permitting the filing of the bill of sale in the case of the attesting witness dying or leaving the Province, etc., and a copy of this order must also be annexed and filed. There is no section in the English Act which corresponds to this one giving the judges of both Supreme and County Courts jurisdiction; section 21 gives jurisdiction to the former judges only. So here we have proceedings authorized by this Act to be taken in both Courts, and, therefore, it might be plausibly contended that the rules of both

should apply, according to the decisions, and this case may not depend upon the rules of the County Court alone, as was assumed at the argument. But it is sufficient in this case to hold that the rules of the Court which is the depository of the instrument should at least apply.

Then a further distinction was suggested—that in England the judges have power to make rules of Court, whereas in this Province they are made by the Lieutenant-Governor in council, both in the Supreme and County Courts, and under this Bills of Sale Act, Sec. 25, and it was suggested that this shewed an intention to regard the English Bills of Sale proceedings as being more under the control of the Court than ours. But that suggestion is not sound, because the English Act, Sec. 21, provides that rules for the purposes of that Act "may be made and altered by the like persons and in the like manner in which rules and regulations may be made under and for the purposes of the Supreme Court of Judicature Acts 1873 and 1875." Now, in both those Acts power was given to Her Majesty to make rules by order-in-council during the times and for the purposes therein specified: *cf.* sections 68-9 of 1873 and section 17 of 1875. But more than that, the Rules of Court under the latter Act were made by Parliament itself by section 16, and set out in the First Schedule thereto and declared to "come into operation at the commencement of this Act." So there is no magic in the fact that the judges had authority given them to "alter and annul" those rules which were enacted and promulgated by Parliament and order-in-council, which were to, and did, remain in force till altered by the judges: *cf.* sections 16 and 17 of 1875 and Wilson's Judicature Acts, 7th Ed., pp. 75, 128, 795. Therefore, the analogy between the two enactments is complete in all respects, and I can discover no real ground for distinguishing the authorities.

MARTIN, J.A.

Some importance was sought to be attached to the fact that it appears to be the practice in England to head the affidavit: "In the King's Bench Division," which was said in *Bagley's* case, *supra,* 171, to be "proper" to do, because the office of registrar is performed "by the Master attached to the King's Bench Division," and I have no doubt that it would also be "proper"

MURPHY, J.

1914

Sept. 24.

COURT OF APPEAL

1915

Feb. 26.

COLUMBIA BITULITHIC v. VANCOUVER LUMBER CO.

to follow that practice here, as the registrar is "attached to the" County Court, though it has not been done so far and is not necessary. But no doubt proceedings under sections 12 and 21 would properly, and should be, headed in the name of the Court, Supreme or County, which is resorted to for an order, as the case may be.

It only remains to notice the contention of the appellant that, as the solicitor here acted for both grantor and grantee, the rule does not apply, as both interests are safeguarded. I note that the converse of that was argued for the appellant in *Baker* v. *Ambrose, supra* (where *Vernon* v. *Cooke* (1880), 49 L.J., Q.B. 767, now relied upon, was distinguished), and I think rightly so, because, if the affidavit were taken by a person who was prohibited from taking it because he was acting for one party, he cannot avoid that prohibition by acting for that party plus another. The prohibition in the rule is absolute and expresses this policy unmistakeably—such an "affidavit shall not be filed or used . . . ."

MARTIN, J.A.

It follows that the appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: I agree with the reasons for judgment of my brother IRVING.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This is an appeal from the decision of MURPHY, J. upon the trial of an interpleader issue, in which it was held by the learned judge that the goods seized by the sheriff were not the property of the plaintiff as against the defendants, the execution creditors.

The learned trial judge was of the opinion that the decision of this Court in *Carter Dewar Crowe Co.* v. *Columbia Bitulithic Co.* (1914), 20 B.C. 37, was a controlling decision, and that the chattel mortgage upon which the plaintiff relied could not be held to be a legal or subsisting security, the whole transaction being *ultra vires*—that is, the loan made to the Scott Goldie Quarry, Limited, the execution debtors, of $50,000, and the security taken therefor upon the goods and chattels and other assets of the Scott Goldie Quarry, Limited, by the plaintiff.

With all respect to the learned trial judge, in my opinion the

present case is not to be determined by the decision in *Carter Dewar Crowe Co.* v. *Columbia Bitulithic Co., supra.* In that case there was admittedly no power to guarantee the obligations of others, and further, the promissory note and renewal thereof were without consideration. In the present case, in my opinion, upon the facts, there was authority in the plaintiff to make the loan and take security by way of chattel mortgage, and further, were it illegal to lend the money, the defendants (the execution creditors) are not in any better position than the mortgagors (the execution debtors): see *Gray* v. *Stone and Funnell* (1893), 69 L.T.N.S. 282. The chattel mortgage being duly filed, the goods and chattels and other assets mortgaged are entitled to be held by the plaintiff as security for the loan, the mortgagors could not set up the illegality of the transaction and thereby successfully resist payment of the loan. That there was authority in the plaintiff to make the loan is clear to me when the general nature of the business of the plaintiff is looked at, and as set forth in the memorandum of association and articles of association, and particular reference may be made to the latter words in clause 3 of the memorandum of association and clause 28 of the articles of association, reading as follows:

"3. . . . . and generally to do all acts and things necessary or convenient to carry out and perform all the acts above enumerated and all acts incidental thereto."

MCPHILLIPS, J.A.

"28. No officer or agent of the Company shall borrow money or make loans without authority from the Board of Directors but the Board may authorize in general terms the total sum of money which may be borrowed by any specified officer or officers of the Company. No loan of money shall ever be made to any shareholder."

It cannot be said that it was not in contemplation that loans might be made, and this loan, it is evident, if not necessary, was at least convenient in the carrying on of the business of the Company, and may also be said to have been an act reasonably incident to the carrying on of the business of the plaintiff. The principle, as defined in *Ashbury Railway, Carriage and Iron Co.* v. *Riche* (1875), L.R. 7 H.L. 653, must not be driven too far. In *Attorney-General* v. *Great Eastern Railway Co.* (1880), 49 L.J., Ch. 545, the Lord Chancellor (Lord Selborne) at p. 547 said:

"I assume that your Lordships will not now recede from anything that

MURPHY, J.

1914

Sept. 24.

COURT OF APPEAL

1915

Feb. 26.

COLUMBIA BITULITHIC v. VANCOUVER LUMBER CO.

MCPHILLIPS, J.A.

was determined in *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875), 44 L.J., Ex. 185, and it appears to me to be important that the doctrine of *ultra vires*, as it was explained in that case, should be maintained. But I agree with Lord Justice James that this doctrine ought to be reasonably and not unreasonably understood and applied; and that whatever may fairly and reasonably 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*."

Then we have the case of *Lock* v. *Queensland Investment and Land Mortgage Co.* (1896), 65 L.J., Ch. 798. That was a case in which it was held that—

"A company limited by shares may, if so authorized by its articles of association, pay interest out of capital to shareholders who have paid up their shares in advance of calls."

The Lord Chancellor (Lord Halsbury) at p. 799 said:

"Then it remains that this is an arrangement which the Legislature has sanctioned in the case of Table A, and the statute expressly gives that as an example of what may be done unless the company think proper to adopt articles of their own. In this case they have adopted articles of their own which have precisely the same effect. Under these circumstances it appears to me that it is an undue compliment to the doubts which have been suggested to do more than say that I entirely concur in every word of the judgment of Lord Justice FitzGibbon in *Dale* v. *Martin* (1882), 9 L.R. Ir. 498, and in every word of the judgment of Lord Justice Lindley in this case. The only commentary I am disposed to make is that Lord Justice Lindley does seem to suggest that the words are not absolutely apt for the purpose. With the greatest deference to his Lordship, I do not concur in that opinion. It seems to me that the words are very plain and apt for the purpose for which they are designed by the Legislature; and it would be, to my mind, a most perverse proceeding to construe these words in any different sense, because by some improper use of the power thus given it might be made mischievous in its operation. If it were mischievous in its operation, and necessarily mischievous in its operation it would, to my mind, be no argument if the statute has expressly authorized the thing to be done. But, as a matter of fact, what has been done in this particular case is admitted to have been done perfectly *bona fide*, and with no such abuse as it has been pointed out might result."

In the present case there is no suggestion that the loan was not perfectly *bona fide*, as, when the powers of the plaintiff are considered, as set forth in the memorandum and articles of association, it cannot, in my opinion, be said effectively that there was not the power to make the loan, and it follows that if the loan was a proper exercise of powers committed to the directors, the taking of the chattel mortgage was proper and an *intra vires*, not an *ultra vires*, transaction.

In *Rainford* v. *James Keith & Blackman Co., Lim.* (1905), 74 L.J., Ch. 531, "the articles of the company empowered the directors to lend money and generally undertake such other financial operations as might in their opinion be incidental or useful to the general business of the company," and it was held "that this authorized the making of a loan to a servant trusted by the company. Stirling, J. at p. 539 said:

"It seems to me that in these circumstances the plaintiff makes out a *prima facie* case entitling him to recover from the defendant company the proceeds of a sale carried into effect in disregard of the rights of the plaintiff, of which the defendant company had notice. Now, how is this case met? It is said, in the first place, that the transaction was *ultra vires* of the company. It was pointed out that the memorandum of association of the company does not expressly authorize the lending of money, and this is quite true. But the memorandum does, however, among the objects of the company, include the doing of all such things as are incidental or conducive to the attainment of the other objects. And by the contemporaneous articles of association the directors are empowered, amongst other things—article 116 (*e*) on behalf of the company to lend money and generally undertake such other financial operations as might in their opinion be incidental or useful to the general business of the company. Regard being had to the decisions in *Harrison* v. *Mexican Railway* (1875), 44 L.J., Ch. 403; and *South Durham Brewery Co., In re* (1885), 55 L.J., Ch. 179, I think that the lending of 180*l.* to a faithful and confidential servant of the company cannot be held to be beyond the powers of the company."

MCPHILLIPS, J.A.

It will be seen now that the articles of association may be turned to upon the question of the authorized powers, and in the present case can it be at all successfully contended—in my opinion, it cannot—that a loan made is without authority when clause 28 of the contemporaneous articles of association is scanned and considered in conjunction with clause 3 of the memorandum of association? Even were the present case to be looked at from the point of view that something was done which was not authorized—that is in the making of the loan—there is no evidence that the money was borrowed for an illegal purpose and the contract cannot be said to be illegal, and, as I have previously stated, it would not be competent for the mortgagors to set up that the mortgagee—the plaintiff—had no authority to lend the Company, and that equally it is incompetent in the defendants, the execution creditors, to so contend. In *In re Coltman, Coltman* v. *Coltman* (1881), 19 Ch. D. 64—a

MURPHY, J.

1914

Sept. 24.

COURT OF APPEAL

1915

Feb. 26.

COLUMBIA BITULITHIC v. VANCOUVER LUMBER CO.

case where a loan was made on a promissory note to one other than a member of a friendly society, which was forbidden by the Friendly Societies Act—it was urged that the transaction was illegal. It was, however, held on appeal, that as it was not alleged that the money was borrowed for an illegal purpose, the contract was not illegal, but merely unauthorized; that it was not competent to the makers of the note to allege by way of defence that the payees had no authority to lend the money, and that the proof, therefore, must be admitted. And see the judgment of Brett, L.J. at pp. 70-71.

It was held in *Great Eastern Railway Co.* v. *Turner* (1872), 42 L.J., Ch. 83, by the Lord Chancellor (Lord Selborne), that certain shares did not pass, owing to bankruptcy, to the assignee, in that the bankrupt held the same as trustee for the railway company, although the railway company was not authorized by its statutes to invest in stock or shares of other companies, the stock being transferred to a trustee for them, the trustee being registered as the owner of the stock and notice of the trust being given to the company. The Lord Chancellor at p. 85 said:

"In this case without legal authority, and therefore without the consent of the corporation, whose trustees and agents they were, the directors took 700*l.* of the company's money, and therewith purchased a property which this contest proves to be of some value—shares in the Lynn and Hunstanton Railway Company. Those shares so bought, not a farthing of any other person's money being contributed to the purchase, were placed in the names of three successive chairmen of the company and uniformly dealt with as that which they were, the property of the company. True it is that the investment was an unauthorized investment, but I entirely assent to what was said by Sir Richard Baggallay, that there is no difference whatever between an unauthorized investment of the moneys of a public company by its trustee, and an unauthorized investment of the moneys belonging to any other trust by the trustees of that trust. It would be monstrous, it would be extravagant to the very last degree to say that because the money of *cestui que trusts* has been laid out in a way unauthorized, therefore they are not to have the benefit of whatever value there is in the property bought with their money. It is clear that the chairman, although this was an unauthorized investment, was a trustee of the shares bought with the money of the company. If they had become burdensome the burden could not have been thrown upon the company, but that is a proposition quite consistent with the other . . . . The case, therefore, seems to me to resolve itself into the ordinary one of trust money in the hands of trustees which the Court follows and traces into every investment which they have made, and which in the case of a trustee

MCPHILLIPS, J.A.

becoming bankrupt will not pass to the assignee. So that, whatever be the nature of the investment into which you trace the trust money invested by the act of the trustee not so as to affect the *cestui que trusts* with the consent which the statute contemplates and the creation of reputed ownership, I apprehend it to be clear law that the property does not pass on that bankruptcy to the assignees, but remains with the person to whom it originally belonged."

MURPHY, J.

1914

Sept. 24.

COURT OF APPEAL

1915

Feb. 26.

COLUMBIA BITULITHIC v. VANCOUVER LUMBER CO.

The present case is not one in which the directors have made a contract on the part of the Company which neither the directors nor the Company had authority to make, and there is question as to its enforcement against the Company. It is the insistence upon the right to have preserved to the Company certain property, upon the security of which moneys of the Company have been loaned. Therefore, in my opinion, *In re Birkbeck Permanent Benefit Building Society* (1912), 81 L.J., Ch. 769; and *Sinclair* v. *Brougham* (1914), A.C. 398, have no application.

It now becomes necessary to consider the question as to whether the affidavits called for by statute under the Bills of Sale Act (R.S.B.C. 1911, Cap. 20) are good and sufficient although sworn before a commissioner who evidently was the solicitor for both the mortgagors and mortgagee. Section 24 of the Act defines before whom the affidavits are to be made, *i.e.*, commissioner empowered to take affidavits. Section 54 of the Evidence Act (R.S.B.C. 1911, Cap. 78), sets forth the method of appointment of commissioners to take affidavits in the Courts, and section 61 provides for all commissioners previously or thereafter being enabled to take affidavits in the Courts and matters before a judge not being or pending in any Court, and it is further provided at the end of the section as follows: "and may also take any affidavit, affirmation, declaration, or acknowledgment authorized to be sworn, affirmed, or made by any statute."

MCPHILLIPS, J.A.

Now, the Bills of Sale Act requires certain affidavits to be made and sworn before a commissioner empowered to take affidavits, and they appear to be so sworn upon examination of the chattel mortgage called in question in the present case, and the affidavits have been well and sufficiently sworn unless it be that the solicitor before whom the same were sworn was disentitled

MURPHY, J.

1914

Sept. 24.

COURT OF APPEAL

1915

Feb. 26.

COLUMBIA BITULITHIC v. VANCOUVER LUMBER CO.

to act as commissioner. In my opinion, he was not. The statutory authority is clear, and the rules of the Supreme and County Courts have no application. As a matter of fact, section 25 of the Bills of Sale Act sets forth certain rules as it is, and these may be repealed, altered and varied, and no rules exist in the way of prohibition of the solicitor for the mortgagor or mortgagee, or the solicitor for both parties, acting as the commissioner. In the taking of the affidavits called for under the Act it could not be intended that there should be more than one set of rules.

The rules relied upon are Supreme Court rule, marginal No. 536; County Court rule, Order XV., r. 16, and the cases cited are *Baker* v. *Ambrose* (1896), 2 Q.B. 372; 65 L.J., Q.B. 589; and *In re Bagley* (1910), 80 L.J., K.B. 168.

It will be observed, however, that the Bills of Sale Act, 1878 (41 & 42 Vict., c. 31), section 17 (Imperial), provides expressly that the affidavits are to be sworn "before any commissioner empowered to take affidavits in the Supreme Court of Judicature," whilst our Bills of Sale Act, section 24, reads: "commissioner empowered to take affidavits."

MCPHILLIPS, J.A.

In my opinion, the cases cited, *viz.*: *Baker* v. *Ambrose, supra,* and *In re Bagley, supra,* have no application to the statute law as we have it, and therefore, in my opinion, the affidavits were properly sworn by a commissioner who was qualified to take the affidavits, and the chattel mortgage was duly registered.

Upon the whole, therefore, in my opinion, the chattel mortgage was duly registered, and is a good, subsisting, and enforceable security to which the plaintiff is entitled, and the appeal should be allowed.

Appeal dismissed, McPhillips, J.A. dissenting.

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

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

SLEUTER v. SCOTT *ET AL.*

MURPHY, J.

1914

March 23.

COURT OF APPEAL

1915

April 6.

SLEUTER v. SCOTT

Trade union—Combination—Depriving member of employment—Inducement not to employ—Just cause—Damages.

A combination of two or more, without justification or excuse, for the purpose of injuring a workman by inducing employers not to employ him, is, if it results in damage to him, actionable. Wrongful interference may, however, be negatived by shewing that the exercise of the defendants' own rights involved the interference complained of.

Quinn v. *Leathem* (1901), A.C. 495, followed.

If the officials of a trade union seek to enforce the payment of a fine on a fellow workman by issuing an order that the workman fined shall cease work under his employment for a period of six months, the result of which is that his fellow workmen, through fear of fines, refuse to work with him, their action resulting in his dismissal, a defence of "just cause" for the interference cannot be entertained.

APPEAL by defendants from a decision of MURPHY, J. in an action tried by him at Vancouver on the 4th and 5th of March, 1914, for damages for conspiracy to prevent the plaintiff from continuing work under his employer, thus preventing him from earning wages. The plaintiff was a member of the Vancouver Association of Operative Plasterers, and the defendants were the executive committee and trustees of the association. While working on a job for his employer (one Hazel), the plaintiff was fined by the association for alleged inferior work. Then, because of an altercation between himself and a walking delegate of the union, a resolution was passed whereby he was forbidden to work in Hazel's shop for six months. The decision was enforced by the union men in Hazel's employ refusing to continue at work if the plaintiff was not discharged. His employer then, fearing that his work would be tied up, dismissed him.

Statement

Alfred Bull, for plaintiff.

W. B. Farris, for defendants.

23rd March, 1914.

MURPHY, J.: The law is clear that a violation of legal right committed knowingly is a cause of action: *Quinn* v. *Leathem*

MURPHY, J.

MURPHY, J.

1914

March 23.

COURT OF APPEAL

1915

April 6.

SLEUTER v. SCOTT

(1901), A.C. 495 at p. 510. And also that " 'Every person has a right under the law as between himself and his fellow subjects to full freedom in disposing of his own labour or his own capital according to his will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others' ": *Quinn* v. *Leathem, supra,* at p. 525. Therefore, a combination of two or more persons, without justification, to injure any workman by inducing employers not to employ him is, if it results in damage to him, actionable: *idem.*

This *prima-facie* wrongful interference may be negatived by shewing that the exercise of the defendants' own rights involved the interference complained of, which interference is merely the exercise of the right of a man to interfere in a matter in which he is jointly interested with others, and such interference gives no cause of action. In such a case there will be intentional procurement of a violation of individual rights, contractual or other, but just cause for it, as being done for the maintenance of the equal civil rights of the defendants: *Glamorgan Coal Company* v. *South Wales Miners' Federation* (1903), 2 K.B. 545 at p. 571.

MURPHY, J.

What is "just cause" or "sufficient justification" that will negative the *prima-facie* right of action in such cases as this is a difficult question to determine, as to which no general rule can be laid down. "The good sense of the tribunal which had to decide would have to analyze the circumstances and to discover on which side of the line each case fell": *Glamorgan Coal Company* v. *South Wales Miners' Federation, supra,* at p. 574; *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland* (1903), 2 K.B. 600 at p. 618.

In this case I find that the minute book contains a true account of what was done at the Union meeting. I find that the plaintiff was forbidden to work in Hazel's shop for a period of six months because of the altercation between him and the walking delegate of the Union. I find that such decision was enforced by the Union men in Hazel's shop refusing to continue

at work if plaintiff was not discharged, and that such refusal occurred at least twice and probably thrice. I find that in consequence plaintiff actually suffered injury, as his employer was forced to dismiss him under penalty of having his work tied up. I find that plaintiff's fellow employees so refused, not because they objected to working with plaintiff, but because they feared fines would be levied on them by the Union if they continued to work with plaintiff in this particular shop. I find that the object of defendants was not primarily to injure plaintiff, but to enforce the decision of the Union.

Now, *prima facie,* a combination to interfere with the civil rights of another, whether it be a right to full freedom in disposal of his own labour or his own capital, or any other right of citizenship, is an unlawful combination, because such interference, if carried into effect, is an actionable wrong, and it is this fact, and not any mere malicious motive, which constitutes the combination a conspiracy: *Glamorgan Coal Company* v. *South Wales Miners' Federation, supra,* at p. 570.

Do the facts as found furnish a just cause for what was done? A body of men may refuse to work with another if it is not shewn that their purpose was to molest him in pursuing his calling and prevent him, except on conditions of their own making, from earning his living thereby: *Graham* v. *Knott* (1908), 14 B.C. 97. But defendants here not only exercised their undoubted right to work or refuse to work; they successfully and intentionally endeavoured to dictate conditions on which plaintiff should work. The law, as above cited, shews they can only escape liability if they had "just cause." The direction given to the jury by FitzGibbon, L.J. in *Quinn* v. *Leathem, supra,* approved in the *Giblan* case, *supra,* at p. 619, and in *Quinn* v. *Leathem, supra,* at p. 508, is that the jury were to consider whether the intent and actions of the defendants went beyond the limits which would not be actionable, namely, securing or advancing their own interests, or those of their trade, by reasonable means, including lawful combination, or whether their acts, as proved, were intended and calculated to injure the plaintiff in his trade, through a combination and with a common purpose to prevent the free action of his customers and

MURPHY, J.

1914

March 23.

COURT OF APPEAL

1915

April 6.

SLEUTER v. SCOTT

servants (in that case; in this, of his employers), and with the effect of actually injuring him, as distinguished from acts legitimately done to secure or advance their own interests. Applying this principle, I hold the facts found do not furnish "just cause" so as to deprive the plaintiff of his right of action. In the *Giblan* case, *supra,* it was held that the right of action was not defeated when the object was to compel payment of a debt to the Union. In *Conway* v. *Wade* (1909), A.C. 506 at p. 515, the right was not defeated even as against a single individual, and *a fortiori,* not against a combination of individuals when the object was to compel payment of a fine imposed by the Union. The defendants themselves, I think, admit that in their view the altercation could not be a "just cause" for their action, because at the trial they endeavoured to make out—wrongfully, as I find—that they acted as they did because plaintiff had, as foreman, connived at or compelled improper work. Their rules in no way authorized them to take the course adopted. The altercation itself was not of a serious character. If ventilated in the police court, if the plaintiff would have been found guilty of an assault at all, which I think would be doubtful in all the circumstances, a small fine would, in my opinion, be the only consequence.

MURPHY, J.

I give judgment for plaintiff for the amount he would have earned in wages up to the time when active steps against him ceased, as shewn by the evidence of Hazel. I think this date is the 20th of November, 1913, but if there is any dispute as to this or as to the quantum, counsel may speak to the matter again.

The appeal was argued at Vancouver on the 26th of November, 1914, before MACDONALD, C.J.A., IRVING and MCPHILLIPS, JJ.A.

J. W. de B. Farris, for appellants: If several union men were together and agreed to a certain course in discipline (as in the case of a union) and restricted one another's liberties in certain ways, they cannot then complain when disciplined; they must adhere to the rules to which they have agreed. There was a conspiracy here, but it must be shewn to have been malicious. The action was for conspiracy for attempting to

Argument

deprive the plaintiff of a means of livelihood. The trial judge found an unlawful conspiracy, following *Quinn* v. *Leathem* (1901), A.C. 495; 70 L.J., P.C. 76. What the men did was the contemplated result of the Union's resolution, and is not actionable: see *Perrault* v. *Gauthier* (1898), 28 S.C.R. 241; *Allen* v. *Flood* (1897), 67 L.J., Q.B. 119 at p. 188. If the plaintiff had a contract and defendants arranged between themselves to procure a breach, that would be unlawful conspiracy; see *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland* (1903), 2 K.B. 600; 72 L.J., K.B. 907. Malice must be an element in the conspiracy, and there is no malice here: see *Graham* v. *Knott* (1908), 14 B.C. 97. Calling out a strike is not, *per se,* an illegal act: see *Mogul Steamship Company* v. *McGregor, Gow & Co.* (1892), A.C. 25. There is a difference between conspiracy the result of which is injury and conspiracy with intent to injury. Sleuter has not the same rights as a stranger, as he has submitted himself to the laws of the Union.

Argument

Alfred Bull, for respondent: The resolution of the defendants of itself gives us a right of action. In *Graham* v. *Knott* (1908), 14 B.C. 97, the underlying principle was that they had proved justification; the distinction is seen in *Jose* v. *Metallic Roofing Company of Canada* (1908), 24 T.L.R. 878; *Conway* v. *Wade* (1909), A.C. 506. They knew they were doing something unlawful when they passed the resolution, from which malice must be inferred: see *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland* (1903), 2 K.B. 600.

Farris, in reply: *Conway* v. *Wade* (1909), A.C. 506, can be distinguished, as in that case malice and spite are clearly shewn.

Cur. adv. vult.

6th April, 1915.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appeal should be dismissed. There was only one point pressed upon us by appellants' counsel, namely, that the penalty imposed by the defendants upon the plaintiff was not for an assault upon their business agent, Hampton, which penalty would be unauthorized by defendant Asso-

MURPHY, J.

1914

March 23.

COURT OF APPEAL

1915

April 6.

SLEUTER v. SCOTT

ciation's constitution and rules, but as a punishment for breach of a rule of defendant Association in connection with his work as a foreman plasterer.

The minutes of the defendant Association are against this contention, the finding of the learned trial judge is against it, and with that finding I agree.

The facts being thus decided against the appellants, there is no difficulty in applying the law, and in my opinion the learned judge has applied it correctly.

IRVING, J.A.: I would dismiss the appeal. The punishment inflicted was for an assault. This is absolutely plain from the minute book.

The plaintiff had a cause of action in that there was an intentional violation of a legal right by an interference with his contractual relations without sufficient justification.

In *Quinn* v. *Leathem* (1901), A.C. 495; 70 L.J., P.C. 76, the cause of action was that the defendants did attempt to ruin the plaintiff's business by coercing his customers. The cause of action was complete without the conspiracy—what was done there was done in spite.

IRVING, J.A.

In *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland* (1903), 2 K.B. 600; 72 L.J., K.B. 907, the cause of action was that the defendants, in order to compel plaintiff to pay his dues, induced other people to break their contracts with him.

In *Perrault* v. *Gauthier* (1898), 28 S.C.R. 241, the man left voluntarily, or rather, in a spirit of loyalty to his employer.

Graham v. *Knott* (1908), 14 B.C. 97, may be right according to the facts of that case, but on the authority of the two first cases already cited, I would support the judgment.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my judgment, the decision of MURPHY, J. was right, and ought to be affirmed.

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

Appeal dismissed.

Solicitors for appellants: *Farris & Emerson.*

Solicitors for respondent: *Buchanan & Bull.*

MARRIOTT v. MARTIN.

MACDONALD, J.

1915

Feb. 15.

MARRIOTT v. MARTIN

Solicitor—Liability to client—Neglect of duty.

In an action by a client against his solicitor for neglect of duty, the burden of proving negligence is primarily on the plaintiff, but when once established the burden then falls on the solicitor to shew that the client was not injured thereby.

ACTION by plaintiff against his solicitor to recover damages for loss occasioned by the alleged professional negligence of the said solicitor, tried by MACDONALD, J., at Vancouver on the 27th of January, 1915. The facts appear in the reasons for judgment. Statement

Dorrell, for plaintiff.
Maclean, K.C., for defendant.

15th February, 1915.

MACDONALD, J.: Plaintiff seeks to recover damages from the defendant on the ground that the defendant, while acting as his solicitor, was negligent and that loss resulted to the plaintiff therefrom. Plaintiff agreed to buy an undivided one-third interest in 516 acres of land at Quatsino, B.C., from one George Shone, and by letter of the 6th of August, 1912, instructed the defendant to act for him in the matter. Plaintiff is a retired English solicitor, but not being familiar with the laws of this Province he thought it advisable to employ a local solicitor. Before the letter referred to had been acted upon, he met defendant in his office at Victoria and a discussion took place upon the question of the title that could be obtained to the land proposed to be purchased. The parties do not differ to any great extent as to what occurred, except that the plaintiff states that at this consultation the defendant informed him that there was no practical risk to run as to the title and that it was only a theoretical risk. Defendant denies this portion of the conversation; although plaintiff was firmly convinced as to his recollection in Judgment

MACDONALD, J.

1915

Feb. 15.

MARRIOTT v. MARTIN

this respect being correct, I am inclined to think he is honestly mistaken. I am led to this conclusion by the fact that plaintiff, when giving instructions as to a second purchase of land on the 18th of October, 1912, referred to the title to a further interest in the same property as follows:

"I presume there is no practical risk so far as title is concerned, is there?"

If he had already discussed the matter with his solicitor he would have put the query in a different manner and likely have referred to the previous conversation. However, I do not think this point material. There is no dispute between the parties as to the remainder of the conversation at the meeting in August. Plaintiff admits that defendant explained to him that he could not get title to the land he was purchasing until the Crown grant issued; that it was within the power of the Crown not to issue a grant, at its discretion; the Crown could so act with or without sufficient reason. Defendant informed the plaintiff that it was not unusual for people to deal with land in the way proposed and that he himself had made similar purchases. Discussion then took place as to the timber, and the defendant was fully aware that the plaintiff was laying stress upon the fact that the timber on the land was valuable, but the matter of rejection on the part of the Crown on account of excess of timber was not discussed. The necessary documents were prepared, and, after examination of the certificates of purchase and a correction in the powers of attorney, defendant saw no reason why the transaction should not be put through and the money paid over in the terms of the agreement. The survey had been made at the time. A cheque for $2,013.17 was issued by the plaintiff in favour of the defendant and this amount paid over to the vendor. On the 18th of October, 1912, plaintiff agreed to buy another one-third interest in the Quatsino land from one Knight, and instructed the defendant to put through the matter for him, adding in his letter the query as to title. Defendant acknowledged receipt of the letter of instructions on the 21st of October, 1912, and stated to the plaintiff that he would find out if the parties had completed their payments to

Judgment

the Government and whether the powers of attorney were then in good order, adding, there is no practical risk, in my opinion, and the way in which the transaction with Mr. Shone was carried through is the only possible way of buying land where the Crown grant has not yet issued. On the 6th of November, 1912, defendant wrote the plaintiff that the documents appeared to be all in order, so that Shone and Knight might now be paid the amounts due as arranged. The purchase from Knight was thus completed in a similar manner to the previous purchase from Shone, and on the 8th of November, 1912, plaintiff paid the agents for Knight and Shone, $3,321.17. The total payments made by the plaintiff in respect of these purchases were the said sum of $2,013.17 paid to the defendant, the sum of $2,667.17 paid to Knight, and the sum of $654 paid directly to Shone—in all amounting to $5,334.34. This amount plaintiff seeks to recover from the defendant, together with interest.

Plaintiff complains that the matter of timber on the land having been brought to the attention of the defendant, he should have warned him as to the danger of completing the purchase before it was determined that the land, sought to be purchased from the Crown, was not "timber lands" within the meaning of the Land Act, or, in the alternative, that the defendant was neglectful of his duty in not pointing out the fact that "timber lands" could not be sold. It is presumed that the defendant had full knowledge of the statutes dealing with the sale of Crown lands, and the question is whether he was negligent in completing the purchases.

Judgment

It is contended that defendant is only liable for gross negligence. In *Schoen* v. *Macdonell* (1911), 18 W.L.R. 329, the defendants were held liable and GALLIHER, J.A. in his judgment, refers to the neglect of the solicitors to procure certain timber licences resulting in loss to the plaintiffs as "a case of gross carelessness" on the part of Jones, one of the partners, and all the defendants were held liable. It is difficult to determine what is gross negligence on the part of a solicitor. Denman, J., in *Whiteman* v. *Hawkins* (1878), 4 C.P.D. 13 at p. 19, in referring to the judgment of the County Court judge, deciding that the defendant was not liable as a solicitor, states:

MACDONALD, J.

1915

Feb. 15.

MARRIOTT v. MARTIN

"If his judgment turned upon any supposed distinction between different degrees of negligence,—if he thought that, to render the defendant liable to substantial damages, it was necessary to establish gross negligence as contradistinguished from a want of due care and attention to his business as a solicitor,—I think he was wrong."

In *Nocton* v. *Ashburton* (*Lord*) (1914), A.C. 932 at p. 956, Lord Haldane does not refer to different degrees of negligence on the part of a solicitor acting for his client. "The solicitor contracts with his client to be skilful and careful." And at p. 958 reference is made to the solicitor being liable for a breach of the implied contract to exercise due care and skill. In *Faithfull* v. *Kesteven* (1910), 103 L.T.N.S. 56, an action was brought by a solicitor for costs, and the wife of the defendant counterclaimed to recover damages for alleged negligence on the part of the plaintiff in giving wrong advice and in omitting to give good advice to her. Degrees of negligence as applied to a solicitor seem to have been fully recognized, and Farwell, L.J., at p. 57, says:

"On the whole, I have come to the conclusion that there is not enough negligence to amount to that *crassa negligentia* necessary to support an action against a solicitor, and that this appeal fails."

In the same case reference is made to the judgment of Lord Denman, C.J. in *Hunter* v. *Caldwell* (1847), 10 Q.B. 69 at p. 82, as follows:

"It was the province of the judge to inform the jury for what species or degree of negligence an attorney was properly answerable, and what duty in the case before them was cast upon him either by the statute or the practice of the Court; but, having done this, it was right to leave them to say, considering all the circumstances, and the evidence of the practitioners, whether, in the first place, the attorney had performed his duty, and, in the second, in case of non-performance, whether the neglect was of that sort of degree which was venial or culpable in the sense of not sustaining or sustaining an action."

Judgment

The error of the plaintiff in advising the wife seems to have been treated as one of lack of judgment. Kennedy, L.J., says that something more than that is necessary in order to constitute actionable negligence, and the learned trial judge was not considered to have been wrong in holding that it was not proved to his satisfaction that there was such a want of the professional care and skill required "as to make good a charge of negligence against a solicitor." Lord Brougham in *Purves* v. *Landell*

(1845), 12 Cl. & F. 91 at p. 98, in referring to an action against a solicitor for negligence says:

"It is of the very essence of this action that there should be a negligence of a crass description, which we call *crassa negligentia*, that there should be gross ignorance, that the man who has undertaken to perform the duty of an attorney . . . . . had so negligently discharged [his duty] as to damnify his employer, or deprive him of the benefit which he had a right to expect from the services."

He refers to Lord Ellenborough's judgment in *Baikie* v. *Chandless* (1811), 3 Camp. 17, to the same effect, and then adds:

"Therefore the record must bring before the Court a case of that kind, either by stating such facts as no man who reads it will not at once perceive, although without its being alleged in terms, to be *crassa negligentia*,—something so clear that no man can doubt of it; or, if that should not be the case, then he must use the very averment that he was *crassa negligentia*."

Plaintiff's pleadings herein do not allege gross negligence, so the plaintiff is driven to contend that the pleadings and evidence shew such statement of facts as to constitute gross negligence, "so that he who runs may read." Plaintiff must, in order to come within the authorities, take the position that it was not merely an error of judgment on the part of his solicitor in failing to consider and advise him as to the danger of the purchase being refused on the ground of the quantity of timber on the land, but that such failure was want of professional care and skill to such an extent as to render the defendant liable for gross negligence. It must be borne in mind that the plaintiff was purchasing property to which he was well aware he could not then obtain title. Presumably, his submission is that, while he knew he could not obtain title and was willing to accept the risks attached to his purchase which had been pointed out to him by the defendant, still he would not have accepted the further risk which he alleges should have been disclosed and from which he suffered damage. This involves consideration of the position of the parties at the time and the extent to which a solicitor is required to search and advise, where it is thus common ground between the client and himself that the title is not being passed, and that the obtaining of a complete title eventually is uncertain. No criticism has been offered as to

Judgment

MACDONALD, J.

1915

Feb. 15.

MARRIOTT v. MARTIN

the form of the conveyancing approved of by the defendant. The documents contained covenants for title and other necessary safeguards. Did the defendant then in the circumstances give bad advice or fail to give good advice in connection with this purchase, and, if so, did such failure amount to actionable negligence? In the purchase of Crown lands it is provided that they are to be classified by the surveyor, who is to make full and accurate field notes of his survey, which are to be filed in the department of lands accompanied by a statutory declaration verifying such notes and shewing the area of timber lands and first-class or second-class lands which are embraced in such survey. The distinction between first and second-class lands is indicated, and then as to timber lands section 39 of the Land Act provides that:

"Timber lands (that is, lands which contain milling timber of the average extent of eight thousand feet to the acre west of the Cascades, and five thousand feet to the acre east of the Cascades, to each one hundred and sixty acres) shall not be open for sale."

Defendant admits that he did not search the field notes pertaining to the lands in question. He was not called as a witness on his own behalf at the trial, and, apparently, relied upon his examination for discovery (put in in its entirety by the plaintiff) together with the correspondence, including copies of the departmental files. He did not offer as an excuse for not examining these field notes that section 39 had no application. It was, however, argued on his behalf that the pieces of land of which he was purchasing undivided interests were not "timber lands" within the meaning of this section. Of the three pieces of land applied to be purchased from the Crown, lot 1012 contains 347 acres, lot 1013, 127 acres, and lot 1011, 44 acres. The submission that the definition given to timber lands in the section could not be applied, as the average extent of timber to the acre is based on "each 160 acres," has no weight when dealing with lot 1012, so that, if "due care and skill" means that the field notes should be searched, and, if not available, completion of the sale should be delayed until survey was made and the field notes filed with proper classification, then the defendant was negligent in the matter. I do not think,

Judgment

however, that the point as to the basis of determining "timber lands" is well taken as to any of the pieces. The department of lands would, at any rate, be justified under the Act in refusing an application to purchase, where the average extent of milling timber was 8,000 feet to the acre, notwithstanding that the piece of land sought to be purchased was less than 160 acres. Were the application of the section to be otherwise, it would mean that along the irregular shore line of the Province applicants might obtain by purchase at the Government price, land which was less than 160 acres in area, but had timber far in excess of 8,000 feet to the acre, contrary to the spirit and intention of the legislation. If this section might thus affect the lands in question, then to what extent should the defendant have advised and searched as to the likelihood of it being applied? As to the first purchase from Shone, the surveyor's notes were mailed to the department of lands on the 25th of July, 1912, and, presumably, were on file in that department until they were returned to the surveyor for correction on the 25th of August, 1912. They were amended and re-filed on the 26th of September, 1912, and, consequently, were on file at the time when the defendant wrote the plaintiff on the 20th of August, 1912, stating that he had examined the certificates of purchase and the powers of attorney, and that they were adequate and sufficient with the exception of a change being required in the description of the property giving the lot numbers "now that the survey has been made." He then added:

Judgment

> "I do not see any reason why the transaction should not be put through in the way here provided for and am giving this letter to Mr. Shone, who states he is going up to Duncans to see you."

Whether such notes were on file or not at this time, I think the solicitor should have examined all available documents that would assist in protecting his client, though the field notes, if examined, would not then have indicated any lands classified as "timber lands." It is true the plaintiff had spoken of the valuable timber on the property, but that of itself might not be sufficient to suggest to the defendant the advisability of investigating as to whether the lands were classified as timber lands or not. He might assume that the applicants for purchase

MACDONALD, J.
1915
Feb. 15.
MARRIOTT v. MARTIN

were not seeking to obtain land from the Crown which was not open for sale. If a search at that time would have disclosed the fact that a portion of the land was classified as "timber land" then it was his duty not to have sanctioned completion of the purchase until the question of whether the Crown was willing to sell had been determined. It might be contended that the defendant should have made inquiries as to the classification of the lands. It is a matter of opinion, but I do not think there was, in the circumstances, as to this piece, the want of care on the part of the defendant, requisite to create liability. As to the second purchase of a one-third interest in the same land from Knight, this took place at a time when the field notes had been altered and returned to the department of lands. If they had been searched, they would have shewn that the surveyor, acting for the applicants to purchase, had by declarations made on the 24th of September, 1912, stated in his classification of the lands that lot 1011, containing 44 acres, had 20 acres of timber lands and 24 acres of second-class lands, while lot 1012, containing 347 acres, had 200 acres of timber lands and 147 acres of second-class lands, and lot 1013, containing 127 acres, had 90 acres of timber lands and 37 acres of second-class lands. It was thus clearly stated that lands which the surveyor classified as "timber lands," were sought to be purchased from the Crown. This would be in the face of the provision of the statute that such lands were not open for sale. Defendant should, after searching and finding this condition of affairs, have either advised his client to abandon the purchase of a further interest or at any rate to hold the matter in abeyance until the danger of refusal had been removed. It was urged that in any event, aside from the question of negligence, it was not proved that the minister of lands had refused to complete the sale on the ground that they were timber lands. It is true that the letter, stating that this was the reason for refusal, is only signed by the deputy minister of lands, but I do not think such a defence is now open to the defendant. His actions subsequently to the refusal to purchase and the correspondence have estopped him from setting up such a contention.

Judgment

My opinion is that in the purchase of the one-third interest from Knight by agreement dated the 13th of October, 1912, the defendant did not exercise the due "care and skill" required of him as a solicitor.

Even if the defendant be held liable for negligence, it is contended that there is no evidence to shew that the plaintiff suffered damage on this account. Plaintiff says that money was paid on the strength of the advice or lack of advice given by the defendant. None of the moneys so paid have been recovered, nor has the plaintiff brought any action under the covenants contained in the agreement with Knight. It was argued on his behalf that even if an action had been brought, aside from the question of Knight being financially responsible, a question might arise as to whether a defence was not open, based upon the decisions in *Brownlee* v. *McIntosh* (1913), [48 S.C.R. 588]; 5 W.W.R. 1137; 26 W.L.R. 906; and *Clark* v. *Swan* (1914), [19 B.C. 532]; 6 W.W.R. 319; 27 W.L.R. 694. I do not consider it necessary to come to any conclusion on this point as, in my opinion, the onus of shewing that the moneys could be recovered under the agreement rests upon the defendant. There is no evidence to shew that he was prepared to indemnify or protect the plaintiff in any action that might be brought for such a purpose, and I do not think he can now successfully contend that the plaintiff should have pursued any remedy he may possess against Knight before being entitled to call upon the defendant for payment. Mayne on Damages, 8th Ed., 554, dealing with actions against attorneys, says:

Judgment

"The plaintiff is entitled to be placed in the same position as if the attorney had done his duty. But he is entitled to no more. Therefore, where no diligence could have been effectual, as where the client had no ground of action or defence, the attorney cannot be liable for negligence, unless it has caused loss independent of the necessary result of the suit, or other proceeding. It lies upon the defendant, however, to establish this defence affirmatively, and the fact that the plaintiff has suffered no actual injury is no bar to the action, if otherwise maintainable. He is still entitled to nominal damages."

In *Whiteman* v. *Hawkins, supra*, the County Court judge says the question of damages would raise a very serious difficulty, even if he held that the solicitor had not been guilty of gross negligence. It appeared that with respect to a piece of

MACDONALD, J.

1915

Feb. 15.

MARRIOTT v. MARTIN

property for which title was defective, the price obtained could not be segregated from the rest of the property disposed of. The extent of the loss that had arisen through the solicitor could not be specifically determined. On appeal, reversing the judgment of the County Court judge, the matter was dealt with by Denman, J., at p. 19, at follows:

"I think we have abundant materials before us to shew to what extent the plaintiff has been damnified by the admitted negligence of the defendant. The whole case was fully gone into, and the defendant offered no evidence to shew that the plaintiff had really sustained no damage. I apprehend it to be a sound principle of law, as against a wrongdoer, that, if negligence is proved, in the absence of evidence on the part of the defendant to reduce the damages, the plaintiff is entitled to recover the full amount of the pecuniary loss he has sustained."

Judgment

In *Gould* v. *Blanchard* (1897), 29 N.S. 361 at p. 364, Townshend, J., says:

"The burden of proving negligence is primarily on the plaintiff, but, when once established, it is for the solicitor to prove that the client was not injured by it."

There should be judgment for the plaintiff for the amount paid under the Knight agreement—$2,667.17. Plaintiff is entitled to his costs of action.

Judgment for plaintiff.

BOYDELL v. HAMES *ET AL.*

GREGORY, J.

1915

March 1.

BOYDELL v. HAMES

Sale of land—Agreement for—Action to recover instalment—Foreclosure and personal judgment—Want of title—Duty to furnish abstract—Rescission—Costs—Defendant added as precautionary measure.

A vendor under an agreement for sale is not entitled to a personal judgment and foreclosure.

Hargreaves v. *Security Investment Co.* (1914), 7 W.W.R. 1, followed.

A purchaser under an agreement for sale knowing the state of title must be taken to have waived all objections thereto when he goes into possession, subdivides the property, and enters into an agreement for sale of an interest therein.

Wallace v. *Hesslein* (1898), 29 S.C.R. 171, followed.

A purchaser is not entitled to rescission unless he is in a position to make restitution.

Parties added as defendants as a precautionary measure, who know that no personal judgment is claimed against them and put in no defence, are not entitled to costs for attendance of counsel.

ACTION tried by GREGORY, J. at Victoria on the 27th of October, 1914, for the recovery of an instalment due the plaintiff on an agreement for sale. The facts are set out fully in the judgment. Statement

Fell, K.C., for plaintiff.
Phelan, for defendant Hames.
F. C. Elliott, for defendant Middleton.
H. E. A. Courtney, for defendants Ryan & Lang.

1st March, 1915.

GREGORY, J.: This is an action by the plaintiff to recover an instalment due on an agreement for sale given by him to the defendant Hames. The defendant contends that the plaintiff is not entitled to judgment on the following grounds: (1) That the vendor never furnished an abstract of title and that the property duly registered in the name of the plaintiff is encumbered with two mortgages, the first of which for $8,000 matured before the instalment for which he is now sued became due; (2) that the plaintiff never gave the thirty days' notice required Judgment

GREGORY, J.

1915

March 1.

BOYDELL v. HAMES

by the agreement for sale; and (3) that the plaintiff is not entitled to a personal judgment and foreclosure with a reference to the registrar to ascertain the amount now due under the agreement.

As to the first objection, it appears to me to be fully met by the plaintiff. There is no doubt on the evidence that the defendant knew of the existence of these mortgages at the time he entered into his agreement to purchase, and that title to the property had been duly investigated by his agents. The plaintiff also testifies that he told the defendant Hames of the existence of the mortgages and said that he intended to pay them off out of the moneys to be received by him from the defendant. He gives no evidence as to what Hames said in reply to this, and I think it must be taken that he agreed to it for he afterwards went into possession, subdivided the property, and entered into an agreement for sale of an interest in it. This seems to me to bring this case within the decision of *Wallace* v. *Hesslein* (1898), 29 S.C.R. 171. He knew the state of the title and waived all objections (if any) to it.

The authorities quoted to shew that it is a vendor's duty to furnish an abstract of title are of course unquestionable, but it is not necessary for him to do this without a demand, and no demand was made in the present case until the 21st of October, and the trial took place on the 26th of the same month. It is quite clear that this demand was an afterthought. If further proof of this were required it is shewn by the fact that in a previous action for interest overdue, this defence was not raised.

Judgment

As to the second objection that the plaintiff has not given the thirty days' notice required by the agreement, it seems to me that that notice has no application to an action on a covenant for the payment of an instalment. An examination of the agreement shews that the object of the notice is to enable the vendor, without the aid of the Court to himself declare the agreement to be null and void and forfeit the moneys already paid after the expiration of the notice. The plaintiff has not attempted to do that here, but brings his action on defendant's covenant to pay on the date named.

As to the third objection, I think it is good: see *Hargreaves*

v. *Security Investment Co.* (1914), 7 W.W.R. 1, where the Supreme Court of Saskatchewan *en banc* dealt with this very question arising as in the present case out of an agreement for the purchase and sale of property.

The defendant counterclaims for rescission of the agreement and return of the cash payment made by him and a reference to the registrar, and in the alternative for an order directing the plaintiff to discharge the mortgages registered against the property.

It seems to me that he entirely fails. While it may be admitted that a purchaser is entitled to have an encumbrance of which he had no knowledge discharged before he makes any payment (other than the payment made when the contract was entered into) it is quite a different thing to say that he can insist upon having an encumbrance discharged of which he had full knowledge at the time he entered into his contract, and it seems to me that having had this knowledge, having entered into the agreement, taken possession and resold an interest, it must be taken that he agreed with the plaintiff that the plaintiff should be allowed as he states to pay the encumbrancers out of the moneys to be received from the defendant. It is also to be noted that while the defendant is seeking rescission and a return of his money, he makes no allegation nor does he attempt to prove that he was at all times ready and willing to perform his part of the contract, and it is quite clear to me that he was not ready, and that he is only seeking a way of escape from his obligation. In any case he cannot have rescission unless he is in a position to immediately make restitution, it is not enough for him to say he can get in the interest he has sold and then make restitution. It would, however, be unfair to require the defendant to make his payments without being properly secured, he is entitled to see that his money is applied on the mortgages.

The result is that the counterclaim will be dismissed and the plaintiff will be entitled not to a personal judgment but to an order for the payment by the defendant Hames of the amount sued for with interest and costs into Court on or before the 1st of May next, and in default of such payment, all his

GREGORY, J.

1915

March 1.

BOYDELL v. HAMES

right, title and interest and of anyone claiming through or under him, in and to the lands, be absolutely barred and foreclosed and the agreement sued on declared void and at an end.

The plaintiff will be entitled to both the costs of the action and of the counterclaim.

As between the plaintiff and the other defendants the plaintiff is entitled to no costs, as they were made party defendants by the plaintiff as a matter of precaution and for his own protection—they were not parties to the agreement and put in no defence. The presence of their counsel at the trial imposed no additional expense on the plaintiff; they, on the other hand, are not entitled to any costs for attendance of counsel, for they knew that no personal judgment was claimed against them, Mr. *Fell* having so stated at the beginning of the trial when their counsel said they were only present to prevent such personal judgment. The apparent claim against them in the statement of claim was clearly a typographical error, the letter "s" being added to the word defendant in two places, making it appear that they were parties to the agreement when they knew they were not.

Judgment

It is unnecessary to refer to the third mortgage for $1,000 for it was given after the agreement, registered after it, and was therefore subject to it and no encumbrance on the title.

As some complications may arise after the payment of the money into Court or otherwise, there will be general leave to apply.

Judgment accordingly.

LANGLEY v. HAMMOND.

CLEMENT, J.

1915

March 3.

LANGLEY v. HAMMOND

Damages—Sale of land—False representation—Burden of proof.

In an action for damages suffered through the complainant having purchased property relying on statements made by the vendor, the burden is on the complainant to convince the Court that the statements were made falsely, either with knowledge of their falsity, or with such recklessness as to amount to moral guilt, and that the statements were in regard to some material fact and an inducing cause leading him to enter into the contract.

ACTION tried by CLEMENT, J. at Kamloops on the 26th to the 29th of January, 1915, on a covenant contained in a mortgage made by the defendant in favour of the plaintiff. The mortgage was given to secure the purchase price of what is known as the Basque Ranch, situate on the Thompson River in the vicinity of Ashcroft, the plaintiff (mortgagee) being the vendor. At the trial it was admitted that there was no defence to the action, and judgment was given in favour of the plaintiff for the amount of the mortgage with interest and costs. The defendant counterclaimed for damages suffered by him through his having purchased the property relying on certain statements made by the vendor. The action proceeded on the counterclaim. The particulars are set out fully in the reasons for judgment.

Statement

Fulton, K.C., for plaintiff.
Davis, K.C., for defendant.

3rd March, 1915.

CLEMENT, J.: This is an action on a covenant contained in a mortgage made by the defendant in favour of the plaintiff. At the trial it was admitted that there is no defence to the action and judgment was accordingly given in the plaintiff's favour for the amount of the mortgage with interest and costs. The mortgage was given to secure the purchase price of what is known as the Basque Ranch, situate on the Thompson River not far from Ashcroft, the plaintiff mortgagee being the vendor.

Judgment

CLEMENT, J.

1915

March 3.

LANGLEY
v.
HAMMOND

Judgment

The defendant counterclaimed for rescission of the contract of sale, but at the trial he limited his claim to the alternative one for damages suffered, as he alleges, through his having purchased the property relying on certain statements made by the vendor. In such an action the burden is, of course, upon the party putting forward the claim. He must convince the Court that the fact was falsely stated, either with knowledge of its falsity or with such recklessness as to amount to moral guilt; that the statement was in regard to a material fact and was an inducing cause leading him to enter into the contract. The purchase was made at a time when there was much speculation in regard to what are called fruit lands. Now, when the action comes to be tried, there is practically no market whatever for such property; in other words, the "boom" has collapsed. Under such circumstances, I am free to confess that when I find in all the correspondence which has passed between the parties themselves, as well as between their solicitors during more than four years, that there is not one word of suggestion by the defendant or on his behalf that he had been induced to enter into the contract by reason of false representations as to existing conditions upon the ranch or any suggestions indeed that the alleged representations had been in fact made, my attitude is, properly, I think, one of considerable scepticism. In such a case it is manifestly the duty of the Court to scrutinize with great caution the evidence advanced.

I have no doubt that during the negotiations the plaintiff did state his opinion or belief that enough water could be obtained from Hat Creek and Oregon Jack Creek to irrigate 1,000 acres; but, while I think the estimate was, in the light of later investigation, a very extravagant one, I am unable to say that it was dishonestly made. Moreover, at the conclusion of the hearing I strongly inclined to the view that any such representations made by the plaintiff were not in fact relied upon by the defendant. At that time a project was on foot for the erection of a reservoir in which the waters of Hat Creek could be collected and stored for use as required. That project, for reasons which appear in the correspondence, has not, as yet, been carried through. The title to the water records held by the plaintiff were duly passed

by the solicitors then acting for the defendant. The railway belt of British Columbia, which includes the territory covered by the water records in question, is the property, so far as unalienated, of the Crown in right of the Dominion. For this and other reasons the matter has, as put in one of the letters, got into a tangle, and that tangle, apparently, has not yet been straightened out. This was the reason always put forward when an extension of time for payment either of principal or interest was asked. The letter of Mr. James Murphy, dated the 20th of July, 1914, written on the defendant's behalf about the time this action was commenced, is, to my mind, a very illuminating document, and I am quite convinced that the ground now taken by the defendant is an afterthought.

In his counterclaim there is scarcely one feature of the transaction in regard to which fraudulent misrepresentation is not alleged. At the trial these were all abandoned with the exception of the one charge—that the plaintiff had falsely represented that the waters of Hat Creek and Oregon Jack Creek would suffice, without storage, for the irrigation of 1,000 acres. As I have said, there is not a word about this in the correspondence, so that the matter rests now upon the oral testimony of the witnesses. Since the trial I have read carefully the extended notes of the evidence and I am confirmed in the view that any such statement made by the plaintiff did not, in fact, induce the defendant to purchase the property.

There were no doubt many discussions with regard to the difficulty that had arisen with regard to the title to the water records. These are well summarized in Mr. Murphy's letter above referred to, but I do not believe that at any time the charge was seriously made by the defendant to the plaintiff that he had misrepresented the actual position of affairs with regard to the water supply. Mr. Young was called as a witness to corroborate the defendant's statement that upon one occasion the plaintiff agreed not to press for payment until the defendant should be satisfied that enough water was available to irrigate 1,000 acres. Mr. Young entirely failed to corroborate this statement and, in fact, on cross-examination, the defendant stated that he was not sure that anything more had been said than that payment was

CLEMENT, J.

1915

March 3.

LANGLEY v. HAMMOND

not to be pressed for until the water trouble was straightened out.

It is only fair to the defendant to say that, if it were necessary to my judgment to make an affirmative finding upon the evidence of the plaintiff, I should have much hesitation in so doing. He certainly did not shew himself in the box to be a very reliable witness. At the same time, the account of the different interviews with the defendant, so far at all events as relates to the claim now put forward, is so entirely borne out by the documentary evidence that I accept it as substantially correct.

Judgment

The counterclaim, therefore, is dismissed with costs.

Counterclaim dismissed.

MORRISON, J.

1915

March 9.

B.C. EXPRESS CO. v. INLAND EXPRESS CO.

BRITISH COLUMBIA EXPRESS COMPANY, LIMITED v. INLAND EXPRESS COMPANY, LIMITED *ET AL.*

Contract—Interpretation of—Transportation—Carrying "mail and express" —Feed offered as "express" under contract—Custom—Knowledge of.

Two transportation companies entered into a contract whereby the one agreed to carry for the other "mail and express" upon certain terms. Feed (hay and oats) was offered for carriage under the contract "as express," but the carrier refused to accept delivery as "express," and carried it as "freight." It appeared from the evidence that both parties had been engaged in the transportation business within the area in question for some years and were familiar with the custom and usages established, and that it had always been the custom to carry feed as freight. In an action for freight charges for the feed carried by the plaintiff for the defendant:—

Held, that the parties knew that it was the custom to carry feed (hay and oats) as freight, and that it was in their minds when they entered into the contract.

Statement

ACTION by the plaintiff Company for freight charges for carrying the defendant Company's feed (hay and oats) by

steamer between Soda Creek and South Fort George on the Fraser River during the summer of 1914, tried by MORRISON, J. at Vancouver on the 19th and 22nd of February, 1915.

On the 2nd of February, 1914, the plaintiff and defendant Companies entered into an agreement by letter, as follows:

"For the chattels mentioned in the annexed list, initialled by you, we will pay you $12,000.00 as follows: $3,000.00 upon acceptance of this offer, and $1,000.00 on the 15th day of each month hereafter until the $12,000.00 is fully paid, with interest on the deferred payments at 7 per cent. and for the said deferred payments we will give you our joint and several promissory notes. Any of the vehicles mentioned in the said list that are not in running order you are to put in running order before delivery.

"Until the expiration of our existing mail contract, if we fulfil this agreement, you are not to operate horse stage in the districts of Cariboo, Yale or Lillooet, or carry on the business of express carriers in the said districts, and you will use your best endeavours to influence and transfer your express business to us.

"Also, during the existence of our present mail contract, while we are not in default under this contract, you will operate the steamer B.X. between its landings at Soda Creek and South Fort George, according to the time schedule in our present mail contract, and carry our mail and express not exceeding 15,000 pounds in any round trip for $300.00 per round trip, payable monthly on the 20th day of the following month, and any excess of 15,000 pounds handled on the round trip we will pay for at the ordinary steamer freight rates, but if in the opinion of your Captain, the steamer is unable or it is unsafe to make any of her trips you shall not be paid for the trips so lost, and not be otherwise liable.

"You undertake, in the event of the steamer B.X. being disabled and unable to perform the service, to place the steamer B.C. Express on the run if said steamer is available.

"In all your dealings with the Inland Express Company or its authorized representatives, any contract entered into or liability incurred to you, we, James C. Shields and J. T. Robinson, undertake personally to fulfil, perform and pay at the time fixed for payment or performance, or if no time is fixed, at the expiration of thirty days from the time the liability is incurred."

Statement

S. S. Taylor, K. C. (*Stockton,* with him), for plaintiff.
Bodwell, K.C. (*Baird,* with him), for defendant.

9th March, 1915.

MORRISON, J.: This is a dispute between two Cariboo freighter concerns as to the meaning of a contract which appears to have been dashed off in Toronto in the form of a letter as follows: [His Lordship read the letter as set out in the statement, and continued:]

Judgment

MORRISON, J.

1915

March 9.

B.C. EXPRESS CO. v. INLAND EXPRESS CO.

The real contest at the trial turned on the meaning of the third paragraph, whether the plaintiff was obliged to carry the defendant's feed (hay and oats) as express at the rate stipulated for in the contract or as freight. The defendant offered those commodities as express. The plaintiff refused to take delivery as express under the contract, but accepted them as freight, issued bills of lading, and rendered their accounts accordingly. They now sue, *inter alia,* for those freight charges.

In order to determine what the respective parties contemplated should be carried as "express" it is necessary to know that they had been for some years engaged in this particular line of business within the area in question and were thoroughly familiar with the customs and usages there established. The British Columbia Express Company have been doing business as common carriers, including express matter by means of horse stage, in the counties of Yale and Cariboo, since 1878. Since 1910 they have been carrying freight by steamboat between Soda Creek on the Fraser River and Fort George on the line of the Grand Trunk Pacific Railroad. Up to the year 1913 they were under contract with the Dominion Government to carry His Majesty's mail along their route. They had, of course, schedules shewing their express, freight and passenger rates.

Judgment

In the year 1913 the defendant Company was given this mail contract and in February, 1914, it and the plaintiff came together and signed the contract already referred to. The Messrs. Shields of the defendant Company were actively associated for many years with the plaintiff Company. They knew particularly that neither hay nor oats were ever carried as express by either the plaintiff or defendant. There arises a presumption, not rebutted by the defendant, that they knew this custom existed and it was in the minds of the parties when entering into the contract. I find this custom had grown up as to the transportation of "feed" (hay and oats) which was known to the shippers. I am of opinion that this custom, not being contrary to the terms of this particular contract, is binding on the defendant.

I find that the plaintiff Company did not refuse to carry

MORRISON, J.

1915

March 9.

B.C. EXPRESS CO. v. INLAND EXPRESS CO.

hay and oats, but, on the contrary, did accept delivery of those commodities when offered and on each occasion specifically accepted them as freight.

On that issue there will be judgment for the plaintiff in the terms of its statement of claim. As to the remainder of the claim, failing an adjustment, there will be a reference to the registrar to take accounts and judgment will go for such amount as may be then found.

Judgment for plaintiff.

GIBSON v. FRANKLIN *ET UX.*

HUNTER, C.J.B.C. (At Chambers)

1915

Feb. 8.

GIBSON v. FRANKLIN

Practice—Pleading—Parties—Fraudulent conveyance—Grantor a proper party—Insolvent defendant.

A judgment debtor is a proper, although not a necessary party to an action by a judgment creditor to set aside a conveyance by the debtor as fraudulent.

Gallagher v. *Beale* (1909), 14 B.C. 247, not followed.

APPLICATION by the defendant Wilfred E. Franklin, for an order striking out his name as an unnecessary and improper party and dismissing the action as against him. Heard by HUNTER, C.J.B.C. at chambers in Vancouver on the 8th of February, 1915. The plaintiff obtained judgment for $661.14 against the defendant Wilfred E. Franklin on the 2nd of October, 1914. On the 2nd of September, 1914, Franklin conveyed certain lots that he owned in North Vancouver to the defendant Annie M. Franklin, his wife. The judgment debt was still unsatisfied and it was alleged that W. E. Franklin was insolvent at the time he made the transfer and that Annie M. Franklin knew of his insolvency and no consideration passed in respect of the sale.

Statement

HUNTER, C.J.B.C. (At Chambers)

1915

Feb. 8.

GIBSON v. FRANKLIN

McLellan, for the application.
H. S. Wood, contra.

HUNTER, C.J.B.C.: The defendant W. E. Franklin is a proper, although not a necessary party. The application is dismissed with costs.

Application dismissed.

MORRISON, J.

1915

March 15.

DILL v. GRAND TRUNK PACIFIC COAST STEAMSHIP COMPANY, LIMITED.

Carriers—Passenger on steamboat—Ticket—Conditions as to liability on its face—Personal injuries—Loss of baggage.

DILL v. GRAND TRUNK PACIFIC COAST STEAMSHIP CO.

Where reasonable care has been taken to send a boat to sea in a seaworthy condition, a passenger's ticket for transportation containing conditions printed thereon whereby the company was not to be liable for loss of or injury to the passenger or his baggage arising from perils of the sea or defects in the boat fittings, will bind the passenger where the latter has reasonable opportunity to read the ticket and to get notice therefrom and from posted notices in the company's office, provided the company does all that is reasonably required of it to bring the conditions to the attention of the passengers.

Statement

ACTION tried by MORRISON, J. at Vancouver on the 2nd and 3rd of March, 1915, for personal injuries sustained by the plaintiff and for loss of baggage owing to the ship Prince Albert, upon which she had taken passage from Masset, on Queen Charlotte Islands, to Vancouver, being driven ashore, necessitating the removal of passengers in boats, in the process of which she was injured and lost her baggage. The facts are set out fully in the reasons for judgment.

McCrossan, for plaintiff.
Sir C. H. Tupper, K.C., for defendant Company.

15th March, 1915.

Judgment

MORRISON, J.: The plaintiff, a young school teacher residing at the time at Masset, on Queen Charlotte Islands, took passage

on the defendant's coasting steamer Prince Albert *en route* to Vancouver. Her father purchased her ticket and looked after her luggage. There was some question as to whether her luggage and other articles, which cannot be included as luggage, were, as a fact, put on board from the wharf upon which they were brought for shipment on her ticket. I find, however, that they were placed on board as claimed.

On the evening of the 18th of August, 1914, the ship was cast ashore during rather "dirty" weather. Whilst one of the boats was being lowered, a bolt which penetrated the keel, and to which the after lowering tackle was fastened, slipped, careening the craft at such an angle that the plaintiff was thrown into the sea, and, whilst in the water, she alleges that a boat which was being lowered struck her. Her description of this last alleged incident seems very improbable. She was promptly rescued. She, together with other passengers, spent some hours during that night in an open boat, and, after suffering considerable privation, was landed at Prince Rupert. She has lost her luggage and claims to be suffering from the effects of the exposure experienced on the occasion in question. The point for me to determine is as to the defendant's liability, first for personal injuries which she may have sustained, and, secondly, for loss of her luggage and other articles. The plaintiff had experience in travelling this route on steamers. She handled the tickets issued by the defendant on this occasion which were given to her father acting as her agent. The ticket in question is a very common one in appearance and shape, and contains on its face or front the conditions on which the passenger is taken. Conditions 4, 7 and 11 are the ones particularly involved in this case, and read as follows:

Judgment

"4. That the person using this ticket assumes all risk of loss or injury to person or property caused by or incidental to the dangers of navigation.

"7. The Company will use all reasonable means to insure the ship being sent to sea in a seaworthy state and well found, but is not otherwise liable for loss of or injury to the passenger or his baggage, or delay in the voyage whether arising from the act of God, King, King's enemies, perils of the sea, rivers or navigation, barratry or negligence of the Company's servants whether on board the steamer or ashore; defect in the steamer, her machinery, gear or fittings, or from any other cause of whatsoever

MORRISON, J.

1915

March 15.

DILL v. GRAND TRUNK PACIFIC COAST STEAMSHIP CO.

nature. The passenger shall not be liable in respect of his luggage or personal effects to pay or be entitled to receive any general average contribution.

"11. Baggage liability is limited to wearing apparel not to exceed One Hundred Dollars ($100) in value for a whole ticket, and Fifty Dollars ($50) for a half ticket, unless a greater value is declared by the owner and excess charge paid thereon at the time of checking baggage."

If the plaintiff knew of these conditions and took passage on the defendant's ship on that footing, she cannot recover as claimed. The difficulty which arises on this point is as to whether the Company did all that was reasonably required of it to bring these conditions to her attention. The evidence is that it had all the usual literature displayed and available at its office; that Massett is a very small settlement in which the Company's agent was well known to the plaintiff; that the plaintiff was somewhat accustomed to travel on those passenger boats; that she is a person of intelligence who in and about taking passage was in no need of hurry. She had ample time to inspect and read her transportation.

I find that the Company did all that was reasonably required of it to bring to the plaintiff's notice the conditions on her tickets, and she proceeded on the voyage on the footing of that contract. I find that the ship had been inspected as required by statute, and that on this occasion was well equipped, manned and provisioned. I find that the proximate cause of any personal injury to the plaintiff was the slipping of the bolt already referred to, and that that defect in the life-boat was latent, the existence of which could not reasonably have been detected: Halsbury's Laws of England, Vol. 4, p. 45.

Judgment

As to her "luggage," it was, I think, practically admitted at the trial that the liability was limited to $100. She had other articles which, according to the authorities, cannot be taken as included in that term; Halsbury, *supra,* par. 69; The Water-Carriage of Goods Act, Can. Stats. 1910, Cap. 61; the Canada Shipping Act, R.S.C. 1906, Cap. 113, Sec. 964.

I think that in the circumstances surrounding the plaintiff's mishaps the officers and crew acted with the best judgment. There will be judgment for the defendant.

Judgment for defendant.

THE ROYAL TRUST COMPANY v. HOLDEN.

COURT OF APPEAL

1915

April 6.

ROYAL TRUST CO. v. HOLDEN

Set-off—Money payable to trustee for maintenance of and settlement of disputes with cestui que trust—Right to set off debts of cestui que trust.

The defendant agreed to pay to the plaintiff Company as trustee for H. a certain sum of money in instalments "in order to settle all matters in difference between the defendant and H. and to make provision for her support and maintenance." In an action by the trustee to recover certain overdue instalments the defendant set up as a set-off sums due from H. under certain judgments. The learned trial judge allowed the set-off.

Held, on appeal (*per* IRVING and MARTIN, JJ.A.), that the defendant was entitled to set off the amounts so claimed.

Bankes v. *Jarvis* (1903), 1 K.B. 549, followed.

Per GALLIHER and MCPHILLIPS, JJ.A.: That the moneys payable under the agreement were to be applied to a specific purpose and in such a case mutual credits could not arise.

The Court being equally divided the appeal was dismissed.

APPEAL from the decision of CLEMENT, J. in an action tried by him at Vancouver on the 30th of September, 1914. The facts are that after William Holden had obtained a divorce from his wife, Annette Holden, he entered into a written agreement with her and the Royal Trust Company as trustee on the 5th of February, 1912, whereby, in order to settle all matters in difference between the parties and to make a provision for the support and maintenance of Annette Holden, he agreed to pay to the Royal Trust Company, in trust for her, $1,000 at the expiration of every six months from the date of the agreement until the whole amount paid reached $8,000. Three instalments were paid, but the fourth and fifth, payable on the 5th of August, 1913, and the 5th of February, 1914, respectively, were not paid. At the instance of Annette Holden the Royal Trust Company then brought this action for the recovery of $2,000. The defendant pleaded that Annette Holden, by virtue of a judgment of the Court of Appeal dated the 10th of June, 1912, was indebted to him in the sum of $1,082, and by an order of

Statement

COURT OF APPEAL

1915

April 6.

ROYAL TRUST CO. v. HOLDEN

the Privy Council dated the 8th of August, 1911, in a further sum of $205, and that he was entitled to set off these sums against the amount sued for, he paying into Court to the credit of the action the balance of $700. The learned trial judge upheld the set-off and gave judgment for the plaintiff for the $700 paid into Court. The plaintiff Company appealed.

The appeal was argued at Vancouver on the 18th of December, 1914, before IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

R. M. Macdonald, for appellant.
S. S. Taylor, K.C., for respondent.

6th April, 1915.

IRVING, J.A.: The plaintiff sues for $2,000 on the defendant's covenant contained in an agreement dated the 5th of February, 1912, made between Annette Holden of the first part and the defendant of the second part, and the plaintiff therein called the trustee of the third part.

The agreement contains the following recital:

"Whereas differences have arisen between the parties of the first and second part, and an action is now pending between them, in the Supreme Court of British Columbia, wherein the party of the first part has made certain claims against the party of the second part, which claims the party of the second part does not admit, but in order to settle all matters in difference between the parties and to make a provision for the support and maintenance of the party of the first part, the party of the second part has consented to enter into the arrangement hereinafter set out."

IRVING, J.A.

By the first clause it was agreed that the plaintiff should pay $1,000 on the execution of the document and costs to be taxed and also—and this is the money sued for—at the expiration of every six months thereafter the sum of $1,000 in cash, until the aggregate amount . . . . shall amount to $8,000.

The third clause provided as follows:

"As and when the said sums are received the trustee shall pay the same to the party of the first part, but it is hereby mutually agreed between all the parties hereto, that the trustee shall not recognize any assignment of the said moneys, whether due or accruing due at any time made or purporting to be made by the party of the first part to any other person or persons, but the party of the first part shall, in each instance, satisfy the trustee that the said payments are being made to the party of the first part personally, and for her sole use and benefit (nothing herein shall prevent the party of the first part from bequeathing the same to any of her

relations); and in consideration of the premises and of the agreements hereinbefore contained on the part of the party of the second part, the party of the first part doth hereby for herself, her heirs, executors, and administrators hereby release and forever discharge the party of the second part, his heirs, executors and administrators of and from all manner of action, causes of action, debts, accounts, covenants, contracts, claims and demands whatsoever which the party of the first part ever had, now has, or which her heirs, executors, administrators or assigns or any of them hereafter can, shall or may have against the party of the second part, or his heirs, executors or administrators, for or by reason of any cause, matter or thing whatsoever, existing up to the present time."

The defendant pleaded that the said Annette Holden was by virtue of a judgment of this Court, dated the 10th of June, 1912, indebted to him in the sum of $1,082; and by virtue of an order of the Privy Council, dated the 8th of August, 1911, was also indebted to him in the sum of £42 4s. 2d. or $205, and claimed to set off these sums against the amount sued for.

The defendant paid into Court the difference, *viz.*: $700. At the trial CLEMENT, J. upheld the defence of set-off and gave judgment for $700.

The first point for our decision is can the defendant set off against the trustee a debt due from the *cestui que trust*? The plaintiff's contention is that as these are not mutual debts, nor in the same right, there can be no set-off. It would appear that prior to the statutes of set-off, Courts of Equity did not exercise any jurisdiction as to set-off, unless some peculiar equity intervened, independently of the mere fact of mutual unconnected accounts. At common law there was originally no right of set-off at all (declining to follow in this respect the civil law where compensation was freely allowed). It was not till the statute of set-off in the reign of George II., that there was any such right established and they only applied to cases of mutual debts. Equity followed and even extended the law, the Courts of Equity holding that certain cases were within the equity of the statute although not within their actual words.

IRVING, J.A.

Sir George Jessel, M.R. tells us in *In re Whitehouse & Co.* (1878), 9 Ch. D. 597, that Courts of Equity did allow set-off, but the Court of Equity, following the spirit of the statute, would not allow a man to set off, even at law, where there was an equity to prevent his doing so, that is to say where the rights, although legally mutual, were not equitably mutual.

COURT OF APPEAL

1915

April 6.

ROYAL TRUST CO. v. HOLDEN

Now as the plaintiff is the representative of Annette Holden, and suing for her benefit, I can see no equity to prevent the defendant setting off her debt to him against the plaintiff's claim. On the other hand I think the relationship of the trustee to Annette Holden constitutes some equitable ground for the defendant being protected against the plaintiff's demand.

There are many instances of a trustee suing on behalf of another being met with a set-off: *Bankes* v. *Jarvis* (1903), 1 K.B. 549; 72 L.J., K.B. 267 is one, and that case seems to me to be in defendant's favour.

The argument that is based on the theory that this was "an inalienable provision for her" like the pension in *Gathercole* v. *Smith* (1881), 17 Ch. D. 1, cannot be supported on the agreement of the parties. The "provision" in that case was exempt from set-off by reason of public policy laid down by statute. The expression "mutual debts" is somewhat hard to understand according to the old cases, but when we see in the ancient and approved form of plea given in Bullen & Leake's Precedents, 3rd Ed., 682, is "That the plaintiff, at the commencement of the suit was and still is indebted to the defendant in an amount equal to the plaintiff's claim . . . ." we are relieved to find that " 'mutual debts' mean practically debts due from either party to the other for liquidated sums, or money demands which can be ascertained with certainty at the time of pleading"—*per* Kennedy, L.J. in *Bennett* v. *White* (1910), 2 K.B. 643 at p. 648; 79 L.J., K.B. 1133.

IRVING, J.A.

I do not think the form of the judgment to be taken against a married woman enters into the question we have to decide.

I would dismiss the appeal.

MARTIN, J.A.: By an agreement under seal dated the 5th of February, 1912, Annette Holden and the defendant arrived at a settlement of certain recited claims of hers against the defendant then in litigation in an action in the Supreme Court of British Columbia, and "in order to settle all matters in difference between the parties and to make a provision for the support and maintenance of said Annette Holden" the defendant agreed to pay to the plaintiff Company as trustee for her

MARTIN, J.A.

a certain sum in cash and $1,000 every six months until $8,000 in all were paid. In consideration of the foregoing, Annette Holden in the same instrument gave the defendant a general release of all demands, but there was no corresponding release by defendant to her. It was the duty of the trustee to pay the moneys over to her "personally" upon being satisfied that she had not assigned them. Two instalments, due 5th August, 1913, and 5th February, 1914, have admittedly not been paid, but the defendant claims to set off against them certain costs due to him by said Annette Holden in unsuccessful actions brought against him by her as appears by three certificates and allocaturs filed; the orders or judgments upon which these were issued are not before us.

So far as the right to set off against the plaintiff, the trustee, is concerned the case is governed in principle by *Bankes* v. *Jarvis* (1903), 72 L.J., K.B. 267, in favour of the defendant. And I am unable also to take the view that in these circumstances anything turns here upon the question of any particular form of order or judgment, even if we had it before us. In fact, I cannot see how any question of separate estate arises at all seeing that it is a question merely of the woman being personally liable to the plaintiff for costs of her unsuccessful actions against him, which debts he sets off against money in his own hands which is payable to her "personally."

MARTIN, J.A.

Something was said about the appropriation of the money for the specific purpose of the woman's maintenance distinguishing this case, but even if that were so the difficulty here is that it was to be paid for two purposes, *viz.*: (a) to settle the action, and (b) for maintenance, and who can say how much was to be appropriated for either purpose. In such indefinite circumstances there could be no definite, or any, appropriation.

In my opinion the appeal should be dismissed.

GALLIHER, J.A.: Under the agreement of the 5th of February, 1912, the parties of the first and second part have agreed upon a sum certain in settlement of the claims made by Annette Holden and for providing for the support and maintenance of

GALLIHER, J.A.

COURT OF APPEAL

1915

April 6.

ROYAL TRUST CO. v. HOLDEN

the said Annette Holden. Whether William Holden was or was not at that time obliged to provide for the maintenance and support of Annette Holden he has entered into an agreement to do so and is estopped from raising that question—in fact if truly read, I think the consideration for the granting of moneys for support and maintenance was the settlement of all claims and disputes between them.

In a case where the agreement was for maintenance and support only, could the defendant set off as against moneys payable under that agreement any debt which he might recover against Annette Holden? I think not. The moneys were to be applied to a specific purpose and in such a case mutual credits could not arise. The parties have agreed to a sum necessary and sufficient for a specific purpose, and it has been so allocated, and to divert any part of those moneys would be contrary to the express intent and agreement of both parties, nor do I think the defendant is in any better position by reason of the fact that the agreement recites in addition to the provision for maintenance and support that it is also in settlement of all claims and disputes between the parties.

GALLIHER, J.A.

In re Pollitt; Ex parte Minor (1893), 62 L.J., Q.B. 236, a solicitor having a bill of costs already owing to him by a debtor refused to do further work unless a certain sum was paid him for future services and the debtor having paid him £15 for this purpose certain work was done, and before the sum was exhausted and while there was some £12 still in the hands of the solicitor the debtor was adjudged bankrupt. This sum of £12 was claimed by the trustee in bankruptcy. It was held that this money became due to the trustee at the moment of bankruptcy. The solicitor claimed the right to set off the amount of his prior debt against this money in his hands and the Master of the Rolls, whose judgment was concurred in by Lindley and Smith, L.JJ., deals with the claim at p. 238 in these words:

> "It was also contended that this is a case of mutual credit, and that the residue of the 15*l.* ought to be set off against the amount due from the bankrupt to the solicitor in respect of work previously done. But the money was paid for a specific purpose, and, that being so, there could not be any mutual credit."

See also remarks of Williams, J. in *In re Mid-Kent Fruit Factory* (1896), 65 L.J., Ch. 250.

But if these cases are distinguishable as being in proceedings under the Bankruptcy Act, which I do not determine, there is another clause in the agreement which coupled with the recital is I think a complete answer to the defendant's contention.

The portion of clause 3 which I refer to is as follows: [already set out in the judgment of IRVING, J.A.]

The effect of this clause, which all parties mutually agree to, is to prevent Annette Holden from in any way anticipating payment of these moneys, and what William Holden is now attempting to do is in effect to anticipate payments.

GALLIHER, J.A.

I would allow the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. agreed with GALLIHER, J.A. in allowing the appeal.

Appeal dismissed,
Galliher and McPhillips, JJ.A., dissenting.

Solicitors for appellant: *MacNeill, Bird & Macdonald.*

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

COURT OF APPEAL

1915

April 6.

AULD v. TAYLOR.

Practice—Application for judgment—Order XIV.—"Triable issue"—Admission of parol evidence to vary written instrument.

AULD v. TAYLOR

The defendant gave two promissory notes payable on demand to secure a debt, at the same time executing a deed of land as collateral security therefor. The plaintiff having sued on the notes, moved for judgment under Order XIV. The defence was that in consideration of giving the deed of land there was a verbal agreement that payment of the notes would not be enforced for two years. The motion was dismissed.

Held, on appeal (MACDONALD, C.J.A., and GALLIHER, J.A. dissenting), that the application was rightly dismissed as the conveyance of land as collateral security for the payment of the debt created a "triable issue" that should come before the Court for determination.

Statement

APPEAL by plaintiff from an order of HUNTER, C.J.B.C. made at Vancouver on the 21st of October, 1914, dismissing the plaintiff's application for judgment under Order XIV. The plaintiff sued the defendant as maker of two promissory notes dated the 1st of December, 1913, for $2,736.07 and $1,100, respectively payable to the order of one Doherty on demand and indorsed by him to the plaintiff. The circumstances under which the action arose were that six months prior to the date of the notes the defendant had borrowed the two sums mentioned from one Doherty representing the plaintiff (Doherty being the plaintiff's attorney in fact). On the 1st of December aforesaid he was asked by Doherty to sign the two promissory notes and also give security for the payment of the moneys represented by the notes. He signed the notes and gave as security an absolute deed to the plaintiff of a number of lots in Port Moody valued at $20,000, but the defendant claimed that in consideration of giving this security it was understood and agreed that payment of the notes was not to be enforced for two years, he was, however, to pay back the moneys in the meantime if able to do so. The plaintiff appealed from the order of the learned Chief Justice on the grounds that the defendant's

affidavit disclosed no defence; that the statement therein as to the agreement that an extension of time for payment of the promissory notes was to be granted should not have been received or considered, and that if received and considered they did not disclose any contract between the parties to extend the time beyond the period mentioned in the promissory notes.

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

Griffin, for appellant: This is an appeal from an order dismissing an application for judgment under Order XIV. The action is against the maker of two promissory notes payable on demand. The defendant says there was an understanding between the parties that he was to pay the notes as soon as he could but that payment would not be enforced for two years. We say that no such oral agreement is admissible in evidence to alter or vary a promissory note payable on demand: see *Jacobs* v. *Booth's Distillery Company* (1901), 85 L.T.N.S. 262; *New London Credit Syndicate* v. *Neale* (1898), 2 Q.B. 487; *Canadian Bank of Commerce* v. *Indian River Gravel Co.* (1914), 20 B.C. 180; *Porteous et al.* v. *Muir et al.* (1884), 8 Ont. 127 at p. 130; Maclaren on Bills and Notes, 4th Ed., 46; Byles on Bills of Exchange, 17th Ed., 121. The plaintiff through his agent lent money to the defendant and six months later these notes were given payable on demand. The only question now before the Court is whether this is part of a larger transaction: see *Chandler* v. *Beckwith* (1838), 2 N.B. 423.

Argument

Spinks, for respondent: In addition to the notes the defendant gave the plaintiff a mortgage on certain property in the form of a conveyance as security to cover the advance to him. The whole transaction must be taken together, which shews that the defendant has a good defence to the action.

Griffin, in reply, referred to *Stott* v. *Fairlamb* (1883), 49 L.T.N.S. 525.

Cur. adv. vult.

6th April, 1915.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would allow the appeal. The defend-

COURT OF APPEAL

1915

April 6.

AULD v. TAYLOR

MACDONALD, C.J.A.

ant gave promissory notes payable on demand to the plaintiff to secure an indebtedness and executed a deed of land as collateral security therefor. The notes having been dishonoured the plaintiff sued upon them. The defence is that at the time the notes and deed were executed the plaintiff's agent, who effected the transaction, promised that the defendant should have a year or two to pay the notes, notwithstanding that they were made payable on demand. No other defence was set up on the motion for judgment. In my opinion the evidence of the alleged contemporaneous verbal agreement is not admissible to contradict the promissory notes, and therefore no defence to this action has been shewn.

IRVING, J.A.: The plaintiff, in June, 1913, lent the defendant some money—$3,836.07—the time of repayment was not stated, nor was any security given. On the 1st of December, 1913, an interview took place between the plaintiff's agent and the defendant, when the defendant signed the two demand notes sued on for an amount equal to the above sum, and at the same time defendant executed as security for the notes a deed absolute on its face.

The defendant says:

IRVING, J.A.

"6. That at said meeting it was distinctly agreed and indeed was the consideration for the giving of the security that the defendant was to be allowed up to two years within which to pay these moneys, it being distinctly understood however that he was to pay back the moneys as soon as he possibly could."

The particular line he means to adopt as to the mortgage has not yet been declared.

The learned Chief Justice dismissed the application, for judgment under Order XIV., but we have not been favoured with the reasons for his decision. I do not think we should interfere with his order in view of the fact that there was this mortgage, and the defendant's right to apply to the Court in respect thereof.

With a view to prevent multiplicity of actions, I think the plaintiff should be allowed to go to trial where the whole matter can be tried out. I would therefore dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: There is a striking similarity between this case and *Jacobs* v. *Booth's Distillery Company* (1901), 85

L.T.N.S. 262; 50 W.R. 49, decided by the House of Lords and lately considered by us in *Canadian Bank of Commerce* v. *Indian River Gravel Co.* (1914), 20 B.C. 180. In the case at bar it appears that the defendant had borrowed two sums of money from the plaintiff and six months afterwards, on the 1st of December, 1913, the defendant agreed to give the plaintiff security for said debt, which security took the shape of an absolute conveyance of certain lands to the plaintiff, and was duly registered, the consideration for such security being that the defendant was to have not less than one year's time to pay said debt, though it was also agreed that he was to pay before that time "if he possibly could." At the time he gave the said security he also gave plaintiff two promissory notes for the said respective sums payable on demand, and the plaintiff has brought this action upon said notes before the minimum time of one year alleged to have been agreed upon has elapsed, the defendant having been unable to pay the notes before that time though he swears he has "endeavoured in every possible way to get" . . . money to do so. In the *Jacobs* case, as I understand it from the two reports cited, the two defendants had likewise given security, by means of a memorandum of charge, and signed two promissory notes to secure an advance to them and further moneys, and one of them had given an indemnity to the other, Jacobs, who defended the action and set up that he had been told that he incurred no liability by signing said charge and notes and that he had signed them relying on that representation; the notes apparently were time notes, it not being stated that they were payable on demand. And it is not stated that the representation was made by the payee, and I should gather from the report that it was made by the co-defendant, the indemnifier, who admitted his liability. But assuming it was made by the payee, as in the case at bar, what is the difference in principle between the two cases? In this one the payer says it was agreed that he was to have a year within which to pay the notes; in *Jacobs's* case he said it was agreed he was never to pay them at all—it is an astonishing statement on the face of it that a man who gets advances of money and gives notes therefor is never to be called upon to pay them. And still more so in

MARTIN, J.A.

COURT OF APPEAL

1915

April 6.

AULD v. TAYLOR

face of the fact that to secure himself for signing he took an indemnity from his co-borrower so as to relieve himself of any responsibility, which was a totally unnecessary precaution and wholly inconsistent act if he were told and believed that he incurred no liability by signing. Nevertheless the House of Lords set aside the judgment of the Court of Appeal affirming an order of Mr. Justice Day in Chambers (ordering the money to be paid into Court within seven days, otherwise judgment) and gave the defendant unconditional leave to defend because it was held there was "a triable issue."

In the light of this decision of so high a tribunal I feel quite unable to say that the learned judge below adopted a wrong course in allowing the defendant herein to defend unconditionally, despite what is to be found in the following cases on the subject of oral agreements varying written contracts: *New London Credit Syndicate* v. *Neale* (1898), 2 Q.B. 487; *Henderson* v. *Arthur* (1906), 76 L.J., K.B. 22; and *Hitchings and Coulthurst Company* v. *Northern Leather Company of America and Doushkess* (1914), 3 K.B. 907. It is to be noted that in the second of them Cozens-Hardy, L.J. contemplates the reception of evidence of the terms of an antecedent parol agreement in an action to rectify a written contract.

MARTIN, J.A.

Furthermore, in the case at bar the question of the conveyance absolute in form yet in reality only a mortgage will or should come up for determination, and in so doing the length of time for which the security was given will have to be considered, which cannot on the face of the matter be ascertained from the notes, which are payable on demand only. It is also to my mind very possible that it may turn out, as argued, that these notes may be held to be "only an incident or part of a larger agreement" which is referred to by Cameron, C.J. as an exception to the rule, in *Porteous et al.* v. *Muir et al.* (1884), 8 Ont. 127 at p. 130, cited in the *Canadian Bank of Commerce* case already referred to. I am not, in the words of James, L.J. in *Jacobs's* case, "expressing any opinion whatever upon the merits of the case," but simply giving some reasons why it is desirable that it should be allowed to be tried out in the usual way.

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

The respondent relied on the decision of Denman, J. in *Stott* v. *Fairlamb* (1883), 48 L.T.N.S. 574, but this was reversed by the Court of Appeal, 49 L.T.N.S. 525, the Court holding that there was consideration for the giving of the note.

In the case at bar some six months after the money was borrowed the respondent at the request of the appellant's attorney gave a demand note for the amount, and as security an absolute conveyance of certain lands intended, however, only to be a mortgage. The respondent contends that this security was given on the express understanding that he was to have up to two years in which to pay the amount. The giving of the demand note was a conditional payment of the debt then due, and parol evidence is not admissible to contradict the terms of the note: see *Porteous et al.* v. *Muir et al.* (1883), 8 Ont. 127.

GALLIHER, J.A.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: Being of the opinion that the learned Chief Justice arrived at the right conclusion in this case in making the order dismissing the application for judgment, and also holding the view that if the action is to proceed to trial it is better that there should be no observations which would in any way affect the disposition of the action by the trial judge, I refrain from adverting to the points of law that were so ably presented by Mr. *Griffin,* counsel for the appellant, which, however, in my opinion, in no way disturbed the correctness of the order appealed from.

I would therefore dismiss the appeal.

Appeal dismissed,
Macdonald, C.J.A. and Galliher, J.A. dissenting.

Solicitor for appellant: *T. F. Hurley.*
Solicitor for respondent: *R. C. Spinks.*

COURT OF APPEAL

1915

April 6.

VON MACKENSEN v. THE CORPORATION OF THE DISTRICT OF SURREY.

Negligence—Highway—Repair of obligation of municipality—Non-feasance—Municipal Act, R.S.B.C. 1911, Cap. 170, Secs. 53, Subsec. (176), 370 and 371.

VON MACKENSEN v. CORPORATION OF SURREY

The Municipal Act casts no duty on municipalities controlled by it to repair the roads, the possession of which is vested in them by section 370 of the Municipal Act. Where, therefore, a road built by others without authority is so vested, the municipality is not liable to pay damages for injuries sustained owing to mere non-repair.

Municipal Council of Sydney v. *Bourke* (1895), A.C. 433, followed.

City of Vancouver v. *McPhalen* (1911), 45 S.C.R. 194, distinguished.

Statement

APPEAL from the decision of CLEMENT, J. in an action tried by him at Vancouver on the 21st of April, 1914. The action arose through injuries sustained by the plaintiff who was thrown from a democrat while driving on the Jericho Road within the defendant municipality. The road in question had been gazetted by the Provincial Government in 1875. The defendant was incorporated in 1882. That part of the road where the accident took place was built by the settlers in the vicinity about the year 1889 without authority from any one, in order to make connection with other roads, and later, in 1896, the settlers (without authority) laid puncheon (or corduroy) on top of the road. The corporation later spent some money on another part of the road, but not where the accident took place. At the time of the accident the road was flooded and some of the puncheon having been carried away a hole was formed, there being a drop of from 10 to 18 inches into it. The plaintiff's democrat in dropping into the hole, threw him out and he was injured. The learned trial judge held that the Municipality was under an obligation to see that the road did not become a nuisance and was liable in damages. The defendant Municipality appealed chiefly on the ground that the learned trial judge erred in holding that the defendant was under obligation to keep the road in question in repair or was

responsible for the condition of the road or in any way liable by reason of the condition thereof.

The appeal was argued at Vancouver on the 26th of November, 1914, before MACDONALD, C.J.A., IRVING, MARTIN and MCPHILLIPS, JJ.A.

Davis, K.C., for appellant: The road was built by settlers without any authority from the Municipality or any one else. After incorporation some repairs were made but not where the accident took place. The question is whether the Municipality is bound to maintain and keep in repair all roads irrespective of whether the road was opened up by the Municipality or not. *Cooksley* v. *Corporation of New Westminster* (1909), 14 B.C. 330 and *City of Vancouver* v. *McPhalen* (1911), 45 S.C.R. 194, do not apply, as in those cases there was a statutory duty imposed to maintain and repair, whereas in this case there was not. Here there is no greater duty to repair than to open up a new road. The case of *Borough of Bathurst* v. *Macpherson* (1879), 4 App. Cas. 256 does not apply, as there they created the nuisance by putting down a drain that got in a state of disrepair. In this case the road was not created by the Municipality and there is an absence of duty imposed by statute to repair. The Municipality is not liable because (a) the obligations as regards repair are transferred obligations; (b) there is no statutory obligation thrown on the Municipality. We rely on the case of *Municipal Council of Sydney* v. *Bourke* (1895), A.C. 433. A duty must be imposed before an indictment can be found. We are not chargeable with misfeasance but with non-feasance and are therefore not liable: see *Cowley* v. *Newmarket Local Board* (1892), A.C. 345, in which case no liability was found although there was undoubtedly a nuisance. The case of *Municipal Council of Sydney* v. *Bourke, supra,* is, we submit, precisely the same as the case at bar. The Act in that case vests the street in the Municipality in the same way as the local Act vests the road in question in the defendant Municipality; both Acts are practically the same and no duty is imposed for maintenance or repair. In this case the question of repair is left entirely in the discretion of the Munici-

Argument

COURT OF APPEAL

1915

April 6.

VON MACKENSEN v. CORPORATION OF SURREY

Argument

pality. In *The City of Saint John* v. *Campbell* (1896), 26 S.C.R. 1, the absence of a statute imposing liability for non-repair relieved the corporation from damages for injury sustained by the plaintiff. Here we are not the owner but simply in possession of the property.

F. J. McDougal, for respondent: *Municipal Council of Sydney v. Bourke* (1895), A.C. 433, can be distinguished. *Cooksley* v. *Corporation of New Westminster* (1909), 14 B.C. 330 is more in point. This is a case of not merely non-feasance as by the Municipality allowing a nuisance to be created it amounts to a misfeasance. The drainage was not attended to and becoming blocked a pond formed on both sides of the road eventually flooding the road and carrying off the puncheon (or corduroy), this making a hole in the middle of the road into which there was a straight fall of 18 inches. When the Municipality came into possession of the road it was their duty to keep it in repair.

Cur. adv. vult.

6th April, 1915.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The judgment appealed from awards the plaintiff damages against the defendant, an incorporated district municipality, for personal injuries which he sustained when thrown from his waggon owing, as he alleged, to the want of repair of the Jericho Road, a highway within the boundaries of the defendant Municipality. Counsel for the defendant put aside all other grounds of appeal and asked the Court for judgment on the broad, and to the defendant, important ground of its liability or non-liability for non-repair of the road in question.

The facts upon which the question is to be decided are not in dispute. The Jericho Road, half a mile of which only is in Surrey, was made by a few settlers for their own convenience in reaching another road nearby. It was declared in 1875 by the Province to be a public road. The defendant was incorporated in 1882. By the Municipal Act the possession and control of public roads are vested in the municipality in which they are situate subject to any rights reserved by the dedicator. No such rights are in question here. Therefore in 1882 the

possession of that part of the Jericho Road within the defendant's boundaries became vested in the defendant. There is no statutory provision affecting this case other than the one vesting the roads in the Municipality, and section 53, subsection (176) of the Municipal Act, which enables the municipal council to pass by-laws "for establishing, opening, making, preserving, improving, repairing, widening, altering, diverting, or stopping up roads, streets," etc.

After 1882, the settlers aforesaid continued to do some work on the Jericho Road within the Municipality without interference by defendant. They put down "puncheon" (another name for corduroy) at the place where the plaintiff met with his injuries. The defendant was not consulted nor did it interfere in this work. It did nothing towards the construction, maintenance or repair of that part of the road on which the plaintiff received his injuries, though it caused some repairs to be made on the road at some distance therefrom.

The plaintiff's case therefore is founded upon the failure of the defendant to exercise the enabling powers given by said section 53, subsection (176). The complaint is that the defendant did nothing to improve or repair that part of the road in question, not that it did something which in the result brought about the plaintiff's injuries.

MACDONALD, C.J.A.

Unlike the special charter of the City of Vancouver in question in *City of Vancouver* v. *McPhalen* (1911), 45 S.C.R. 194, the Municipal Act casts no duty on municipalities controlled by it to repair the roads, the possession of which was by law vested in them.

Having regard to the facts already recited and to the statute governing this case, I am unable to distinguish it from *Municipal Council of Sydney* v. *Bourke* (1895), A.C. 433, and must therefore allow the appeal and dismiss the action.

IRVING, J.A.: This is an appeal from CLEMENT, J. who found in favour of the plaintiff on the ground that the Municipality did not take care of the artificial works so as to prevent the highway becoming a nuisance. He bases his judgment on

IRVING, J.A.

COURT OF APPEAL

1915

April 6.

VON MACKENSEN v. CORPORATION OF SURREY

the reasons of Duff, J. set out at p. 213 of the report of *City of Vancouver* v. *McPhalen* (1911), 45 S.C.R. 194.

In all cases the first question which arises is what duty is imposed on the defendant, and what duty has it broken? It is admitted that there is no complaint of positive misfeasance against the Corporation, and in particular it is admitted that the box drain was built by the settlers; but it is said this place was a trap, and that the case turned on the fact that the highway was a nuisance, amounting to misfeasance, and that the plaintiff was entitled to maintain an action.

The defendant was incorporated in 1882. The road in question had been gazetted by the Provincial Government in 1875.

The defendant within the last five years employed one Hughes to repair the road, but apparently the place that needed it most, the portion where the accident took place, was left untouched by the contractor. The road at this point was built by the settlers 25 years ago, without authority from anybody. About 18 years ago a corduroy was laid on top of the road by the settlers. About three years ago a settler (Grant) removed a portion of this corduroy or puncheon. It was at or about this place where the accident took place, in a stretch of road of about 30 feet. Money had been expended by the defendant on the road but not on the part in the neighbourhood of this 30 feet.

IRVING, J.A.

By section 370 of the Municipal Act (R.S.B.C. 1911, Cap. 170) possession of all public roads is vested in the Municipality. This "vesting" only goes so far as is necessary for the particular powers conferred. The enactment by the Legislature that a highway shall be vested in a municipal corporation is to be construed as a means of protecting the highway by attributing ownership so far as consistent with public rights. It is a convenient way of getting rid of all claims in respect of dedicating owners, or owners of land fronting on the highway.

The statute, chapter 170, section 53, subsection (176), authorizes the council to pass by-laws for "establishing, opening, making, preserving, improving, repairing, widening, altering, diverting, or stopping up roads . . . . or other public

thoroughfares," but the Act does not contain a section such as was inserted in the Act under consideration in the *McPhalen* or *Cooksley* cases. This section 53 (176) in my opinion is merely empowering. I do not contrast it with section 371 because I am not prepared to say without argument how far that section obliges a municipality to open, maintain and repair a road. The statute, chapter 170, does not give any right of action to a person injured through non-repair or otherwise. The right of action then must depend on the common law.

We have been referred to a number of cases. The defendant before us does not argue contributory negligence, or that it was without notice of the state of the road, but relies on the authorities, in particular on *Municipal Council of Sydney* v. *Bourke* (1895), A.C. 433, for its exemption from liability.

In *Wallis* v. *Municipality of Assiniboia* (1886), 4 Man. L.R. 89, plaintiff failed because the statute which said the municipality should be charged with the maintenance of the road, did not provide that the municipality should be liable civilly or criminally.

In *Borough of Bathurst* v. *Macpherson* (1879), 4 App. Cas. 256, the plaintiff, whose action was dismissed at the trial, succeeded before the Privy Council because the hole formed by reason of their negligence amounted to a nuisance for which they were liable to indictment and also as a corollary to their liability to indictment to an action by any one sustaining direct and particular damage for such misfeasance. The Act imposing on the municipality "the care, construction and management of public roads" was not passed upon by the Privy Council.

Cowley v. *Newmarket Local Board* (1892), A.C. 345. The plaintiff (whose action was dismissed at the trial) failed. The place complained of had been constructed years before the accident by Captain Maclin without the leave of the local authority. There was no misfeasance on the part of the defendants. The fact that the footway was by statute "vested" gave the plaintiff no right of action.

The ruling in *Borough of Bathurst* v. *Macpherson, supra,* as to an action lying wherever an indictment would lie was

COURT OF APPEAL

1915

April 6.

VON MACKENSEN v. CORPORATION OF SURREY

questioned by Lord Herschell, p. 354. The plaintiff failed because the statute did not give an action.

Municipality of Pictou v. *Geldert* (1893), A.C. 524. The plaintiff (who succeeded at the trial) failed. The approach to the bridge was out of repair, through the non-feasance of the defendants. The House of Lords held that the transfer to the municipality of the obligation to repair did not of itself render the corporation liable to an action in respect of mere non-feasance. It required words indicating an intention on the part of the Legislature that liability should be imposed. In the opinion it was pointed out that the *Bathurst* case turned on misfeasance.

Municipal Council of Sydney v. *Bourke* (1895), A.C. 433. The plaintiff (who succeeded at the trial) failed before the Judicial Committee. The charge was non-feasance, a failure to make repairs in a road built by the defendants. The defendants were held not liable (a) because no liability was expressly imposed on them by statute, nor (b) had the Legislature imposed on them a duty for the breach of which the person injured had a right of action.

The statute in question "vested" in the council all the streets, and empowered it to repair them, but did not purport to impose a duty to repair.

IRVING, J.A.

Their Lordships then dealt with the *Bathurst* case, and pointed out the facts of the case which I have already incorporated in the synopsis of that case, and said that the *Bathurst* case did not depend on the question whether the municipality was liable to an action in respect of non-repair. Other matters were referred to and it was said, in effect, that the *Bathurst* judgment, which must be read with great care, was rightly decided on the ground that it was a case of misfeasance, that is to say, of having caused a nuisance for which they could be indicted and therefore an action would lie. But in respect of non-repair, as in the *Cowley* case, an action would not lie, although an indictment might lie.

Campbell v. *City of St. John* (1895), 33 N.B. 131, on appeal to the Supreme Court of Canada (1896), 26 S.C.R. 1. The plaintiff failed at the trial and before the Supreme Court

of Canada. I shall deal with only one phase of it. The case was one of non-feasance, neglect to repair an asphalt road the corporation had laid down. The Court was of opinion that assuming the City was bound as a duty towards the public to repair, the plaintiff had no right of action.

The foregoing is a statement of all the cases cited before us with the exception of the cases of *Cooksley* v. *Corporation of New Westminster* (1909), 14 B.C. 330 and *City of Vancouver* v. *McPhalen* (1911), 45 S.C.R. 194, but before dealing with those cases I shall draw attention briefly to other cases in our British Columbia Courts.

Lindell v. *Victoria* (1894), 3 B.C. 400. DRAKE, J. held the City of Victoria not liable under the Municipal Act of 1892, Sec. 104, Subsec. (90). *Smith* v. *City of Vancouver* (1897), 5 B.C. 491, DAVIE, C.J. held the City of Vancouver guilty of misfeasance in building an 8-foot sidewalk with a 2-foot drop at the end where it met a 4-foot crossing. *Gordon* v. *City of Victoria, ib.* 553, DAVIE, C.J. dismissed the action, thinking the case was one of non-feasance. *Patterson* v. *Victoria, ib.* 628, the majority of the Court thought that the case disclosed acts of misfeasance, more misfeasance than in the *Bathurst* case. *Lang* v. *Victoria* (not reported below), which followed the *Patterson* case, and the *Patterson* case were carried to the Privy Council, where the decision appealed from was upheld, and where certain other points raised by the City were held not open to the defendants. *Cooksley* v. *Corporation of New Westminster* (1909), 14 B.C. 330, was in the opinion of the Full Court, a case of misfeasance, and came within the *Bathurst* case. The statute governing it imposed on the corporation the duty of keeping the street in repair. Then came *McPhalen* v. *Vancouver* (1910), 15 B.C. 367, and on appeal to the Supreme Court of Canada (1911), 45 S.C.R. 194 founded on a different statute to that under consideration in this case. The case against the City was one of non-feasance and the City held liable as the duty to repair was created in mandatory and imperative language.

IRVING, J.A.

The result of these cases is that the plaintiff has failed in

COURT OF APPEAL

1915

April 6.

VON MACKENSEN v. CORPORATION OF SURREY

every instance of non-feasance except in the *McPhalen* case, and that case turned on the language of the statute.

The learned trial judge held that the defendant was liable because it did not prevent the road being a nuisance, irrespective of the question whether the road under the care of the Municipality was originally constructed by it or not.

With deference to the learned judge, that ground seems to me to ignore the explanations of the *Bathurst* case given in the subsequent cases.

IRVING, J.A.

I would allow the appeal.

MARTIN, J.A.: It appears that the road in question, called the Jericho Road, was originally made about 25 years ago by certain settlers, at their own expense, to get access to their homesteads, and it runs east and west, crossing the boundaries of the Municipalities of Surrey and Langley, about half a mile of it being within the limits of the defendant Municipality, which lies to the west of Langley, and was incorporated in 1882. Though the road was gazetted as a "public highway" on the 22nd of May, 1875, no work or money has been done or expended by the defendant Corporation on that eastern end of it which lies within 300 yards of the Langley boundary, but it has done work to the extent of $202.20 since 1889 for repairs on the other and western portion of the said half mile of road, starting from the Latimer Road and working east. We were not informed at all about that part of the road to the east of the boundary, within Langley, doubtless because it has no bearing on the case. The accident occurred at a spot about 100 yards from the Langley boundary, in a shallow depression or mud hole, where water collected in the rainy season, and, therefore, what is locally called "puncheon" (meaning cedar slabs usually about 8 to 10 feet long and 6 inches thick) had been laid by the settlers across the depression for a distance of about 20 feet to facilitate crossing it, and a certain amount of ditching, both side and transverse (box drain), has been done in an unsuccessful attempt to adequately drain off the water, which ditches formed part of the road itself. The road was originally only a bush track, and now may fairly be described as a rough

MARTIN, J.A.

but passable side road. After a careful perusal of all the evidence I should not, having regard to the surrounding circumstances and country side roads in general, describe the place in question as dangerous in the true sense at the time of the accident, which took place between 11 and 12 a.m. It openly and palpably called for careful driving, because the puncheon had largely drifted away and the water and mud were about a foot or a foot and a half deep to a firm footing, but there was nothing in the sense of a trap or any concealed danger. However, assuming that it was a dangerous place, and that the defendant, with due notice thereof, did not choose to exercise its admitted power to repair it, what is its liability?

There is no statutory obligation to repair this highway (*cf.* Municipal Act, R.S.B.C. 1911, Cap. 170, Sec. 53, Subsec. (176) and Sec. 371), as it is not a boundary road. It is to be noted that section 370 only vests the "possession" of public roads, etc., in the municipality and not the roads themselves, as in *Municipal Council of Sydney* v. *Bourke* (1895), A.C. 433; 64 L.J., P.C. 140; but in the view I take this makes no difference in the present circumstances. No question of a nuisance arises in my opinion, for non-repair cannot be transformed into a nuisance merely by so styling it, and the defendant cannot be indicted for nuisance as it did nothing and committed no breach of a statutory duty. There is no greater duty cast upon the defendant to improve or repair this road under the powers conferred by subsection (176) than there was to open or make it originally, or later to widen or stop it up; all these are "matters left absolutely to the discretion and judgment of the council," and the words are "empowering only," as was said in *Municipal Council of Sydney v. Bourke, supra,* from which I am unable to distinguish this case. To escape from the *Sydney* case it was suggested that this at bar is in reality one of misfeasance, but I am quite unable to see in what respect it can be so considered, because the defendant herein merely allowed the easterly portion of the road to remain in a rough state or gradually get worse, while repairing the western portion to a certain extent. The *Sydney* case goes, I think, to this extent, that, even if the defendant had originally properly put

MARTIN, J.A.

COURT OF APPEAL

1915

April 6.

VON MACKENSEN v. CORPORATION OF SURREY

in the "puncheon" at the hole in question and then allowed it to fall into disrepair, it would not be liable for the consequences of such non-repair. What was done in *Borough of Bathurst* v. *Macpherson* (1879), 48 L.J., P.C. 61; 4 App. Cas. 256 (*viz.*: the digging of an open drain two to four feet deep and five feet wide along the side of a highway) was explained and held in the *Sydney* case to be based on the fact "that the defendants had caused a nuisance in the highway," just as "the owner of land adjoining a highway has been held liable to an action if he digs a hole so close to the highway as to create a nuisance to passengers lawfully passing along it." Their Lordships go on to say that some of the *dicta* in the *Bathurst* case

> "can scarcely be supported, in view of the more complete discussion which the subject has subsequently undergone. But they do not affect the authority of that case, for the decision rests on grounds independent of them. The conclusion being arrived at that the defendants had caused a nuisance to the highway for which they could be indicted, it cannot be doubted that it was properly decided that the action lay."

MARTIN, J.A.

Is this Court to hold that if a municipality, under no obligation to repair, properly builds an asphalt road but decides not to repair it and lets it gradually wear down to such a state that a hole appears in it which is dangerous to traffic, thereupon the *locus* becomes a nuisance for which the municipality is answerable? I think not. But on the other hand, if a municipality undertakes, quite apart from any obligation, to repair a street, and does so in a negligent manner, by *e.g.*, leaving a sidewalk in an unsafe condition after the repairs were ostensibly finished, then it is liable for misfeasance for causing such "a dangerous nuisance": *City of Halifax* v. *Tobin* (1914), 50 S.C.R. 404.

It follows that the appeal should be allowed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This is an appeal in a negligence action in which CLEMENT, J., sitting without a jury, found in favour of the plaintiff and assessed the damages for the personal injuries sustained by the plaintiff at $350, and awarded costs on the County Court scale.

The plaintiff, a resident of Port Kells, B.C., whilst driving on the Jericho Road, within the Municipality of Surrey, was

thrown from the vehicle in which he was driving owing to the disrepair of the road, and suffered personal injuries therefrom. The point where the accident took place was about one hundred yards west of the boundary line between the Municipality of Surrey and Langley.

The Municipality was incorporated in the year 1882. The road upon which the accident occurred was gazetted as a Provincial highway on the 22nd of May, 1875.

The admitted facts would appear to be that the road was first opened up by the settlers of the district some 25 years before the trial of the action, and about 18 years ago the settlers built the road as at present existing, that is, a corduroy road, otherwise known as a puncheon road, with timbers or poles laid across the travelled way, and such was the condition when the road was brought within the municipal boundaries. No municipal organization existed at the time of the original construction of the road, nor existed at the time the corduroy road was constructed, and no work was at any time done by the appellant upon the road at the point where the accident occurred although some work was done at some other point, but it was not alleged nor contended that any work done by the appellant had caused, or in any way contributed to the accident.

The road had become defective; some of the timbers or poles were washed out, leaving spaces of some 12 to 18 inches, and the road was difficult of travel. A wheel of the vehicle struck or was caught in one of the timbers or poles in the road and the plaintiff was thrown out upon the road and sustained the injuries complained of.

The learned counsel for the appellant, in his very forceful and able argument, presented the case for the appellant in this way: that the appellant had not imposed upon it any statutory or other duty to repair the road; that the fee simple in the roads or highways is not vested in the municipality, but the possession thereof only; that the repair of the roads or highways, the opening up of same, or the taking of them over, is a matter of absolute discretion in the municipality; and that no action was sustainable for non-repair, or liability for the injuries complained of, and relied strongly upon *Municipal Council*

COURT OF APPEAL

1915

April 6.

VON MACKENSEN v. CORPORATION OF SURREY

of Sydney v. *Bourke* (1895), 64 L.J., P.C. 140, contending that it was the decisive case and was conclusive upon the question to be determined upon the facts of this present case, and was an authority which demonstrated the impossibility of the judgment herein appealed from being sustained by this Court, and I may say—in fact, I am constrained to say—that with this very high authority holding as it does, and a decision which is absolutely binding upon this Court, that in the absence of a duty or liability being imposed by an Act of the Legislature, the mere non-repair of a road does not entitle a person injured by reason thereof to sue the Municipality. It is apparent that no such duty or liability such as would be necessary to create the duty or obligation is imposed upon the Municipality by the provisions of the Municipal Act (Cap. 170, R.S.B.C. 1911).

There is no indication of the intention of the Legislature to impose any such liability as contended for. It is true that the possession of public roads is vested in the municipalities, section 370 reading as follows:

"The possession of every public road, street, bridge, lane, square, or other highway in a municipality, except such as have been taken and held possession of by any person in lieu of a public road, street, bridge, lane, square, or other highway laid out by him without compensation therefor, shall be vested in the municipality, subject to any rights in the soil which the persons who have laid out such road, street, bridge, lane, square, or other highway may have reserved."

MCPHILLIPS, J.A.

It is true there is power to make, alter, and repeal by-laws having relation to streets, bridges and roads, but in respect to the road in question nothing has been proved shewing that any such steps were taken by the Municipality having reference to the road in question, subsection (176) of section 53 of the Municipal Act reading as follows:

"For establishing, opening, making, preserving, improving, repairing, widening, altering, diverting, or stopping up roads, streets, squares, alleys, lanes, bridges, or other public thoroughfares," etc.

We do not find that express statutory requirement to repair which was present and adverted to by Duff, J. in his judgment in *City of Vancouver* v. *McPhalen* (1911), 45 S.C.R. 194 at p. 217.

In view of the very careful attention which the point in ques-

tion in this appeal received at the hands of the learned judges of the Supreme Court of Canada in *City of Vancouver* v. *McPhalen, supra,* it is not necessary to review the authorities at length, but only to point out the line of differentiation which exists between that case and this, and that is that it is a decision which only determines that where there is a statutory duty imposed to keep the highways in repair, and adequate means, by statute, have been provided enabling it to perform its obligations, persons suffering injuries by reason of such omission may sue and recover compensation although no right of action is by statute expressly provided, unless the statute itself, or the circumstances attendant upon its enactment, repel any such inference of liability.

Therefore, in my opinion, *City of Vancouver* v. *McPhalen, supra,* relied upon by the learned counsel for the respondent, cannot be held to be a decision helpful to him in the present case.

Counsel for the respondent, in a careful review of the *ratio decidendi* of *Municipal Council of Sydney* v. *Bourke, supra,* endeavoured to distinguish the effect of that decision in its bearing upon the present case in that in the case before the Privy Council it was admitted that the highway on which the accident occurred was originally constructed quite properly, but that in the present case, although the Municipality did not construct the road, it took it over, allowed it to continue, and had let a contract for work upon a portion of the road, not, however, at the point in question, and that the facts would support an action for misfeasance.

I have no hesitation in coming to the conclusion that the facts as proved in the present case cannot, even on the most elastic construction, be held to in any degree substantiate an action for misfeasance. It could only be one of mere non-feasance, and that was really the action which was tried, and, in my opinion, the present case is concluded in the appellant's favour by the decision of their Lordships of the Privy Council in *Municipal Council of Sydney* v. *Bourke, supra.* The Municipality is in no way answerable for non-feasance. Also see *Lambert* v. *Lowestoft Corporation* (1901), 1 K.B. 590; 70 L.J., K.B.

COURT OF APPEAL

1915

April 6.

VON MACKENSEN v. CORPORATION OF SURREY

333; *Maguire* v. *Liverpool Corporation* (1905), 1 K.B. 767; 74 L.J., K.B. 369.

It therefore follows that in my opinion the judgment of the learned trial judge should be reversed, the action dismissed with costs, and the appeal allowed.

Appeal allowed.

Solicitors for appellant: *McQuarrie, Martin & Cassady.*

Solicitors for respondent: *McDougal, Long, McIntyre & Cameron.*

COURT OF APPEAL

1915

April 6.

ADAM v. RICHARDS

ADAM v. RICHARDS.

Execution—Seizure of money by sheriff—Payment over to execution creditor—Subsequent assignment for benefit of creditors—Money becomes property of execution creditors on seizure—Execution Act, R.S.B.C 1911, Cap. 79, Sec. 13—Creditors' Relief Act, R.S.B.C. 1911, Cap. 60, Sec. 20, Subsec. (3)—Creditors' Trust Deeds Act, R.S.B.C. 1911, Cap. 13.

Upon the sheriff seizing money under an execution it becomes the property of the execution creditor and is not affected by an assignment for the benefit of creditors executed after the seizure.

Statement

APPEAL from the decision of GREGORY, J. at Victoria, on the 30th of October, 1914, directing that the sheriff pay certain money to the assignee for the benefit of creditors of one Molony. The plaintiff was assignee for the benefit of creditors of Molony, who was defendant in an action brought against him by the British American Trust Company, Limited. The sheriff received a writ of *fi. fa.* from the Trust Company on the 23rd of May, 1914. He seized about $500 between the 23rd and 26th of May, and paid the Trust Company a cheque

for $382.15 on the morning of the 27th of May. On the afternoon of the 27th of May, Molony made an assignment for the benefit of his creditors to the plaintiff in this action. On the following day the sheriff found he had paid the judgment creditors too much. He then made out another cheque for $357.15 and exchanged it for the cheque for $382.15 that he had given them the day before. The question of the notice of the seizure arose. The sheriff went into the debtor's store. He did not take possession, but he left a man there and took the moneys at the end of each evening until he obtained about $500. The bar business went on in the usual way under the debtor, an arrangement having been made between him and the sheriff that the sheriff would take the money each evening until the execution was satisfied. The learned trial judge held that the execution had not been completed by the payment, and that it passed to the assignee under the deed of assignment. The sheriff appealed on the grounds that the matter at issue was wholly governed by the Execution Act, that the Creditors' Trust Deeds Act had no application in the circumstances, and that the execution was completely executed by payment to the execution creditor before the assignment took place.

Statement

The appeal was argued at Victoria on the 6th of January, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Mayers, for appellant: The whole transaction is governed by section 13 of the Execution Act (R.S.B.C. 1911, Cap. 79). This is a special Act and is not repealed or affected by the Creditors' Trust Deeds Act or the Creditors' Relief Act: see *London, Chatham, and Dover Railway Co.* v. *Wandsworth Board of Works* (1873), L.R. 8 C.P. 185 at p. 189; *Fitzgerald* v. *Champneys* (1861), 2 J. & H. 31 at p. 54; *The London and Blackwall Railway Company* v. *The Limehouse District Board of Works* (1856), 3 K. & J. 123; *Johnson* v. *Pickering* (1908), 1 K.B. 1 at p. 8; *Roach* v. *McLachlan* (1892), 19 A.R. 496; *Breithaupt* v. *Marr* (1893), 20 A.R. 689. We contend the money was paid over before the assignment. On the question of payment of moneys and receipt for same, see *Clarkson* v.

Argument

COURT OF APPEAL

1915

April 6.

ADAM v. RICHARDS

Severs (1889), 17 Ont. 592 at p. 598; *Sinclair et al.* v. *McDougall* (1869), 29 U.C.Q.B. 388; *Newton* v. *Foley* (1911), 17 W.L.R. 105. The payment of the second cheque relates back to the date of payment of the first cheque: see Halsbury's Laws of England, Vol. 2, p. 553; *Kendrick* v. *Lomax* (1832), 2 C. & J. 405 at p. 409; *Marreco* v. *Richardson* (1908), 2 K.B. 584. In the alternative we say it was money that was seized. The sheriff made successive seizures of money; he never seized goods, and we contend further that it was a voluntary payment made by the debtor: see R.S.B.C. 1911, Cap. 60, Sec. 20, Subsec. (3).

Argument

McDiarmid, for respondent: The sheriff went into possession and left a man in charge. He then sold the goods and he should have held the proceeds of the sale. The Creditors' Relief Act should be held to impliedly repeal section 13 of the Execution Act. A voluntary payment is a payment made where there is no seizure, and it was admitted in the Court below that there was not a voluntary payment.

Mayers, in reply: Voluntary payment means "of his own free will" without any pressure.

Cur. adv. vult.

6th April, 1915.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiff sues as assignee for the benefit of creditors of the debtor. The moneys in dispute were seized by defendant sheriff under a writ of *fi. fa.* issued at the instance of the co-defendant. Some of them were paid over by the sheriff to the execution creditor in the morning, and in the afternoon of the same day the assignment to the plaintiff was executed.

The issue is a simple one. Section 14 (2) of the Creditors' Trust Deeds Act gives an assignment precedence over executions not completely executed by payment. In *Sinclair et al.* v. *McDougall* (1869), 29 U.C.Q.B. 388 at p. 393, Wilson, J., with whom Morrison, J. concurred, said:

"I make no distinction here between the debtor paying the money and the sheriff making it by seizure of goods and the conversion of them by sale into money, or seizing the money and getting it without the act and against the will or resistance of the debtor. When once he had the money, it ceased to be the money of the debtor and became the money of

the creditor, just the same as if the sheriff had raised the amount by seizure and sale of goods."

See also *Clarkson* v. *Severs* (1889), 17 Ont. 592.

In the case at bar the moneys were taken in specie from the debtor's till and were, except as hereinafter mentioned, on the third day paid over as aforesaid to the execution creditor under whose writ the sheriff had seized. They were taken in the legal sense of that term against the will of the debtor, and are in the same category as moneys realized on the sale of goods. From the time they came into the sheriff's hands they were moneys of the execution creditor, or of those who might become entitled to the distribution thereof under the Creditors' Relief Act.

If, then, these moneys, when they reached the sheriff's hands, ceased to be the property of the debtor, the assignment could not in any way operate upon them, and I think this would be so even if they had been retained by the sheriff for future payment over to the execution creditor, or for distribution under the Creditors' Relief Act. The moment they ceased to be the moneys of the debtor, his power to dispose of them by an assignment for the benefit of creditors, or otherwise, ceased.

Much of the argument was directed to the application to the facts of this case of the Creditors' Relief Act, but in my opinion that Act has nothing to do with the case. It has to do with the respective rights of the first execution creditor and judgment creditors who were entitled to take advantage of the Act, but the rights of those persons are not in question in this action. With such an issue the assignee for the benefit of creditors is not concerned. If he cannot get the moneys in question in virtue of the Creditors' Trust Deeds Act, then he must entirely fail.

MACDONALD, C.J.A.

There remains, however, the matter of $88.05 taken from the till by the sheriff on the evening of the 27th, the day of the execution of the assignment, still to be dealt with. The facts appear to be that the sheriff left with the debtor's bartender the sum of $60 with which to make change, and took his I.O.U. as evidence of the fact. That night, namely, after the assignment had been executed, the sheriff took from the till the said sum of $88.05,

COURT OF APPEAL

1915

April 6.

ADAM v. RICHARDS

gave $24 of it to the assignee, the plaintiff, with which to pay some arrears of wages to the debtor's employees, and carried off the balance—$64.05. It now becomes necessary to consider the rights of the parties in respect of this sum of $64.05. It appears that the said sum of $60 was included in the sheriff's cheque of $357.15 issued to the execution creditor that morning, and therefore, in the judgment below, it was not necessary to deal specifically with this sum, because the assignee was given the benefit of it as included in the gross sum awarded to him. But if that judgment is to be reversed, I have to consider the assignee's right to the $64.05 as a separate item. The arrangement under which the sheriff was virtually carrying on the business and seizing the earnings from day to day may have been a very beneficial one for all concerned, but it was an irregular way of executing a writ of *fi. fa.* If the $60 were loaned by the sheriff to the bartender, it passed to the assignee before it was taken from the debtor's till on that evening, and was the assignee's property.

MACDONALD, C.J.A.

There has been no cross-appeal, but that was unnecessary, as when the judgment below is to be set aside, this Court should render the judgment which ought to have been rendered below, and as I think this sum of $60 never passed to the execution creditor, or if at an earlier date it did so, the possession of it having been for the time being relinquished by the sheriff to the debtor, it, together with the $4.05 taken over the counter that day, passes to the assignee.

There should, therefore, be judgment for the plaintiff for the sum of $64.05, but without costs of the action, as the plaintiff has failed in his principal claim and has succeeded only in respect of a matter as to which there was no great contest.

The appellant should have the costs of the appeal.

IRVING, J.A.

IRVING, J.A.: The British American Trust Company, on the 23rd of May, 1914, placed a writ of execution for $1,524.15 against the goods of Molony in the sheriffs hands, and on the same day the sheriff seized all the goods and chattels (including some moneys) on the premises known as the "Brown Jug."

On the 27th of May, 1914, Molony made an assignment to

the plaintiff for the benefit of his creditors under the Creditors' Trust Deeds Act. On the 27th of May the sheriff paid to the plaintiff $382.15; this was afterwards reduced to $357.15. On the 28th of May the assignee made a formal demand on the sheriff for all moneys taken from the "Brown Jug." To this the sheriff, on the 1st of July, replied that the matter had been closed up some days ago. The assignee then brought this action for an account of all moneys received by the sheriff under the writ. The sheriff's defence was that he had paid over all moneys received by him before the assignment was executed or he had notice thereof, and that he was justified in so doing by section 13 of the Execution Act and section 20 of the Creditors' Relief Act. The learned judge gave judgment in favour of the assignee for $331.40, on the principle that priority among creditors was abolished, and the assignee was entitled to everything, including moneys in the hands of the sheriff under an execution not completely executed by payment. Three statutes come in question: Execution Act, R.S.B.C. 1911, Cap. 79; Creditors' Relief Act, R.S.B.C. 1911, Cap. 60; and Creditors' Trust Deeds Act, R.S.B.C. 1911, Cap. 13.

The Execution Act deals with writs of execution issued out of the Supreme or County Courts and any inferior Court. The statute is a combination of the old British Columbia statute, 1 & 2 Vict. (Imp.), Cap. 110, and some sections taken from the Ontario statute. Sections 13, 14 and 15 are taken from the Imperial statute, and authorize the sheriff to seize moneys.

IRVING, J.A.

The object of the Creditors' Relief Act is to abolish priority among creditors by execution from the Supreme and County Courts, and, to secure that end, requires the sheriff, when he levies money upon an execution, to make an entry thereof in a book, and such sum shall be distributed rateably amongst execution creditors, and other creditors whose writs or certificates are in the sheriff's hands at the time of the levy, or within 30 days after the entry.

The Creditors' Trust Deeds Act relates to assignments made for the benefit of creditors. It vests in the assignee all the real and personal estate belonging at the time of the assignment in the assignor, and declares, as to goods with which we are now

COURT OF APPEAL

1915

April 6.

ADAM v. RICHARDS

concerned, that every assignment shall take precedence of all judgments and of all executions against goods . . . . not completely executed by payment, subject to a lien in favour of such execution creditors for their costs.

It was argued by Mr. *Mayers* that the Creditors' Relief Act can have no application to a levy made on money under section 13 of the Execution Act. The history of that section is dealt with in *Johnson* v. *Pickering* (1908), 1 K.B. 1. Mr. *Mayers's* contention is that this section, being a special Act in force when the Creditors' Relief Act was first passed in 1902, is now to be treated as wholly outside the provisions of the Act, on the principle *generalia specialibus non derogant.* That argument would bring about an anomalous state of things—that whereas moneys realized by sale of goods under a writ of *fi. fa.* would be subject to the Creditors' Relief Act, money seized at the same time, under the same writ, would not be. When we read section 13 of the Execution Act and its history, we can see that the object of the enactment was, first, to enable the sheriff to seize that which at common law was not liable to seizure, and, secondly, to fix a time from which the money would become the property of the execution creditor. In effect, the statute did, with reference to money, what the common law had already done with reference to the proceeds of a sale of goods under a writ of *fi. fa.,* that is, put an end to the ownership of the debtor and make the amount seized, or the moneys realized, the property of the execution creditor, so that he could maintain an action against the sheriff therefor. That argument does not carry him vary far. The words "completely executed by payment" mean payment by the debtor to the sheriff. When the goods are sold and the money received by the sheriff, the execution debtor has lost his interest in the goods. The goods belong to the purchaser; the money paid therefor belongs to the execution creditor.

IRVING, J.A.

If the sheriff had proceeded according to the Creditors' Relief Act he would have entered it in his book, and then other claimants might have come forward and taken advantage of that Act. But, instead of doing so, he paid over to the execution creditor $357.15. It is on this refusal to follow the provisions

of the Creditors' Relief Act that the plaintiff bases his claim. The answer is, I think, plain. The assignee had no interest in the moneys paid over before the assignment. Such moneys were not part of the assignor's estate at the time of the assignment.

The appeal must, therefore, be allowed.

The assignee was entitled to the money in the till on the evening of the 27th, *viz.*: $88.05, but of that he has already received $24 in cash. His judgment will, therefore, be for $64.05, but without costs, as he failed on his main contention. The sheriff should have the costs of the appeal.

IRVING, J.A.

MARTIN, J.A.

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

GALLIHER, J.A.

GALLIHER, J.A.: The plaintiff is the assignee for the creditors of one H. H. Molony, and the defendant is the sheriff for Victoria.

The defendant, as such sheriff, seized certain moneys on the premises of Molony under a *fi. fa.* issued upon a judgment for $1,500 at the suit of the *British American Trust Co.* v. *Molony*. These moneys were seized on the 24th, 25th and 26th of May respectively, being the daily proceeds of sales in the Brown Jug Hotel, of which Molony was the proprietor, and amounted to about $500. On the morning of the 27th of May the sheriff, after deducting sheriff's fees, poundage, etc., paid over to the plaintiff's solicitors the sum of $382.15, and having on the 28th of May discovered that he paid over too much, issued a new cheque to plaintiff's solicitors for $357.15, taking back the cheque of the 27th, which had not been cashed. On the afternoon of the 27th of May, while the sheriff was still in possession, Molony executed an assignment to the plaintiff in trust for all his creditors, and the sheriff went out of possession. The plaintiff, as assignee, claims for the creditors this sum of $357.15, less the costs of judgment *British American Trust Co.* v. *Molony*. At the hearing, the learned trial judge gave judgment in plaintiff's favour for $331.40, being for the amount claimed, and from this judgment the defendant appeals.

Three Acts come in question: Execution Act, R.S.B.C. 1911, Cap. 79, Sec. 13; Creditors' Trust Deeds Act, R.S.B.C.

COURT OF APPEAL

1914

April 6.

ADAM v. RICHARDS

1911, Cap. 13; Creditors' Relief Act, R.S.B.C. 1911, Cap. 60. Under section 13 of the Execution Act, the sheriff is directed to seize all moneys, etc., belonging to the execution debtor and to pay and deliver such moneys to the execution creditor. It is contended that this clause governs, and that the Creditors' Relief Act has no application. The sections of the Creditors' Relief Act invoked by the respondents are sections 3 and 4:

"3. Subject to the provisions hereinafter contained, there shall be no priority among creditors by execution from the Supreme Court or County Courts.

"4. In case a sheriff levies upon an execution against the property of a debtor, he shall forthwith enter in a book, to be kept in his office open to public inspection without charge, a notice stating that such levy has been made, and the amount thereof; and the money shall thereafter be distributed rateably amongst all execution creditors and other creditors whose writs or certificates, given under this Act, were in the sheriff's hands at the time of the levy, or who shall deliver their writs or certificates to the said sheriff within one month from the entry of notice," etc.

Section 13 of the Execution Act, Cap. 79, R.S.B.C. 1911, is section 13 of Cap. 72, R.S.B.C. 1897, which in turn is taken from 1 & 2 Vict. (Imp.), c. 110, s. 12, and is prior in date to the Creditors' Relief Act, Cap. 17, B.C. Stats. 1902, and appellant argued that the Execution Act is a special Act and is not affected by a later Act, and for that proposition cited a number of authorities. I have read these authorities cited but they do not, in my opinion, apply in the case before us. Section 13 of the Execution Act gave power to the sheriff to seize moneys, bank notes, etc., with certain directions as to paying over or realizing upon; additional powers not theretofore possessed.

GALLIHER, J.A.

The Creditors' Relief Act abolishes priority among execution creditors and in that respect it makes no difference to my mind whether it is moneys seized or goods seized. Moneys when seized are cash and do not require to be converted or sold—goods are sold and converted into cash, and in either event the seizure of cash in the one instance and the conversion into cash in the other, the proceeds are to be held by the sheriff to be distributed as provided in the Creditors' Relief Act. But there is another feature to be considered. Assuming that the cash seized had to be retained for 30 days by the sheriff before distri-

bution, the assignment for the benefit of creditors intervenes between the date of seizure and the date for distribution. Can execution creditors whose writs are in the hands of the sheriff before the assignment rank in priority to creditors who can claim only under the assignment? *Breithaupt* v. *Marr* (1893), 20 A.R. 689, following *Roach* v. *McLachlan* (1892), 19 A.R. 496, is authority for this, but in the *Breithaupt* case the sale of the goods seized did not take place until after the assignment, while in the case at bar the actual money was seized and was in the hands of the sheriff before assignment.

Maclennan, J.A. in his judgment in the *Breithaupt* case refers to that distinction in these words:

"If the money were realized and the entry made in the sheriff's books before the assignment it is possible that the fund might be divisible among all creditors coming in within the limited time. But no question of that kind arises here, for the sale was not made until after the assignment."

I treat the moneys seized here in the same way as I would moneys realized under a sale made before the assignment, and in that view we have before us the very point suggested by Maclennan, J.A.

We, of course, have not the opinion of the Court on that point in the *Breithaupt* case, but in dealing with the case at bar it seems to me that when the sheriff seized the moneys before the assignment they became moneys which he was bound to distribute under the provisions of the Creditors' Relief Act. His first duty was to enter a notice in a book in his office stating that the levy had been made and the amount thereof, and after such entry the other creditors who within one month from the date of such entry should deliver their writs or certificates to the sheriff were entitled to share. In other words, these moneys had been realized before the assignment and as to them the execution was completely executed by payment before the debtor assigned: see *Sinclair et al.* v. *McDougall* (1869), 29 U.C.Q.B. 388. Further, moneys seized or moneys realized from the sale of goods before an assignment are in the hands of the sheriff not subject to disposal by the debtor in the same way as goods, but the special interest and property therein is in the execution creditor who has seized and such creditors as come in within the

GALLIHER, J.A.

COURT OF APPEAL

1915

April 6.

ADAM v. RICHARDS

prescribed time to the extent of their claims, so that as to these moneys execution creditors who come in subsequently are a special class by virtue of the statute and the only class who can claim to be entitled to share with the first execution creditor, and as neither the assignee nor those who claim through him by virtue of the assignment are within this class the assignee has no status to maintain this action in respect of these moneys.

There is a further item of $64.05 taken by the sheriff on the afternoon of the 27th subsequently to assignment and as to $4.05 of that there is no question that that belongs to the assignee. As to the other $60, the sheriff took that or a like amount on the 23rd but in effect lent it to the debtor to be used as change in carrying on the business. That when lent to the debtor again became the property of the debtor and was such when the assignment took effect.

GALLIHER, J.A.

This the assignee is also entitled to. The transaction, though honestly intended as in the interest of all parties, was irregular, and as the assignee claims for an account and pressed this item upon us at the hearing, we are obliged to give effect thereto. In the result the appeal is allowed with costs as to the moneys paid over to the Trust Company, and the plaintiff succeeds as to the item of $64.05, but as his action fails in the main there will be no costs below.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal should be allowed. The moneys seized and realized by the sheriff from day to day amounted *pro tanto* to the execution against goods being completely executed by payment. The decisions which in my opinion support the conclusion at which I have arrived are *Clarkson* v. *Severs* (1889), 17 Ont. 592; *Clarkson* v. *Ryan* (1890), 17 S.C.R. 251; *Thordarson* v. *Jones* (1908), 18 Man. L.R. 223; *Newton* v. *Foley* (1911), 20 Man. L.R. 519.

In considering the above authorities it is to be noted that the Creditors' Trust Deeds Act (R.S.B.C. 1911, Cap. 13) has no provision therein similar to section 9 of The Assignments Act, R.S.M. 1902, Cap. 8, which requires the sheriff when an assignment for the benefit of creditors is made to deliver to the assignee all the estate and effects of the execution debtor in his hands.

In British Columbia the controlling enactment is as contained in section 14, subsection (2), R.S.B.C. 1911, Cap. 13, which reads:

"(2) Every such assignment shall take precedence of all judgments, of all executions against goods, and of all attachments of debts not completely executed by payment, subject to a lien in favour of such execution creditors for their costs."

In *Clarkson* v. *Severs, supra,* Ferguson, J. at p. 598 said:

"The authorities are abundant, shewing, I think, that by the seizure and sale the property is changed, and not only so, but that by this act of sale and receipt of the money by the sheriff, the writ of execution is executed. From and after that period the writ is an *execution executed*; and if the payment mentioned in the section were held to mean payment to the execution plaintiff by the sheriff, I do not see how that could be any part of the execution of the writ, or how the execution of the writ (which was complete before) could be completed by it."

In *Clarkson* v. *Ryan, supra,* Gwynne, J. at pp. 257-8 said:

"Now the statute in its 9th section enacted that an assignment for the general benefit of creditors under that Act should take precedence of all judgments and of all executions not completely executed by payment; the effect of this section was to deprive a judgment creditor of all right of precedence in payment of his judgment debt as to so much of the debt as remained unpaid or unrealized by execution executed; and to give precedence to the assignment for the general benefit of creditors over all judgments, even though executions issued thereon should be in the sheriff's hands to be executed."

Some considerable stress was laid upon the action of the sheriff in at once paying over to the execution creditor the moneys realized, *i.e.,* not withholding same for rateable distribution under section 4 (1) of the Creditors' Relief Act (Cap. 60, R.S.B.C. 1911). In my opinion no heed need be given to this contention, especially in view of the evidence in the present case that no other writs of execution against the execution debtor were placed in the sheriff's hands. Further, in my opinion, the Creditors' Relief Act has no application when an assignment for the benefit of creditors has been made, then the controlling statute is the Creditors' Trust Deeds Act. In this connection I would refer to what Mathers, J. said in *Thordarson* v. *Jones, supra,* at pp. 226-7, there referring to The Executions Act, R.S.M. 1902, Cap. 58, which provides for a rateable distribution of moneys realized by the sheriff under an execution:

MCPHILLIPS, J.A.

"I am not, as it appears to me, concerned with the disposition the sheriff may have to make of this money, after he has received it. If he

COURT OF APPEAL

1915

April 6.

ADAM v. RICHARDS

were then bound to distribute it rateably amongst all the defendant's creditors as under the assignment, it might be said that nothing could be accomplished by his retaining possession of the goods. But that is not the case. At most he would only have to distribute it rateably amongst those creditors having executions in his hands."

As previously pointed out, no other executions did come into the sheriff's hands. It was not necessary that the moneys should have been paid over by the sheriff to the execution creditors. To establish "completely executed by payment" (Creditors' Trust Deeds Act, Cap. 13, R.S.B.C. 1911), payment to and receipt by the sheriff, fully satisfies the language of the statute, in my opinion, and I would refer to what Macdonald, J. said in *Newton* v. *Foley, supra,* at p. 521:

"Under section 8 of the Assignments Act, an assignment for the general benefit of creditors shall take precedence of all judgments and registered certificates of judgments and of all executions not completely executed by payment. It is urged that the words 'completely executed by payment' mean by payment to the execution creditor. The words of the statute following, 'Subject to the lien, if any, of execution or attaching creditors for their costs,' will, however, dispel that interpretation, as, after payment to the execution creditor, there could not be any lien for costs. 'Completely executed by payment' must, therefore, mean payment to the sheriff; upon payment to the sheriff, therefore, by the defendant the moneys were applied to the claim of the defendant Company. The debtor thereafter could not interfere with their application, and such moneys could not be affected by the assignment itself: *Clarkson* v. *Severs* [1889], 17 Ont. 592."

MCPHILLIPS, J.A.

With regard to the manner in which the sheriff realized the moneys, whether by sale or payment voluntary or involuntary by the execution debtor, the language of Wilson, J. in *Sinclair et al.* v. *McDougall* (1869), 29 U.C.Q.B. 388 at p. 393 is very much in point.

In *Newton* v. *Foley, supra,* the moneys were paid to the sheriff under an arrangement made between the execution debtor and the execution creditor and the sheriff was instructed to withdraw from possession and release the seizure and payments were later made to the sheriff. Macdonald, J. said at pp. 521-2 (referring to section 9 of The Assignments Act, R.S.M. 1902, Cap. 8):

"But it is further urged that under section 9 the sheriff shall, in case of an assignment, forthwith deliver to the assignee all the estate and effects of the execution debtor in his hands, and further that, if the sheriff has sold the debtor's estate or any part thereof, he shall deliver to the assignee the moneys so realized by him. The moneys received by the

sheriff were not, at the date of the assignment, part of the estate and effects of the execution debtor, as they were appropriated to and became the property of the defendant Company prior to the assignment to the plaintiff. They were not moneys realized by the sheriff from a sale of the debtor's estate and the plaintiff is not entitled to them as such."

Now a question arises as to the actual time when the assignment for the benefit of creditors took effect. The statute is silent as to this. Section 5 of the Act (Cap. 13, R.S.B.C. 1911) reads:

"5. No assignment under this Act shall be dated after the execution thereof by the assignor."

The assignment bears date the 27th of May, 1914, and there is evidence that the sheriff received upon that same day $88.05, paying thereout for wages $24, leaving $64.05, and there is evidence that this money was received after the assignment. No evidence would appear to have been given as to the actual time when the assignment was made and delivered; the assignment being a deed would take effect from delivery. Patterson, J. in *Browne* v. *Burton* (1847), 17 L.J., Q.B. 49 at p. 50 said:

"Now, the rule uniformly acted upon from the time of *Clayton's Case* [(1585), 3 Co. Rep. 1] to the present day is, that a deed or other writing must be taken to speak from the time of the execution, and not from the date apparent on the face of it. That date is indeed to be taken *prima facie* as the true time of execution; but as soon as the contrary appears, the apparent date is to be utterly disregarded."

MCPHILLIPS, J.A.

And in *Jayne* v. *Hughes* (1854), 10 Ex. 430 (102 R.R. 661), at p. 433, Pollock, C.B. said:

"We are all of opinion that the deed must be taken to speak from the time of its execution."

Therefore upon the facts, in my opinion—as to the $64.05—it cannot be said that the execution to that amount was completely executed by payment, and that amount the plaintiff is entitled to.

I would vary the judgment of the learned trial judge in this way, that the plaintiff do recover the sum of $64.05 instead of $331.40, with such costs as would in the County Court be allowed upon the recovery of such a sum, the appellant to have the costs of this appeal.

Appeal allowed in part.

Solicitor for appellant: *C. B. S. Phelan.*

Solicitor for respondent: *F. A. McDiarmid.*

COURT OF APPEAL

1915

April 6.

FITZHERBERT v. THE DOMINION BED MANUFACTURING COMPANY, LIMITED.

Company law—Action for rescission of contract for shares—Misrepresentation—Company in difficulties but not in liquidation.

FITZHERBERT v. DOMINION BED MANUFACTURING CO.

Where, in an action by a shareholder against a company for rescission of a contract to take shares, the company was in financial difficulties at the commencement of the action but liquidation had not taken place and no question of contribution had arisen, rescission will, in a proper case, be granted.

Oakes v. *Turquand and Harding* (1867), L.R. 2 H.L. 325, distinguished.

APPEAL from the decision of MACDONALD, J. at the trial of the action at Vancouver on the 9th of October, 1914. The action arose over the purchase of 270 shares by the plaintiff in the defendant Company. The facts are, that one Lynch, an agent of the Company for the purpose of soliciting subscriptions for its capital stock, approached the plaintiff with a view to inducing him to subscribe, and stated to him that one Douglas had taken shares to the value of $3,000, when in fact he had not taken any. The plaintiff intimated he had not much cash on hand, whereupon Lynch offered to obtain a purchaser at $10,000 for certain bonds held by the plaintiff in the Columbus Securities Company. The plaintiff then applied for 250 shares in the defendant Company and as payment therefor he gave Lynch the bonds mentioned and four promissory notes of $625 each payable to himself and indorsed by him in blank. Lynch, as agent for the defendant Company, then gave the plaintiff a receipt for $12,500 as payment in full for the shares. Later the plaintiff duly received the share certificates of the Company. The plaintiff paid three of the promissory notes when they came due and in the meantime purchased twenty more shares in the Company, which were duly allotted to him by the Company and paid for. Shortly before the action the plaintiff found out that when his first application for shares came before the board it was rejected because the Company could not take the bonds and promissory notes in payment therefor, and that shortly after the Company, without any notification to him, at the

Statement

request of one Bereiter (who had a large block of promoters' shares) cancelled 250 of Bereiter's share certificates and re-issued them in the plaintiff's name. Nearly a month prior to the commencement of the action an assignee had been appointed under the provisions of the Sale of Goods in Bulk Act to carry out the sale of the entire stock in trade of the defendant Company. The action was for a declaration that the plaintiff was induced to buy the shares by misrepresentation and non-disclosure of material facts, for rescission of the contracts to take shares, a return of the bonds in the Columbus Securities Company, a return of the promissory note unpaid and of all moneys that he had paid in respect of shares. The learned trial judge held that the plaintiff was entitled to rescission and ordered that the bonds of the Columbus Securities Company be returned to him; also all moneys paid by him in respect to shares. The defendant appealed.

Statement

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

Brydon-Jack, for appellant: A month before this action was brought the defendant Company made a sale of its assets and an assignment of the proceeds under the Sale of Goods in Bulk Act and was at that time insolvent. If the plaintiff does not succeed there will be 25 per cent. more for the creditors of the Company. Lynch merely produced the Douglas letter to Fitzherbert; he did not undertake to say that it was true, and there is no evidence to shew that he knew Douglas had not taken the shares. The plaintiff by his negligence and laches has waived any right he may have had. He formally applied for shares, was afterwards made a director, looked through the books of the Company and wrote letters praising the Company for sale of shares. As to the 250 shares first purchased, Lynch went to Bereiter and dealt entirely with him, Bereiter transferring his shares to the plaintiff and taking the security offered by the plaintiff as payment therefor; there was no dealing with the Company whatever as far as these shares are concerned. The notes given to the plaintiff never went to the Company, or the money received for them from the plaintiff when paid.

Argument

COURT OF APPEAL

1915

April 6.

FITZHERBERT v. DOMINION BED MANUFACTURING CO.

Abbott, for respondent: The Company is responsible as Bereiter's shares were transferred on the books of the Company to the plaintiff. The Company has by its own act through its agent put itself in such a position that it is now estopped from saying that the $10,000 was not received: see Cababe on Estoppel 50. As to the winding up of the Company see *In re London and Leeds Bank; Ex parte Carling* (1887), 56 L.J., Ch. 321; Emden's Winding-up, 8th Ed., 190. The evidence does not disclose that the Company was insolvent.

Brydon-Jack, in reply: Estoppel can only arise when the acts are inconsistent with a certain reasonable course of business. The plaintiff having waited until the Company was in such a position that it could not pay its debts is estopped from repudiating his shares: see *Tennent* v. *City of Glasgow Bank* (1879), 4 App. Cas. 615; *Derry* v. *Peek* (1889), 14 App. Cas. 337; *Burgess's Case* (1880), 15 Ch. D. 507; *Houldsworth* v. *City of Glasgow Bank* (1880), 5 App. Cas. 317; *Newlands* v. *National Employers' Accident Association* (1885), 54 L.J., Q.B. 428; *Barnett, Hoares & Co.* v. *South London Tram. Co.* (1887), 56 L.J., Q.B. 452; *Directors, &c. of Central Railway Co. of Venezuela* v. *Kisch* (1867), L.R. 2 H.L. 99 at p. 125; *Oakes* v. *Turquand and Harding, ib.* 325.

Argument

Cur. adv. vult.

6th April, 1915.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The facts of this case so far as they have been brought out in evidence are that one Lynch, the agent of defendant to solicit subscriptions to its capital stock, induced the plaintiff in June, 1912, to apply for 250 shares by falsely alleging that one Douglas had taken shares to the value of $3,000 when in fact he had not taken any. Subsequently, in October, 1912, the plaintiff applied for an additional 20 shares, which were allotted to him. Before agreeing to apply for the 250 shares the plaintiff intimated that he had not the cash in hand to pay for them. Lynch thereupon offered to obtain a purchaser at the price of $10,000 for bonds of the Columbus Securities Company which the plaintiff held. The plaintiff delivered the bonds to Lynch together with his (the plaintiff's) four promissory notes for sums aggregating $2,500 payable to

himself and indorsed by him in blank, which with the bonds would enable Lynch to find the $12,500 necessary to pay for the 250 shares applied for.

The written application signed by the plaintiff made no reference to the bonds and notes. At the same time, and on what appears to be one of defendant's forms, Lynch, as agent for defendant, acknowledged receipt of $12,500 in full for 250 shares in terms of the application, which was identified by a number corresponding to the number on the receipt. The receipt was headed "Temporary receipt," and at the bottom were the following words:

"All cheques or drafts must be made payable to The Dominion Bed Manufacturing Company, Ltd., when this application is given."

Sometime later the plaintiff received from the secretary of the Company certificates executed by the president and the secretary certifying that he had been placed on the register of shareholders in respect of 250 shares.

Shortly before the commencement of this action plaintiff became aware that the shares were not allotted to him by the Company, but were promoters' shares which had previously been allotted to one Bereiter and belonged to him, and that the plaintiff's bonds and promissory notes or the proceeds thereof had never, unless Lynch's receipt of them could be deemed to be the receipt of the Company, been received by the Company. The defendant's minutes shew that plaintiff's application had come before the board of directors and was rejected, professedly because defendant would not accept the bonds and promissory notes in payment of the shares applied for.

Without any notification to the plaintiff of this refusal the Company afterwards, at the request of Bereiter, cancelled certificates for 250 of Bereiter's shares and re-issued them in the plaintiff's name, thus intentionally or ignorantly concealing the true nature of the transaction from him. That Lynch and Bereiter, and perhaps Bereiter's co-directors fraudulently colluded together to bring about this result may in the circumstances be suspected. Neither Lynch, nor any of the persons connected with the manipulation of the shares, bonds and notes were called to give evidence. In the absence of such it cannot, I think, be inferred that anyone other than Lynch acted fraudulently. The

COURT OF APPEAL

1915

April 6.

FITZHERBERT v. DOMINION BED MANUFACTURING CO.

MACDONALD, C.J.A.

fact, however, is that the plaintiff's application to the defendant to be allotted 250 shares was not accepted, and no contract between them was made. Plaintiff's offer was not for the purchase of Bereiter's shares and hence no contract between himself and Bereiter existed. In respect of these shares therefore the plaintiff is not a shareholder in the defendant Company, and his name is not properly on the register of shareholders, and he is therefore entitled to have it removed. But the substantial relief which he claims is the return of his bonds or their value at the time they were delivered to Lynch, the return of the unpaid note, and the repayment of the moneys paid in respect of the other three notes which he had satisfied before action brought. His right to this relief depends on whether Lynch is to be regarded as his agent for the sale of the bonds and notes, or as the defendant's agent to give an acknowledgment binding on defendant of the receipt of $12,500. There is no evidence that Lynch had authority or was held out as having authority to accept bonds or notes in payment of shares. Indeed the Company could not, because of a provision to that effect in the Companies Act, accept payment for shares except in cash. The arrangement between the plaintiff and Lynch for the sale of the bonds must, I think, be regarded as an arrangement between themselves by which Lynch became plaintiff's agent to make the sale. Therefore the receipt of the bonds by Lynch was not the receipt of the bonds by the Company. There is no evidence that the bonds were in fact sold; there is no evidence of what became of them. The manner in which the notes were drawn suggests the same relationship in connection with them. They were not made payable to defendant but to the plaintiff, and indorsed by him in blank to enable, no doubt, Lynch to negotiate them. In his evidence the plaintiff endeavours to explain this by saying that Lynch told him the Company needed money, that the bank would not discount their notes, and that these notes could be more readily discounted if drawn in the way suggested. This is a most illogical reason but it is the only one given. I think the notes must be held to have been given in that way in contravention of the notice which appears at the foot of the receipt which I have already recited. Plaintiff had notice that

cheques and drafts were to be made payable to the defendant and that should have warned him not to intrust Lynch with negotiable paper. In this view of the case the Company never had possession of the bonds and notes, and hence there is nothing to make restitution of.

As regards the 20 shares applied for in October, that transaction, I think, stands on a different footing to the one which I have just been considering. The plaintiff's application for the 20 shares was accepted by the defendant and the shares were duly allotted and paid for. The plaintiff also claims rescission of this contract on the ground of fraud. The evidence is not very clearly directed to that issue, but the original fraudulent misrepresentation was never corrected, that is to say, when the plaintiff applied for and received the 20 shares he was still entitled to rely upon the representation which had been made to him when he purchased the 250 shares that Douglas had taken shares to the value of $3,000. There is no doubt that that representation was made by Lynch and that the defendant Company was privy to it and that it was calculated to and did induce plaintiff to apply for the 250 shares. No doubt there were other inducements offered to the plaintiff when he took the 20 shares, but I think it must be inferred that he acted not only on these inducements but relying on the representation which originally influenced him to become an applicant for shares.

In this view of the matter the plaintiff is entitled to retain his judgment for rescission of the contract to take those shares, and he is entitled to have his name removed from the register of shareholders in respect thereof, and to have judgment for the return of $1,000 paid to the Company therefor, with interest.

The defendant's counsel contended before us and in the Court below that because it was in financial difficulties at the time, or immediately after the commencement of this action, the plaintiff could not claim the relief of rescission, because the interests of creditors had intervened, and cited *Oakes* v. *Turquand and Harding* (1867), L.R. 2 H.L. 325; and *Directors, &c. of Central Railway Co. of Venezuela* v. *Kisch, ib.* 99, and other authorities in support of it. In my opinion these cases have no application to the present case. It cannot be doubted that as between share-

COURT OF APPEAL

1915

April 6.

FITZHERBERT v. DOMINION BED MANUFACTURING CO.

holder and company rescission may, and in a proper case, ought to be decreed. The cases mentioned above were contests between shareholder and creditors represented by liquidator, not between shareholder and company. This plaintiff is not suing to have his name removed from a list of contributories, indeed no question of contribution arises. It may be said that if he is permitted to recover judgment in this action for the return of moneys paid on account of shares the plaintiff will claim to rank with other creditors in the distribution of a fund which is insufficient to pay the creditors in full, and in this way obtain an advantage repugnant to the principle of these cases.

I do not, however, think we have anything to do with that in this appeal. If the plaintiff should seek to rank with the other creditors the liquidator has power to contest his right to do so. Then the question will be one between the plaintiff and creditors. I express no opinion as to what the result should be in such an issue. It is unnecessary here to do more than distinguish those cases from the one at bar.

MACDONALD, C.J.A.

In the result the plaintiff is entitled to have his contract for the purchase of the 20 shares rescinded; to have his name removed from the register of shareholders in respect of these shares, and also of the 250 shares; he is entitled to judgment for the sum paid for the 20 shares, with interest, and with respect to the other relief claimed and given in the judgment below, the appeal should be allowed.

The appeal having partly succeeded and partly failed, there should be no costs, but the plaintiff should have the costs of the action.

MARTIN, J.A.

MARTIN, J.A.: In this action the plaintiff seeks to rescind the contracts for the two blocks of 250 and 20 shares, to remove his name from the register and list of shareholders, and for a return of his money, promissory note, and bonds. As regards the first block the grave difficulty is that the trial judge has found, as I understand his judgment (as was open to him on the evidence) that, in plain language, the plaintiff was swindled, and that by a conspiracy of some of the Company's officers certain promotion shares which had been issued to one of the

directors, Bereiter, were surreptitiously and subsequently transferred to him in pretended answer to his application of the 3rd of July, 1912, for shares in the Company, after that application (which involved the acceptance of the plaintiff's promissory notes and Columbus Securities Company bonds), had been formally rejected by the board of directors at their meeting on the 18th of July, 1912, and the proceeds of which fraud went directly into the pockets of the conspirators instead of into the treasury of the Company.

As I view the transaction it is simply this, that it was a fraudulent scheme by certain directors to rob the Company as well as the plaintiff, and they succeeded in doing so. The application only came before the board of directors to be rejected, and so there was no acceptance of it and no contract. The effect of what was secretly done after that rejection is just the same in principle as if one or more directors had secretly taken blank shares out of the share book, filled them in, signed and sealed them and delivered them to an applicant in exchange for cash which they put in their own pockets. It was not an act of the Company at all which could estop it but simply a private and independent piece of rascality which the Company as such had no knowledge of and which it was powerless to prevent. The result is that the plaintiff never had any contract with the Company and therefore there is nothing to rescind. His remedy is a personal one against those who conspired to defraud him, but he has no claim against the Company which has suffered as much as he has.

MARTIN, J.A.

Then as to the second block of 20 shares applied for on the 3rd of October, 1912. They were paid for in cash, $1,000, to the Company, and appear to have been regularly issued, but the learned trial judge has found that the contract should be set aside for fraudulent misrepresentation, and I see no good ground for disturbing his finding. The only question that remains is the fact that the plaintiff did not bring this action till the 22nd of July, 1913, which is nearly a month after an assignee had been appointed, on 25th June, under the provisions of the Sale of Goods in Bulk Act, Cap. 204, R.S.B.S. 1911, to carry out

COURT OF APPEAL

1915

April 6.

FITZHERBERT v. DOMINION BED MANUFACTURING CO.

the sale of the entire stock in trade of the Company to one Barber, and it is submitted, on the authorities cited, chiefly *Oakes* v. *Turquand and Harding* (1867), L.R. 2 H.L. 325; and *Tennent* v. *City of Glasgow Bank* (1879), 4 App. Cas. 615, that it was then too late to rescind this contract to take the shares. I think, however, that the learned judge was right in holding that the principle in those cases, which were between liquidators and shareholders as to the right to remove names from the list of contributories, does not extend or apply to the circumstances of the present case wherein the shareholder has fully paid for his shares and no question is or can be raised as to putting him on a list therefor. Whatever rights, if any, the creditors of the Company may have against him, they do not stand in the way of his right to have the contract between himself and the Company rescinded for just cause, and the judgment below in his favour should stand in that respect.

MARTIN, J.A.

GALLIHER, J.A.

GALLIHER, J.A.: I agree with the Chief Justice.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This is an appeal from MACDONALD, J. pronounced at the close of the trial of the action, the learned trial judge having held that the plaintiff in the action was induced to apply for 270 shares in all and to take 20 shares allotted to him by misrepresentation and non-disclosure of material facts and that there was failure to allot to him in the terms of his application 250 shares, and rescission was ordered of the contracts to take shares and the register of members and list of shareholders was directed to be rectified by removing the plaintiff's name therefrom, and the 500 shares of the Columbus Securities Company, being part payment on account of the 250 shares, were directed to be re-delivered to the plaintiff, and if not re-delivered within 30 days the registrar was to proceed and ascertain the value thereof, and that value being found, that the plaintiff do recover from the defendant the ascertained value, and that in addition the plaintiff do recover the sum of $2,932.75 and that the note made and indorsed by the plaintiff and delivered to the defendant for $625, dated the 3rd of July, 1912, be delivered to the plaintiff.

The learned trial judge in his judgment held that there was misrepresentation by the sales agent Lynch, whom he found to be the duly-authorized agent of the defendant. The learned judge in the course of his judgment made use of this language:

"It is contended that the actions of Lynch are not binding upon the Company; that if he made any misrepresentations the Company was not bound. I do not think that is the law. I think an agent, employed as he was to make sales of shares, if he makes a statement that brings about a sale and application follows and is received upon that basis and then comes into the hands of the company, the company is bound."

With all respect and deference to the learned judge, in my opinion it was not established by the evidence that Lynch was the agent for the Company for the sale of 250 of the 270 shares issued to the plaintiff. With respect to the 250 shares it was a transaction whereby the plaintiff was transferred 250 shares which previously stood in the name of E. W. Bereiter, and under date August 26th, 1912, the plaintiff gave a receipt therefor. It is contended that the plaintiff was unaware of this fact. Without entering into detail of how I arrive at a contrary conclusion, I unhesitatingly say that I do not give any credence to this contention.

The plaintiff applied to the Company for the issue to him of 250 shares under date the 3rd of July, 1912, but no allotment was made, in fact the application was refused, and in particular because of the fact that the plaintiff proposed to pay therefor as to $10,000 of the $12,500—the par value—by the transfer of 500 shares of the Columbus Securities Company. The Company had determined on the 8th of February, 1912, that J. B. Askew was to be the exclusive agent for the sale of $99,750 of the Company's stock on a commission to him of 25 per cent. on all stock sold, he being empowered to accept one-fifth of the purchase price in cash and promissory notes at 6 per cent. or 6 per cent. mortgages on real estate as security for the balance, the notes to run not exceeding twelve months and the mortgages for not longer than five years, or any negotiable security approved by the directors. It is true that J. W. Lynch, purporting to act as the agent for the Company, issued to the plaintiff in respect of his application for the 250 shares a receipt for $12,500, but the receipt was untruthful and no such sum was paid to the Com-

MCPHILLIPS, J.A.

COURT OF APPEAL

1915

April 6.

FITZHERBERT v. DOMINION BED MANUFACTURING CO.

pany, and who was better aware of that than the plaintiff? The plaintiff did, it is true, turn over to J. W. Lynch 450 shares of the Columbus Securities and four promissory notes for $625, three of which notes have been paid, all of which it would seem were made to the plaintiff's own order, the plaintiff accepting as sufficient explanation that it was not desired that they should be made to the Company, as its line of credit with the Bank of Montreal, its bankers, was exhausted and it was not desired to make the transaction known to the bank, but the notes would be realized upon independent of the bank, an explanation which then and there should have aroused the plaintiff's suspicions if it was the fact that he was embarking in this transaction in good faith and not lending himself to the flotation of a Company which was clearly, as the evidence shews, being manipulated by men devoid of principle or honesty. Upon the very receipt accepted by the plaintiff is this statement:

"All cheques or drafts must be made payable to The Dominion Bed Manufacturing Company, Ltd., when this application is given."

The circumstances surrounding this application for the 250 shares are so suspicious in character that I cannot give credence to the plaintiff's testimony. I cannot believe that he was unaware that his application as made was refused by the directors and that not until the month previously to this action being brought did he become aware that he had been transferred shares that previously stood in the name of E. W. Bereiter. It is to be noted that upon the application made for the 250 shares there is this statement:

MCPHILLIPS, J.A.

"The Company reserves the right to reject all or any part of this application."

The application for the 250 shares was made on the 3rd of July, 1912, and on the 11th of July, 1912, we have the plaintiff writing a letter to the defendant Company in the following terms:

"I have subscribed for two hundred and fifty shares in your Company, as I believe that the bed which you will turn out will prove to be a better and a simpler bed to erect than any other make on the market, and I have no doubt that there is great scope for such an industry in Vancouver, and that a large field can be tapped from Vancouver. With sufficient capital to commence operations and able management, I consider that a most successful future is in store for the Company."

The plaintiff would appear to be very willing and at a very early date to lend his name to the exploitation of the Company, and no doubt to aid in inducing others to invest in the shares of the Company, and it would appear that his profession or business is that of financial agent.

On August the 8th, 1912, J. W. Lynch issued a receipt to the plaintiff for the further 50 shares of the Columbus Securities Company, making in all the 500 shares, and on the 8th of August, 1912, the plaintiff received two certificates from the Company covering 250 shares in the Company, one for 50 shares and the other for 200, and signed receipts therefor which, as they appear in the appeal book, shew that the shares were shares previously held by E. W. Bereiter, *i.e.*, it is contended that the receipts were separated from that which goes before and afterwards pasted on. No doubt that appears to be so, but again I cannot give credence to this contention and that the plaintiff was unaware of the actual facts. I am impelled to hold that he was conversant with the fact that he had had transferred to him shares previously held by E. W. Bereiter.

It is to be noted that the plaintiff in purchasing shares in the Company went upon the advice of his partner, Mr. Weller, who made an investigation of the business affairs of the Company, and it was only after this investigation was had that the plaintiff decided to purchase shares in the Company, and on the 11th of July, 1912, eight days after his application, he wrote the letter already quoted.

It was admitted upon the argument of the appeal that Lynch was not acting for the Company when he undertook to sell the stock of the Columbus Securities, but for the plaintiff. We find the plaintiff making this statement in examination-in-chief: "He [Lynch] was in a great hurry. He said that he would agree to the disposal of this stock and would sell it and buy this other stock in the Dominion Bed Manufacturing Company," and Mr. Weller, who had advised the plaintiff, was present on this occasion. This all indicates that Lynch was clothed with authority by the plaintiff to carry through a transaction of sale of the stock of the Columbus Securities and purchase on behalf

COURT OF APPEAL

1915

April 6.

FITZHERBERT v. DOMINION BED MANUFACTURING CO.

of the plaintiff shares in the Dominion Bed Manufacturing Company. To accomplish this some time would necessarily elapse, and the plaintiff apparently never obtained the certificate for the 250 shares until the 26th of August, 1912. If the position of matters was as the plaintiff wishes it to be understood, why this long delay from the 3rd of July to the 8th of August, 1912, before the certificates issued? It can only be explained upon the footing that Lynch was to in some way dispose of the Columbus Securities stock and procure shares in the Dominion Bed Manufacturing Company not by way of the application for shares to the Company but from some holder of shares in the Company.

Then we have the plaintiff on the 3rd of October, 1912, making a further application for 20 shares in the Company, but this application is at once acted upon by the Company and a certificate issues under date the 4th of October, 1912.

Then on the 7th of October, 1912, the plaintiff wrote to the secretary of the defendant Company the following letter:

"Dear Sir,—Having made further investigations with regard to the possibilities of future developments for the manufacturing of the beds for which you hold the patent rights, I believe that the Company should prove very successful and pay good dividends to shareholders. I have, therefore, arranged for the increase of my holdings from $12,500 to that of $20,000. I also trust that I may be of service in the extension of your business, as good manufacturing concerns are needed in this city."

MCPHILLIPS, J.A.

What is the explanation of this letter? It would not appear that there is any explanation. All that can be said is that it would appear that the plaintiff was ready and willing to make a statement presumably to be used to induce others to have confidence in the Company and to invest in its shares, and the statement that he had increased his holdings to $20,000 was wholly untrue. But now the plaintiff seeks in this action, when the Company is in liquidation and unable to pay its debts in full, to have set aside upon the ground of misrepresentation and fraud his business transactions with the Company, and to have returned to him moneys paid and the securities handed over or the value thereof, and that he should not be in any way a contributory or in any way responsible for the liabilities of the Company.

Further, the plaintiff in the taking of the additional 20 shares did so in consideration for or in connection with his becoming a director of the Company, and he was appointed a director, but went to England for some time and apparently was quite careless of the affairs of the Company, or at any rate rendered himself by his absence unable to give any attention to his duties as such, and yet he is contending that he never knew of the rejection of his application when he proposed to transfer the 10,000 shares of the Columbus Securities Company to the defendant Company. In connection with his application for shares or the worthlessness of the shares proposed to be transferred in this connection, and as to the moneys paid on the promissory notes the plaintiff made the following statements under cross-examination: [His Lordship read the evidence and continued.]

At the trial of the action counsel for the plaintiff took the position that the officers of the Company were scoundrels, only excepting the plaintiff. It is a pertinent question if the plaintiff has not put himself into the position, considering all the surrounding facts and circumstances, of not being entitled to now complain. In my opinion this is not a case in which rescission should have been ordered, but a proper case in which to hold that the plaintiff must be considered to be the holder of the shares standing in his name, with no right to the return of any of the moneys paid; that as to the Columbus Securities Company stock, that was a transaction in which Lynch was the agent for the plaintiff, and the Company cannot be in any way connected with that, and as to the promissory notes, these apparently were never made payable to the Company or went to the Company at all and the Company cannot be charged with any liability in respect thereof.

MCPHILLIPS, J.A.

With respect to the receipt given for $12,500 by Lynch presuming to act as the agent of the Company, all that is necessary to be said is this, that the facts disprove the payment of any such sum as $12,500, and the plaintiff cannot rely in any way upon the receipt, with respect to what payments have been made by the plaintiff upon the shares held by him, that will be a matter for the liquidator of the Company, and as to whether

COURT OF APPEAL

1915

April 6.

FITZHERBERT v. DOMINION BED MANUFACTURING CO.

he should not be placed upon the list of contributories. In arriving at this conclusion I may say it is based upon my view of all the facts and circumstances, and in my opinion the plaintiff was not misled by any false statements made by Lynch as to Douglas being a subscriber for stock in the Company. He took steps to investigate the affairs of the Company, and he was not induced or materially influenced by any false statements for which the Company is chargeable to part with any of the money paid by him. The plaintiff in examination-in-chief made answer as follows:

"At all events on the strength of what Mr. Weller told you at the time you invested? Yes."

And it was Mr. Weller who had made the investigation of the affairs of the Company at the request of the plaintiff. The plaintiff has not discharged in a satisfactory manner, in my opinion, the onus which was upon him, and that was that it was upon the false and fraudulent representations of Lynch that he was induced to become a shareholder in the Company. Further, in my opinion, he comes too late. No proceedings were taken by the plaintiff to rectify the register or for the removal of his name from the list of shareholders, and this action was only commenced on the 22nd of July, 1913, and on the 16th of September, 1913, a resolution was passed at an extraordinary general meeting for the voluntary winding-up of the Company and confirmed on the 2nd of October, 1913, and when it is considered that the plaintiff was the holder of 250 out of the 270 shares from the 8th of August, 1912, and of the remaining 20 shares from the 3rd of October, 1912, can it be reasonably said that the plaintiff may now be heard in support of the contention made by him? In my opinion the authorities are against his being so admitted to be heard. Stirling, J. in *In re London and Leeds Bank; Ex parte Carling* (1887), 56 L.J., Ch. 321, at pp. 325-6, said:

MCPHILLIPS, J.A.

"Applying the rule laid down by Lord Cairns, that the question whether or not a contract to take shares can be rescinded before the commencement of a winding up must depend upon the particular circumstances of the case, let us see what the particular circumstances of this case are. The facts are set forth in a short affidavit of the liquidator. That is all. It is not said that the applicant had any knowledge of these circumstances. In the first place, are there any countervailing equities which ought to prevail

against his right in equity to have his name removed from the register? One class of cases is where the name of the shareholder has been for a long time upon the register. That is not conclusive. But it is possible to suggest that people may have made advances on the faith of the name of that particular shareholder being on the register."

And in the present case the plaintiff is a financial agent in active business in Vancouver, where the Company carried on its business, and further he became a director of the Company, and the Company embarked in a large way of business and incurred very considerable liabilities, and so far in the winding-up proceedings 40 per cent. has been paid to the creditors, and if the plaintiff is held not to be entitled to recover in this action there will remain about 25 per cent. more for distribution amongst the creditors of the Company. In my opinion the "countervailing equities" are paramount in the present case.

In *Stone* v. *City and County Bank* (1877), 47 L.J., C.P. 681, Bramwell, L.J. at p. 695, said:

"I think I have touched on every point. In the result, then, I am of the opinion that this claim is just on the footing of rescinding, and that there is a good voluntary winding-up. I am of opinion that the case of *Oakes* v. *Turquand* (1867), 36 L.J., Ch. 949; L.R. 2 H.L. 325, shews that where there is a winding-up, whether voluntary, with or without supervision, it is too late for a person who has been defrauded into becoming a shareholder to rescind. I am of opinion that that case shews, not only that the name must be on the register, but that it is too late to rescind. Upon these grounds I am of opinion that this voluntary winding-up is good, and, upon the authority of the case of *Oakes* v. *Turquand*, this action based upon the footing of recovering the consideration money back, fails, and that our judgment must be for the defendants."

MCPHILLIPS, J.A.

The cases undoubtedly shew that once upon the register the shareholder must be vigilant to escape liability in respect of the shares held by him. Lord Cairns in *Lawrence's Case* (1867), 2 Chy. App. 412 at p. 417, said:

"It is difficult to disembarrass these cases of the effect which a man's name being on the register has in inducing other persons to alter their position."

Now the plaintiff when he came back from England in April, 1913, became aware of the bad condition of affairs of the Company, and certainly in the month of June, 1913, became aware of the fact that as to 250 of the shares held by him they were shares transferred from Bereiter, but he did not commence action until the 22nd of July, 1913. Upon this point there are

COURT OF APPEAL

1915

April 6.

FITZHERBERT v. DOMINION BED MANUFACTURING CO.

several cases, and a very short delay is held to disentitle the shareholder to relief, a delay of a couple of weeks being fatal: see *In re Scottish Petroleum Company* (1883), 23 Ch. D. 413; *Taite's Case* (1867), L.R. 3 Eq. 795; *Peel's Case* (1867), 2 Chy. App. 674; *Re Snyder Dynamite Projectile Company*; *Skelton's Case* (1893), 68 L.T.N.S. 210.

Further, in this case there was long delay, and if not knowledge the means of knowledge were available to the plaintiff: see *Ashley's Case* (1870), L.R. 9 Eq. 263; *Scholey* v. *Central Railway Company of Venezuela* (1868), *ib.* 266 (*n*).

Upon the whole, in my opinion, the plaintiff failed to establish the action as brought, namely, one for rescission, and if I should be in error in this view, the action was brought too late. I would therefore allow the appeal and dismiss the action, the defendant to have the costs in the Court below and the costs upon this appeal.

MCPHILLIPS, J.A.

Appeal allowed in part.

Solicitor for appellant: *A. C. Brydon-Jack.*

Solicitors for respondent: *Abbott, Hart-McHarg, Duncan & Rennie.*

MOORE v. DEAL AND SAULTER.

COURT OF APPEAL

1915

April 6.

MOORE v. DEAL

Practice—Costs—Previous action—Costs not paid—Vexatious proceedings —No stay granted unless action substantially same as first.

An action will not be stayed until the costs of a previous action have been paid unless the second action is founded on substantially the same cause of action as the first.

APPEAL by plaintiff from an order of MORRISON, J. made at Vancouver on the 22nd of December, 1914, striking out that portion of the statement of claim in the action that dealt with certain mineral claims known as the Copper Mountain, the Copper Mountain No. 1, and the Bank of Vancouver and staying proceedings in the action until the costs of two previous actions dealing with the same property be paid. In 1906 the plaintiff executed a power of attorney to the defendant Deal as to the Copper Mountain and the Copper Mountain No. 1 mineral claims and to the defendant Saulter as to the Bank of Vancouver mineral claim to enable them to deal with the claims in his absence. Subsequently Saulter transferred the Bank of Vancouver mineral claim to Deal and Deal transferred the Copper Mountain and Copper Mountain No. 1 to Saulter. In 1908 plaintiff brought action against the defendants to set aside the transfer of the Bank of Vancouver mineral claim, and for an account. This action was dismissed with costs. In 1909 he again brought action against the defendants to set aside the transfer of the Copper Mountain and Copper Mountain No. 1 claims and for an account. That action was also dismissed with costs. The costs were never paid. This action was brought in 1912, and in the statement of claim the plaintiff repeats the allegations made in the two previous actions respecting the same mineral claims and prays for the same relief, but in addition he sets up that the defendants had fraudulently dealt with three other mineral claims at Welcome Pass, in which the plaintiff had an interest. He also claimed to have advanced

Statement

COURT OF APPEAL

1915

April 6.

MOORE v. DEAL

the defendants certain moneys and that the defendants had received large sums in connection with the claims referred to and he prays for an account.

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

Killam, for appellant: Even if all that portion of the statement of claim is struck out that refers to the three claims litigated upon in the two former actions there still remains an independent cause of action upon which we are entitled to proceed without paying the costs of the former actions to which it in no manner relates: see *Lawrance* v. *Norreys* (1890), 15 App. Cas. 210 at p. 219; *Budge* v. *Budge* (1849), 12 Beav. 385; *Abdy* v. *Abdy* (1896), 12 T.L.R. 524; *Higgins* v. *Woodhall* (1889), 6 T.L.R. 1.

Haviland, for respondent: Everything that the plaintiff claims in this action was due him when he commenced the former actions and he should have included all he thought he was entitled to in those actions. Not having done so he must pay the costs of those actions before he can proceed: see *Boeckh* v. *Gowganda-Queen Mines, Limited* (1912), 6 D.L.R. 292 at p. 296; *Srimut Rajah Moottoo Vijaya* v. *Katama Natchiar* (1866), 11 Moo. Ind. App. 50; *Serrao* v. *Noel* (1885), 15 Q.B.D. 549; *Earl Poulett* v. *Viscount Hill* (1893), 1 Ch. 277; *Williams* v. *Hunt* (1905), 1 K.B. 512; *Humphries* v. *Humphries* (1910), 1 K.B. 796; *Martin* v. *Earl Beauchamp* (1883), 25 Ch. D. 12 at p. 15; *M'Cabe* v. *Bank of Ireland* (1889), 14 App. Cas. 413.

Argument

Killam, in reply:

Cur. adv. vult.

6th April, 1915.

MACDONALD, C.J.A.: I think the judgment appealed from was right in ordering that those portions of the statement of claim relating to the Copper Mountain, Copper Mountain No. 1 and Bank of Vancouver mineral claims should be struck out. As to the relief claimed in respect of these three mineral claims the doctrine of *res judicata* must be applied, and a subsequent

MACDONALD, C.J.A.

action for the same relief should be dealt with under the provisions of rule 288 of the Supreme Court Rules.

As to the balance of the order appealed from, I think the learned judge was in error. By the statement of claim it appears that the plaintiff and defendants were respectively interested either severally or together in a number of mineral claims. In 1906 the plaintiff executed powers of attorney in favour of each of the defendants for the purpose of enabling them in the plaintiff's absence to deal with said mineral claims.

In 1908 the plaintiff brought an action against the defendants to set aside a transfer of the said Bank of Vancouver mineral claim made by defendant Deal to his co-defendant under his power of attorney, and for an account. That action was dismissed with costs. In the following year the plaintiff brought another action against the defendants to set aside transfers of the said Copper Mountain and Copper Mountain No. 1 mineral claims made by defendant Deal under the said power of attorney to his co-defendant, and for an account. This action also was dismissed with costs. None of these costs have been paid by the plaintiff.

The present action was commenced in 1912, and in his statement of claim the plaintiff repeats the allegations made in the previous actions respecting the said mineral claims, Bank of Vancouver, Copper Mountain and Copper Mountain No. 1, and claims the relief previously claimed in the other actions. These, I think, were frivolous and vexatious claims, and were properly struck out of the statement of claim. But in addition to these claims the plaintiff set up that the defendants had fraudulently dealt with the following mineral claims belonging to the plaintiff or in which the plaintiff had an interest, namely Copper Cliff, Copper Cliff No. 1, and Copper Cliff No. 2, and a mineral claim at Welcome Pass which, in his affidavit in these proceedings, the defendant Saulter appears to identify as Copper Islet or Copper Islet No. 1. The plaintiff also claims to have advanced to the defendants the sum of $2,726 in connection with their said dealings or interests. He alleges that defendants have received large sums of money in connection with these

MACDONALD, C.J.A.

COURT OF APPEAL

1915

April 6.

MOORE v. DEAL

claims, and prays for an account. That these latter claims constitute an entirely different cause of action from those litigated in the two previous suits does not in my opinion admit of the slightest doubt. What authority is there, then, for ordering a stay of this action until the plaintiff shall have paid the costs of previous actions brought against these defendants not for the same or substantially the same, but for quite separate causes of action? I have been unable to find any. On the contrary in every case in which a stay has been granted until costs of a previous action should have been paid the relief was grounded upon the fact that the second action was for the same or substantially the same cause of action as the first. In *Higgins* v. *Woodhall* (1889), 6 T.L.R. 1, the Court of Appeal, consisting of Lord Halsbury, L.C., and Lord Esher, M.R. and Lindley and Lopes, L.JJ. on an appeal from a Divisional Court, refused a stay. The Lord Chancellor, whose remarks were concurred in by the other members of the Court, said he had no doubt that the Court had jurisdiction to interfere, but that the jurisdiction would only be exercised in the case of vexatious proceedings, and that a judicial discretion must be exercised as to what proceedings were vexatious. He is reported to have said:

MACDONALD, C.J.A.

"The Court must not prevent a suitor from exercising his undoubted rights on any vague or indefinite principles. It was clear that the Court ought not to interfere in this case. It had been urged that the cause of action was the same in both actions, but that was not so."

Turning to the Rules of the Supreme Court adopted by the Legislature, I find that rule 293 provides that if any subsequent action shall be brought before payment of the costs of a discontinued action for the same, or substantially the same cause of action, the Court or a judge may grant a stay. Such a case is exactly analogous to this one. One who has had his action dismissed with costs is not logically in any worse position in respect of the question under consideration than one who has chosen to discontinue with costs. If in the one case a plaintiff is only to be stayed if his new action is for the same or substantially the same cause of action as the old one, why in the other case should he be stayed when his action is for a separate

cause of action? This rule is in harmony with the principles adopted by Courts in the exercise of their undoubted inherent jurisdiction to prevent an abuse of their process, and I think I am right in saying that the Courts have not carried the doctrine any further generally than the Legislature has carried it in the particular case provided for in said rule 293.

Cases like the present must not be confused with those in which a stay is granted for the purpose of preventing multiplicity of action. If two actions are pending at the same time, and all the relief claimed in both may be obtained in one, the second action will be stayed and the parties allowed to settle their differences in the one action: *Earl Poulett* v. *Viscount Hill* (1893), 1 Ch. 277; and *Williams* v. *Hunt* (1905), 1 K.B. 512. I can see a very clear distinction in principle between staying an action until the costs of a previous action for substantially the same cause of action shall have been paid, and staying an action where the previous one was for a separate cause of action. Courts are loath to put obstacles in the way of a plaintiff seeking to enforce his rights, and the imposition of a condition that he shall pay money before proceeding may in effect amount to a prohibition in the case of a plaintiff without means. That consideration has no application, however, where he has already litigated the same right. Cases of this nature can now seldom arise except under said rule 293 and in actions of ejectment, or where there has been a nonsuit.

MACDONALD, C.J.A.

The appeal should be allowed to the extent of removing the stay.

IRVING, J.A.: I think the learned judge was right beyond question in striking out the matters relating to the first actions. Having done that, I am of opinion he was not justified in staying the action.

IRVING, J.A.

I would allow the appeal on that point.

MARTIN, J.A.: Though the present action is not in all respects for the same causes of action as those which have been determined in two former actions, yet I think it is really "so substantially the same" within the meaning of rule 293 or so "sub-

MARTIN, J.A.

COURT OF APPEAL

1915

April 6.

MOORE v. DEAL

stantially asserting the same rights" as Lord FitzGerald put it in *M'Cabe* v. *Bank of Ireland* (1889), 14 App. Cas. 413 at p. 416, that it would be vexatious to allow it to proceed except on terms. Now, Fletcher Moulton, L.J. said in *In re Connolly Brothers, Limited* (1911), 1 Ch. 731 at p. 746:

> "It is quite clear that the Court has felt justified in exercising this jurisdiction where it is satisfied that it would be vexatious to let the other action proceed. Just as fraud assumes innumerable shapes, so vexation may assume innumerable shapes."

Having regard to the matters alleged in the first action begun on the 21st of November, 1908, and the second one begun on the 16th of July, 1909, it is obvious, indeed it was conceded on the argument, that all charges of fraud respecting the collusive conveyance of the three mineral claims then disposed of, but now again re-vamped, should have been struck out of this new record. But in addition it was also asked in the prior actions that the plaintiff should be recognized as the sole owner of said three claims and the transfers of his interest cancelled, and this dual claim is again advanced after all these years in the present action, only now it is put forward as a "sole or joint" ownership. It is true that other claims are now included and a partnership set up, but from a perusal of all the pleadings and proceedings in the three actions it is difficult to resist the inference (in the absence of any real explanation in the affidavit of the plaintiff) that the present amplification of the original causes of action is not merely an attempt to escape the consequences of the two former failures. The statement in paragraph 5 of said affidavit that the claim in the present action is "entirely different" from the former ones is obviously untrue.

MARTIN, J.A.

Viewing the matter as a whole I think the learned judge was right in regarding it as a case where there was so much of the original "substance" left that it would be vexatious to allow it to proceed unless the costs of the former actions were paid. It is true that the second clause of the order dealing with the three said claims is, apparently by inadvertence, a little wider than the former pleadings and issues would justify, and it should be restricted to the alleged collusive transfers thereof. Otherwise the order should stand, and though the appeal must

be allowed to said extent, it should in my opinion be without costs.

COURT OF APPEAL

1915

April 6.

MOORE v. DEAL

GALLIHER, J.A.: I think the order appealed from is right as to the mineral claims already adjudicated upon, but that the appeal should be allowed as to the balance.

The order below should be varied accordingly. Costs to the appellant.

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

MCPHILLIPS, J.A.

Appeal allowed in part.

Solicitors for appellant: *Killam & Beck.*

Solicitors for respondents: *Shaw, Shaw & Haviland.*

LOCKWOOD v. NATIONAL SURETY COMPANY.

COURT OF APPEAL

1915

April 26.

LOCKWOOD v. NATIONAL SURETY CO.

Practice—Judgment—Application for on admissions in defence—Order XXXII., r. 6.

On application for judgment upon admissions in the defence under Order XXXII., r. 6, the defendant Company (a foreign corporation licensed to carry on business in British Columbia) set up that the money sued for was claimed by third parties under a foreign jurisdiction. An order was made directing the defendant Company to pay the amount claimed into Court, but that the said moneys be not paid out unless notice of the application therefor be served on the foreign claimants, the application for judgment to be finally disposed of on that application.

Held, on appeal, affirming the decision of HUNTER, C.J.B.C. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that the order was properly made in the circumstances.

APPEAL from an order of HUNTER, C.J.B.C. made at Vancouver on the 1st of March, 1915, whereby the defendant was ordered to pay into Court the sum of $4,900. The plaintiff

Statement

COURT OF APPEAL

1915

April 26.

LOCKWOOD v. NATIONAL SURETY CO.

Statement

was appointed liquidator of the National Mercantile Company, Limited, in British Columbia on the 15th of January, 1915. In October, 1914, criminal proceedings were instituted in the Federal Court of the United States at Seattle against certain officers and agents of the National Mercantile Company and in particular against A. D. Baker, agent at Portland, and R. C. Oeder, agent at Tacoma. They were later released on bail and the bail bonds were furnished by the defendant Company, whose head office is in New York and is licensed in British Columbia, $3,000 for Baker and $5,000 for Oeder. At the time of furnishing the bonds the defendant demanded of the National Mercantile Company a deposit of $8,000 in cash as security against loss, which was paid. About the 8th of January, 1915, the plaintiff, with the consent of the defendant Company, caused the said Baker and Oeder to be surrendered to the Federal Court. They were delivered over to the marshal and the bail bonds were cancelled and discharged, and proofs of the discharge were handed by the plaintiff to the defendant Company. The $3,000 paid to cover Baker's bond was refunded, but the defendant Company refused to repay the remaining $5,000, claiming, first, that it was entitled to $100 therefrom as its premium on the bond, also that it received notice from Oeder that the $5,000 was properly appropriated by the National Mercantile Company for his defence and was paid by that Company to one John W. Roberts, his attorney, for such purpose, that the said Roberts has claimed from the defendant Company that the $5,000 was paid to him and by him appropriated for the benefit of Oeder and that both Roberts and Oeder refuse to release the Company from the obligation of the bond and lay claim to the $5,000, alleging the same to belong to Roberts for the purposes of the said Oeder and his defence. The defendant Company also set up that it was cited before the Superior Court of the State of Washington by the receiver of that Court to shew cause why the $4,900 should not be handed to him on behalf of the contract holders of the National Mercantile Company in that State, alleging that the $5,000 is part of a fund improperly appropriated by the Company out of a trust

fund belonging to the contract holders and not the Company itself, and that he (the receiver) is acting for the contract holders. On ordering that the $4,900 be paid into Court the learned Chief Justice ordered that the money be not paid out unless notice of the application therefor be served on John W. Roberts and R. C. Oeder and that the motion for judgment stand adjourned to be brought on upon application for payment out. The defendant Company appealed.

Statement

The appeal was argued at Vancouver on the 26th of April, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

R. M. Macdonald, for appellant: The order appealed from was given on an application under Order XXXII., r. 6 (marginal rule 376). The Company for which the plaintiff is liquidator carried on business in several jurisdictions. Lockwood is liquidator in British Columbia. In the State of Washington the Company is in the hands of a receiver. The plaintiff says these were trust funds that belonged to the National Mercantile Company. We make an express denial that this is the case. There are therefore not the admissions in the pleadings by which such an order should be made: see *Landergan* v. *Feast* (1886), 34 W.R. 691.

Argument

Walkem, for respondent: These were trust moneys belonging to the National Mercantile Company in this Province. The $3,000 paid to cover Baker's bail was paid back.

Macdonald, in reply, referred to *Pearlman* v. *Great West Life Insurance Co.* (1912), 17 B.C. 417; *Rex* v. *Lovitt* (1912), A.C. 212.

MACDONALD, C.J.A.: I would dismiss the appeal. I think paragraph 12 of the statement of defence explains the whole situation. Two officers of this Company, the plaintiff in this action, were arrested in Seattle. They applied to their company for $8,000 to be deposited to secure bail and it was sent down apparently to the attorney who had been employed to defend these two men, and was paid to this company. Subsequently the two prisoners were surrendered and the bail bonds were

MACDONALD, C.J.A.

COURT OF APPEAL

1915

April 26.

LOCKWOOD v. NATIONAL SURETY CO.

cancelled. The question now is, what should be done with the money? That is the issue in this action. The learned Chief Justice has made an order that the money be paid into Court and that it be not paid out except upon the giving of notice to the parties concerned. I think that that order was a proper order to make.

IRVING, J.A.: I agree.

MARTIN, J.A.

MARTIN, J.A.: I think the admissions in the pleadings are too ambiguous to support the judgment given below. I think the appeal should be allowed.

GALLIHER, J.A.

GALLIHER, J.A.: I agree that the order of the Chief Justice made below is a proper order.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I think the appeal should be allowed. Unquestionably in my opinion, the defendant is in the position of being required to pay money under circumstances which the practice, pleadings and rules of the Court do not admit of. There is no opportunity on the part of the defendant Company to make Roberts, or the other party come from a foreign jurisdiction and attorn to the jurisdiction of the Court in this Province, and where the party who can give a complete discharge cannot be made a party and cannot be required to attorn to the jurisdiction, it is not a case to order payment of money into Court.

Appeal dismissed,
Martin and McPhillips, JJ.A. dissenting.

Solicitors for appellant: *Bird, Macdonald & Ross.*
Solicitors for respondent: *Burns & Walkem.*

BROWN v. NORTH AMERICAN LUMBER COMPANY, LIMITED, *ET AL.*

GREGORY, J.

1915

May 12.

BROWN v. NORTH AMERICAN LUMBER CO.

Practice—Writ—No address of defendant—Necessity for.

The omission in the writ of summons of the address of a defendant Company is fatal, and the writ will be set aside.

APPLICATION by the North American Lumber Company to set aside a writ of summons, heard by GREGORY, J. at Chambers in Vancouver on the 11th of May, 1915. The writ was issued against the North American Lumber Company, Limited, Vancouver, the North American Lumber Company (no address) and H. L. Jenkins. Two copies of the writ were left at the office of the North American Lumber Company, Limited, one of the copies purporting to be for the North American Lumber Company.

Statement

A. D. Taylor, K.C., for the application: The failure to give the address of the defendant company is fatal. As a matter of fact the Company is a foreign company with no office in Vancouver, and had the plaintiff disclosed that it was a foreign corporation the writ would have been irregular as not containing the words "Not for service out of the jurisdiction." If the defendant has no known address the last known place of business must be given. [He referred to *The W. A. Sholten* (1887), 13 P.D. 8.]

Argument

Woodworth, contra: The failure to give the address is only an irregularity and can be cured by amending the writ.

[He asked leave to amend accordingly.]

12th May, 1915.

GREGORY, J.: The application is granted and the writ is set aside.

Judgment

Application granted.

MACDONALD, J.

1915
Feb. 17.

RYDSTROM v. KROM

RYDSTROM
v.
KROM

RYDSTROM v. KROM *ET AL.*

Costs—Alien enemy—Suit against—Rights as to—Stay of execution during war.

An alien enemy may be sued during a state of war and if the action against him is dismissed the Court may award him costs.

Statement

ACTION tried by MACDONALD, J. at Vancouver on the 8th of February, 1915. Upon the dismissal of the action counsel for the plaintiff contended that as the defendants were Hungarians and alien enemies they were not entitled to costs.*

F. J. McDougal, for plaintiff.
H. S. Wood, for defendants.

17th February, 1915.

MACDONALD, J.: This action was dismissed at the trial, but, at the request of the plaintiff's counsel, the question of costs was reserved. He contended that the defendants were both Hungarians and not entitled to costs against the plaintiff. The evidence as to the nationality of these defendants is meagre, but, assuming that they are both Hungarians, I see no reason on that account to change the opinion I expressed at the trial: that they should not be deprived of costs. They were required to defend an action brought in this Province, and it would be an act of injustice were they compelled to pay their own costs in connection with their defence. Counsel for the defendants has presented a complete and carefully prepared argument in support of his contention that his clients are entitled to their costs.

Judgment

The rights of alien enemies in British Courts have been recently dealt with by the Court of Appeal in England. I quote

* Upon the formal order being submitted to the learned judge for approval he added the words, "with leave to plaintiff to apply for stay of execution for such costs," thereby giving the plaintiff an opportunity to obtain relief from the payment of money to an alien enemy during the war, following the judgment of Bailhache, J. in *Robinson and Co.* v. *Continental Insurance Company of Mannheim* (1914), 31 T.L.R. 20.

from the Times Weekly Edition of the 22nd of January, 1915, at p. 83, as follows:

"There is no valid reason why, owing to his hostile character, he (an alien enemy) should be relieved from liability to pay his British creditors. Accordingly, the Court decided he may be sued, and, if he is exposed to an action, it follows that he may appear and defend proceedings taken against him. To deny him that right would be to deny him justice and would be quite contrary to the basic principles guiding the King's Courts in the administration of justice."

These defendants had a perfect right to defend themselves in this action and, in my opinion, are entitled to their costs. There will be judgment accordingly.

Action dismissed with costs.

STEWART v. CUNNINGHAM AND SPROTT.

Sale of land—Agreement for—Action for overdue instalments—Defence of misrepresentation as to locality and quality of land.

In an action for the recovery of certain instalments payable under an agreement for sale of land the defendants claimed rescission of the contract and return of the instalments paid on the ground that the plaintiff (vendor) misrepresented the property in that the land was level, and as to its locality. The learned trial judge found for the defendants.

Held, on appeal (reversing the decision of MACDONALD, J.), that on the evidence the directions as to locality were nothing more than general indications thereof and that the contract had been affirmed by the defendants after they had notice of the true quality of the land.

APPEAL by plaintiff from the decision of MACDONALD, J. in an action tried by him at Vancouver on the 5th and 8th of June, 1914. The action arose over the sale by the plaintiff to the defendant of lot 4, district lot 882, North Vancouver, being a two-acre block, under an agreement of sale dated the 27th of May, 1912. The purchase price was $6,000, of which $1,500

Statement

COURT OF APPEAL

1915

April 6.

STEWART v. CUNNINGHAM

Statement

was payable on the execution of the agreement, and $1,125 payable every six months for four payments, with interest at 7 per cent. The defendant failed to pay a portion of the instalment due on the 27th of May, 1913, and all the instalment due on November 27th, 1913. The plaintiff brought action, claiming in all $1,876. The defendant raised the defence that during the negotiations the plaintiff, through her agent, had represented that the land in question was good, level land, and suitable for building lots, when in fact it is situate on and forms part of a precipitous slope and is unfit for the purpose for which it was purchased, also that the agent had pointed out the wrong land to them when about to inspect the property. The learned trial judge held, on the evidence, that there was misrepresentation, and gave judgment for the defendants.

The appeal was argued at Vancouver on the 25th and 26th of November, 1914, before MACDONALD, C.J.A., IRVING and MCPHILLIPS, JJ.A.

Argument

S. S. Taylor, K.C., for appellant: McCready was not in fact plaintiff's agent. He approached the plaintiff with a view of obtaining a sale to the defendants. In any case, there was no misrepresentation, as the defendants had the right property surveyed by their own surveyor, and if prior to the survey they, in endeavouring to obtain a view of the property, did not view the right property, it was due to their own carelessness.

Bucke, for respondents: The findings of the trial judge were justified by the evidence. It was on McCready's representation, he being the plaintiff's agent, that the defendants were directed to the wrong property. There were no stakes on the property by which it could be identified.

Taylor, in reply: There was a creek across the corner of the lot by which it could be located. As to the finding of the trial judge, see *Smith* v. *Chadwick* (1884), 9 App. Cas. 187 at p. 194.

6th April, 1915.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would allow the appeal. The facts and circumstances of this case are not, in my opinion, such as ought to lead to the intervention of a Court of Equity in

favour of the defendants. The transaction is a good sample of the manner in which speculators do business in a highly inflated real-estate market. The plaintiff, to my mind, was the only person connected with the sale and what followed, who was not guilty of want of reasonable care and attention to the business in hand. McCready was a friend of at least one of the defendants. He knew, or suspected, that the defendants were open to purchase a parcel of land for the speculative purpose of subdividing it into lots and offering them to the public. He ascertained the fact that the plaintiff was the owner of block 4 in a district survey in the Municipality of North Vancouver. He told her he had a "client" who would purchase the block. She was induced to "list" it with him, whereupon he sold it to the defendants and was immediately employed by them to procure its subdivision into lots and to offer them to the public. The block was surveyed by defendants' surveyor into 49 lots. The streets did not conform to the lines of the block, but angled across it, indicating plainly the precipitous nature of the ground. It was also known to all the parties, who were familiar with North Vancouver, that the property was situated on a mountain-side.

The defendants fixed varying prices for the lots, influenced no doubt by the situation and topography of the land. A prospectus was issued in which, amongst other laudatory statements, the view was said to be superb. For a year or more following the said subdivision the defendants or their agent, McCready, were endeavouring to sell lots, but the real-estate market reacted and became inert. In November, 1913, more than a year after the agreement, defendants made default in the payment of one of the instalments of purchase-money, and in February, 1914, when the plaintiff was pressing for payment, the defendants made excuses for non-payment.

MACDONALD, C.J.A.

The plaintiff finally sued for the instalment, and the defendants resisted on the ground that the block had been falsely represented to them by McCready as being good level land suitable for building lots, whereas it was not such. This was their sole defence and sole ground for rescission up to the opening of the trial, when they applied to amend by setting up that McCready

COURT OF APPEAL

1915

April 6.

STEWART v. CUNNINGHAM

had represented the land to be in a certain locality which he pointed out to them from the window of their offices, a distance of 2½ miles, with directions for their guidance for reaching it for inspection; that by reason of these directions, which were misleading, the defendants, before concluding the purchase, had inspected the wrong property, and had not seen block 4 until about the time the action was commenced. This appears to be the ground upon which the judgment below is founded. The learned judge rather severely criticized the plaintiff for not having called McCready as her witness. With great respect, I cannot concur in that criticism. McCready was no doubt the agent of the plaintiff in making the sale to the defendants, having got his commission from her. Nevertheless he was otherwise a stranger to her, while he was the friend, and subsequently to the purchase, the agent of the defendants. They had a good opinion of him even at the time of the trial, when they gave their evidence, and did not doubt his honesty. Then, why did they not avail themselves of their opportunity to call him as their witness? At all events, it is, in my opinion, not open to adverse comment that the plaintiff did not do so.

In view of the fact that after the alleged misrepresentations by McCready, that the land was good, level land, suitable for building lots, defendants sent their surveyor there, saw the result of his work, undertook to offer the property to the public as suitable for building lots, made no complaint for more than a year, and then only as a defence to a suit for purchase-money, they have, in my opinion, not made out their case as at first pleaded.

MACDONALD, C.J.A.

It therefore only remains to consider whether they ought to have succeeded on the case set up for the first time at the trial. Now, there was no uncertainty as to the subject-matter concerning which the parties were negotiating. It was a surveyed block of land, shewn on a plan which, I think the fair inference from the evidence is, defendants saw before they signed the agreement, and before they attempted to inspect the land. It was situate in a locality surveyed into blocks with streets between, some of them well-known streets with which defendants were not unfamiliar. Defendants say that a mill

was pointed out, but it appears there were two mills. Some green timber was also mentioned, and a stream. Doubtless McCready, in undertaking to direct them generally where to find the land, would mention objects of the kind, but as the land was surveyed and the posts could have been seen, McCready could not have intended his directions as more than a general indication of the locality of the land, nor could the defendants properly regard them as anything but such. If they were misled, they were, in my opinion, not misled in a way which entitled them to a rescission of the contract. I cannot regard McCready's directions as representations material to the contract.

MACDONALD, C.J.A.

The plaintiff should have judgment in the action for the moneys due under the contract, with costs, as well as the costs of this appeal.

IRVING, J.A.: In my view, the dates are of the greatest importance. The representations as to the land being suitable for subdivision purposes, this we may call a representation as to its quality, and the directions for its identification by the intending purchasers, were made early in May, 1912.

The defendants then went to North Vancouver to hunt the property up and failed to find it. On the 27th of May, 1912, the agreement for sale was made, and $1,500 paid down. In June, 1912, the property was surveyed and subdivided by the purchasers' agents. Plans were made and prices fixed. This denotes a knowledge by the defendants of the quality and characteristics of the land. On the 27th of November, 1912, the first instalment of the deferred payments fell due. It was not paid till January, 1913—six months after the subdivision. On the 27th of May, 1913, the second instalment fell due, and one-half of it was paid in June, 1913, one year after the subdivision. On the 27th of November, 1913, a third instalment fell due, and was not paid, and in this month Cunningham asked for time to make the payments then in default—sixteen months after the subdivision. On the 22nd of January, 1914, the vendor brought her action for the amount due, and in February, 1914, when the statement of defence was about due,

IRVING, J.A.

COURT OF APPEAL

1915

April 6.

STEWART v. CUNNINGHAM

the purchasers made the discovery (on which they now rely) that they had, by mistake, examined a piece of land different from that which they had bought, and that which they had bought did not have the qualities which the vendor's agent had represented it to have.

Mr. *Taylor* asks us not to believe the story told by them that this was their first visit to the land, but I do not think that course is open to us. The findings of the learned judge must be respected, and he must have thought these witnesses truthful. I think the case can be disposed of on the ground that the defendants had elected to affirm the contract after they had notice through their agent, Hewitt, the surveyor, and McCready, their subdivider and salesman, of the true quality of the ground.

When the subdivision plan was made in June, 1912, the unusual zigzag roads were plainly shewn, and Mr. Sprott inquired what was the reason for their being drawn that way, and was told that this was necessary by reason of the grades. Sprott must then have known that this subdivided land could not have been the place he and Cunningham had gone to, and which his agents, Sprott and McCready already knew was "like the roof of a house." In my opinion, this establishes clearly the intention of the defendants to accept the property notwithstanding its defects, and an election on their part not to repudiate the bargain on discovery of the misrepresentation: *Campbell* v. *Fleming* (1834), 1 A. & E. 40; 3 L.J., K.B. 136.

IRVING, J.A.

In *Oliphant* v. *Alexander* (decided by this Court on the 2nd of December, 1913), 27 W.L.R. 56, where the misrepresentation was that the ground was level, we upheld the judge's decision and rescinded the agreement. In the present case we are asked to reverse the trial judge, who has granted rescission.

In both cases the purchaser went to examine the land he was about to buy, and in both cases he got on other ground. In the *Oliphant* case the purchaser was led to buy by being expressly directed by the vendor to a piece of land which was not the land for sale. In this case the purchasers were given a description of the land, a description of its suitability for subdivision purposes, and also a description of its situation. They sought it

out alone. In the *Oliphant* case the direction was precise and given close to the land, and there could be no doubt he was misled. In this case the directions to find the land were given in the City of Vancouver, from the window of a high building there, several miles from the land; and with reference to a mill —either a shingle mill or planing mill—in such a case, as mills are constantly moved, they could easily mislead themselves. As a matter of fact, they did not find the property when they went out to inspect it, but examined property much closer to town. The surveyor employed to subdivide it had no difficulty in finding it, nor did they, when pressed by the necessity for putting in a defence. The learned judge was much concerned with the point, the serious point for his consideration, he thought, as to whether or not the visit of inspection of these two gentlemen alone was not negligence on their part of such a character as to disentitle them to relief, but he finally came to the conclusion that they acted in a reasonable manner, and granted them rescission.

In *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1, it was laid down that the effect of false representations cannot be got rid of by shewing that the person deceived was guilty of negligence. That was the sale of a solicitor's business represented to be worth £300 a year, and the negligence relied on was that the vendor's books were produced, but the purchaser did not take the trouble to look at them. But is that rule of law, which is designed, no doubt, to protect a man who has been lulled to sleep, applicable to a case of this kind, where the gist of the representation was as to the suitability of the land for subdivision—a matter which depends so much on opinion and judgment? I cannot think so. Lord Halsbury, L.C., in the House of Lords, referred with approval to the familiar canon that one must read a judgment, however general in terms, as having reference to the particular facts with which the judgment is dealing: *Russell* v. *Russell* (1897), A.C. 395 at p. 424. I do not think the point in *Redgrave* v. *Hurd, supra,* should prevent us from holding that it was the purchasers' own want of care which led them into this difficulty, more particularly as they do not suggest that McCready was guilty of misleading them—they have

IRVING, J.A.

COURT OF APPEAL

1915

April 6.

STEWART v. CUNNINGHAM

the utmost confidence in him they say. Nor can I agree with the learned judge that there was any duty on the vendor's agent to take precautions that the intending buyer is made aware of the character of the property that he intends to purchase. If the learned judge thought the question of negligence was the turning point of the case, he, in my opinion, misdirected himself. The real point was as to their intention to abide by the contract.

Then (continuing to deal with the quality of the property), what was it the plaintiff's agent said on that point more than an expression of his belief, having regard to the character of the surrounding land, the class of stuff that was being sold, and the condition of the market? There must, to justify rescission, be a definite assertion of fact, distinguished from a vague affirmance of the excellence of the property. *Dimmock* v. *Hallett* (1866), 2 Chy. App. 21, is instructive on what will justify rescission, but on the ground that the purchasers having notice through their agents of the true qualities of the ground in June, 1913, and continuing to make payments on account, I would allow the appeal.

IRVING, J.A.

McPHILLIPS, J.A.: This is an appeal from the decision of MACDONALD, J. delivered at the close of a trial had before him without a jury, the action being one for instalments of principal and interest due upon an agreement for sale of the east half of the west half of block 4, subdivision of district lot 882, group 1, Vancouver District, lying and being in the Municipality of North Vancouver, in area 10 acres, sold by the plaintiff to the defendants for $6,000, the agreement for sale entered into by the plaintiff with the defendants being of date the 27th of May, 1912.

MCPHILLIPS, J.A.

It is clear upon the facts that the defendants became the purchasers in a highly speculative way when the real-estate market was perhaps at its highest pitch, and when the instalments went into arrear it may well be said that the boom, or real-estate inflation, had broken, and the land was—and was perhaps for some time previously to the payments falling into arrear—unsaleable. The defendants set up, by way of defence, fraudu-

lent representations made by the plaintiff, *i.e.*, that the land was good, level land and suitable for building lots, whilst the land was on a precipitous slope and valueless, and counterclaim for rescission of the agreement for sale, return of purchase-money, and damages.

With the greatest of deference and respect for the learned trial judge, I am unable to agree with the conclusion at which he arrived, which was, granting rescission, and an order for the return of the purchase-money already paid by the defendants, *viz.*: $3,275.

It is patent, on the evidence, that the defendants entered into the purchase recklessly and carelessly, and were only desirous of subdividing the property and placing it upon the market, with a florid description of its beauties and potentialities, desiring to reap therefrom handsome returns from the sale prices fixed, and relied wholly upon an agent by the name of McCready, in whom they placed great trust and still believe to be an honourable man, and permitted McCready, along with Palmer, Burmeister & Von Graevenitz, Limited, to place the property upon the market. The land not selling, really, perhaps, solely because the market was too replete with like outlying subdivisions, or more probably because of the fact that the boom was on the wane, the defendants then cast about for some defence, and the defence alleged is set up. Can it be that the law will support this course of conduct of recklessness and carelessness and then absolve these defendants from obligations solemnly undertaken under an agreement for sale? In my opinion, upon the facts of the present case, the law will not excuse, but hold the defendants to the obligations undertaken by them.

MCPHILLIPS, J.A.

The learned trial judge arrived at the conclusion that McCready was the agent for the plaintiff in effecting the sale. With this finding of fact I cannot agree. In my opinion he was the agent for the defendants. The plaintiff had never seen the property and had bought it some four years before the sale to the defendants, and was not overly anxious to sell the land, and McCready opened matters with the plaintiff and said he had a client looking for land in that neighbourhood, and all that

COURT OF APPEAL

1915

April 6.

STEWART v. CUNNINGHAM

the plaintiff said was he might sell it for $6,000, and McCready paid down, about a week afterwards, the sum of $25 on account of a purchase of the land at $6,000. McCready was unknown to the plaintiff before this. Therefore, there was no representation whatever made by the plaintiff. It is contended, however, by the defendants, that representations were made by McCready to them, and directions as to where the property was upon the ground, and that in following these directions they went upon the ground but got upon the wrong property.

From the evidence, the strongest statement sworn to as to the property being level is given in the defendant Cunningham's evidence, and that is as follows:

"How did he [McCready] describe it? He said it was good building lots —that would make good building lots—It was on a general slope, and I remember asking him if it was level—and he said—I used that word 'Level.' I knew there was no level property in North Vancouver."

It may be taken I think upon the evidence as common ground that there is no such thing as level land in North Vancouver—it is all ascending land, practically foot hills to the mountains beyond.

The defendants did not proceed as reasonable men should have and could have. Had they done so, it was quite an easy matter to identify the land purchased by them. The defendant Sprott was asked the following questions:

MCPHILLIPS, J.A.

"It is very easy to get a map of North Vancouver? Yes.

"It is very easy to find lot 4, block 882? Yes.

"Did you do that? No."

The truth is that it would look as if the defendants were almost willing to delude themselves into the belief that the property they were buying was the most desirable of the immediate neighbourhood, although they were buying the land at $600 an acre as against about $1,500 an acre prevailing in the near neighbourhood.

To indicate how vague the recollection was of what McCready is alleged to have said when the proposition was mooted, is to note the following question put by his own counsel, and the answer thereto:

"Can you remember what language Mr. McCready used when he introduced this proposition to you? Well, I would not attempt to give his exact words: it is just that general impression that I have."

Now what finally induced the defendants to purchase the land? We find that in examination-in-chief the defendant Sprott said:

"This is the culmination of these negotiations (handing agreement to witness—Exhibit 1)? Yes.

"That is because of your faith in Mr. McCready's representation of the locality of the property that you bought it? That only and nothing else."

The singular happening is this, that, apparently with no further information obtained than at first they swear they were apprised of, the defendants go out, in February, 1914, after action commenced and instalments are in arrear, and then do find the property—why did they not find it at the outset? No satisfactory explanation of this is forthcoming or can be borne in upon my mind. It was the case of seeking for some line of defence and one that in my opinion is absolutely untenable upon the surrounding facts and circumstances. [Here followed a citation of the defendant's evidence on the point.]

If there was misrepresentation and fraud, it is plain that the misrepresentation and fraud could only be that of McCready, as there is no suggestion that the plaintiff was guilty of any misrepresentation or fraud; and what do the defendants say of McCready? When the defendant Sprott is under examination by his own counsel the following statements are made: [His Lordship quoted the evidence at length and continued]:

The evidence is that the defendants in about a month or six weeks after the purchase of the property had it subdivided, it being surveyed by Mr. Marvin W. Hewitt, a duly qualified British Columbia land surveyor.

It was incumbent upon the defendants to make out and substantiate their defence. It was in no way part of the plaintiff's case, in my opinion, to call McCready. McCready was the agent of the defendants, but even if the case were to be viewed differently and it could be at all contended that McCready was the agent of the plaintiff and entitled to make representations upon her behalf, the defendants having apparently unbounded faith in McCready could have safely called him. However, to counsel must be left the conduct of the case. It only remains for the Court to determine the facts and apply the law thereto.

That which the defendants were called upon to prove and in

COURT OF APPEAL

1915

April 6.

STEWART v. CUNNINGHAM

which they failed in my opinion is well defined in *United Shoe Machinery Company of Canada* v. *Brunet* (1909), A.C. 330, *per* Lord Atkinson at p. 338.

It is to be remembered that this is not an action for specific performance, but one for instalments due, and the defence is rescission, and it requires stronger evidence to be adduced, because it has been laid down that "misrepresentation, though in a slight degree, is an objection to a specific performance"; there is a distinction when the contract is asked to be rescinded: *Cadman* v. *Horner* (1810), 18 Ves. 10; 11 R.R. 135; *In re Banister. Broad* v. *Munton* (1879), 12 Ch. D. 131 at p. 142.

There has been long delay in the present case, but it is said the defence now set up was not even discovered until after the commencement of action; this is a circumstance though that weighs strongly with me in not giving credence to the defence as set up. How impossible is it to believe that this question of gradient was unknown to the defendants? The survey is made within one month or six weeks of the purchase, the surveyor goes upon the ground, makes the survey, plants the stakes, makes the plan, and blue prints are struck off, the prices are fixed upon the lots varying with location, printed matter with plan is distributed to the public all under the direct supervision and control of the agents for the defendants, and yet it is contended that this question of gradient known to the surveyor and the agents of the defendants, if not known to the defendants, is at this late date such a defence as will entitle rescission to be granted. As pointed out by the surveyor, the gradient does not exceed that present in a well-settled portion of the City of Vancouver, and it is a matter of common knowledge that in the large cities of the Pacific Coast the grade in question would not be deemed to be at all prohibitive or ever greatly affect the saleable value: that which destroyed the saleable value of the property in question was not the gradient, but the collapse of the boom.

MCPHILLIPS, J.A.

In my opinion the defendants failed to establish a defence which would admit of rescission being directed, and therefore the appeal should be allowed, the plaintiff being entitled to judgment for the amount claimed and due under the agreement

for sale, the counterclaim to be dismissed and the plaintiff to have the costs in the Court below and of this appeal.

Appeal allowed.

Solicitors for appellant: *McLellan, Savage & White.*
Solicitors for respondents: *Lucas, Lucas, Bucke & Wood.*

THE ROYAL BANK OF CANADA v. WHIELDON AND BALL.

Chattel mortgage—True consideration—Past debt—Sufficiency of description of chattels—Assignment of mortgage—Bills of Sale Act, R.S.B.C. 1911, Cap. 20, Sec. 7—Bank Act, Can. Stats. 1913, Cap. 9, Sec. 76.

By an agreement made between The People's Trust Company, Limited, and the Royal Bank of Canada, on the 13th of January, 1913, it was recited that the said Company was carrying on business as agents and trustees and as the receivers of moneys paid on deposit, that at its branch at South Hill, the Company had received on deposit $30,341.31 and had lent at interest $25,576.50, receiving therefor promissory notes, bills of exchange, and other securities; that the Company desired to sell said branch business to the Bank and at the same time provide for payment to the depositors the amounts due them; that the Company had agreed to transfer to the Bank the business at said Branch, with the office, premises, and contents thereof, and had agreed to pay the Bank the difference between the amount of the deposit accounts and the total amount of the promissory notes and bills of exchange aforesaid. The agreement then provided that the Company should convey to the Bank the premises aforesaid, with the goods and effects situate thereon, the deposit accounts and the promissory notes, bills of exchange, and other securities aforesaid; that the Company would pay to the Bank in cash $4,762.81, being the difference between the amount of the deposits and the total amount of the promissory notes and bills of exchange; that the Company should execute and deliver to the Bank its promissory note for $30,341.31, which the Bank would discount, and deposit the cash equivalent to the credit of the Com-

COURT OF APPEAL

1915

April 6.

ROYAL BANK OF CANADA v. WHIELDON

pany in the Bank in a special account, from which the depositors to the deposit account aforesaid should be paid, and that the Bank should credit on said promissory note the amounts collected on the said bills of exchange and promissory notes. The agreement further provided that the Bank could, within six months from the date of the agreement, call upon the Company to receive back any of the said promissory notes or the bills of exchange, the Company to replace for same a cash equivalent, but that such of the bills of exchange or promissory notes as remain at the end of the six months and are not rejected by the Bank should be taken over by the Bank, the Company's note to receive credit for the amount of the securities so held; finally that upon the due transfer of the various properties as aforesaid the Bank was to pay the Company $12,500.

Held, that the transaction was not in contravention of section 76 of the Bank Act.

Where a promissory note is given to cover a past debt, and a chattel mortgage is given at the same time to secure the note, the consideration therein stated being "a loan of $1,200 on a promissory note of even date," the failure to disclose the past debt does not invalidate the mortgage under section 7 of the Bills of Sale Act.

Credit Co. v. *Pott* (1880), 6 Q.B.D. 295, followed.

Where the mortgage contains a full description of the promissory note it is intended to secure, the fact of its not being attached thereto does not invalidate the mortgage.

The description of chattels in a mortgage is sufficient if their identity are thereby capable of ascertainment.

Statement

APPEAL by defendant Ball from the decision of MURPHY, J. in an action tried at Vancouver on the 8th and 9th of September, 1914. The action was commenced to restrain the defendant Ball from disposing of certain goods and chattels of the defendant Whieldon, which the plaintiff Bank claimed was covered by a chattel mortgage it held. Ball claimed that under an agreement between himself and Whieldon, made subsequently to the mortgage, he was authorized to sell the goods and chattels in question to pay himself an indebtedness that Whieldon owed him. By consent, the goods and chattels were sold by Ball, sufficient of the proceeds being paid into Court to satisfy the plaintiff's claim, if successful in the action. In 1912, Whieldon owed The People's Trust Company $1,119.92 on an overdue account. On the 4th of January, 1913, he gave the Trust Company a promissory note for $1,200 and a chattel mortgage to secure the note. The consideration mentioned in the mortgage was "a loan of $1,200 on a promissory note of

even date." On the 13th of January, 1913, The People's Trust Company and the Royal Bank entered into an agreement whereby the Trust Company agreed to transfer to the Bank the business of its branch at South Hill, South Vancouver, including the note and chattel mortgage in question. On the 29th of January following, The People's Trust Company assigned for the benefit of its creditors. On the 15th of September, 1913, in pursuance of the agreement of the 13th of January, The People's Trust Company formally assigned the chattel mortgage in question to the plaintiff. The learned trial judge held that the agreement of the 13th of January gave the plaintiff a good equitable title to the chattel mortgage; that it did not contravene section 76 of the Bank Act; and the plaintiff was entitled to judgment for the amount claimed.

Statement

The appeal was argued at Vancouver on the 30th of November and the 1st of December, 1914, before MACDONALD, C.J.A., IRVING, GALLIHER and MCPHILLIPS, JJ.A.

J. A. MacInnes, for appellant (defendant): We contend, first, there was not a sufficient description of the chattels to identify them, and the burden is on the mortgagor to identify them: see *Winter* v. *Gault Brothers, Limited* (1913), 18 B.C. 487; (1914), 49 S.C.R. 541. Section 7 of the Bills of Sale Act is not complied with, as the "true consideration is not set out in the mortgage": see *Ex parte Carter. In re Threappleton* (1879), 12 Ch. D. 908; *Ex parte National Mercantile Bank. In re Haynes* (1880), 15 Ch. D. 42; *Ex parte Charing Cross Advance and Deposit Bank. In re Parker* (1880), 16 Ch. D. 39; *Ex parte Challinor. In re Rogers, ib.* 260; *Credit Co.* v. *Pott* (1880), 6 Q.B.D. 295; *Hamilton* v. *Chaine* (1881), 7 Q.B.D. 319; *Ex parte Rolph. In re Spindler* (1881), 19 Ch. D. 98; *Ex parte Firth. In re Cowburn, ib.* 419; *Winter* v. *Gault Brothers, Limited, supra.* We say the mortgage was given for a past-due debt. The full amount of $1,200 set out in the mortgage and in the note was not advanced; the larger portion of it was in payment of an old debt: see *Counsell* v. *London and Westminster Loan and Discount Co.* (1887), 19 Q.B.D. 512. The description of the chattels does not comply

Argument

COURT OF APPEAL

1915

April 6.

ROYAL BANK OF CANADA v. WHIELDON

with the cases, as it does not specify any particular horses, cows, etc.: see *McCall* v. *Wolff* (1885), 13 S.C.R. 130; *Carpenter* v. *Deen* (1889), 23 Q.B.D. 566; *Williams* v. *Leonard & Sons* (1896), 26 S.C.R. 406. The mortgage is void unless accompanied by the statutory affidavits, and if the Court does not designate an officer to execute an assignment, the assignment of a chattel mortgage by one not so designated is invalid: see *Jones* v. *Imperial Bank of Canada* (1876), 23 Gr. 262; *Bank of Toronto* v. *Perkins* (1883), 8 S.C.R. 603. As to the Bank having an equitable title, see the judgment of Duff, J. in *Winter* v. *Gault Brothers, Limited* (1914), 49 S.C.R. 541 at pp. 560-1.

Argument

Sir C. H. Tupper, K.C., for respondent: The defendant Ball has no status to attack our mortgage, as he is not a *bona-fide* purchaser for value: see *Parkes* v. *St. George* (1884), 10 A.R. 496; *Empire Sash and Door Co.* v. *Maranda* (1911), 21 Man. L.R. 605. We contend Ball was nothing more than an auctioneer for Whieldon: see *Carpenter* v. *Deen* (1889), 23 Q.B.D. 566; *Hickey* v. *Greenwood* (1890), 25 Q.B.D. 277. With relation to the identity of the horses, etc., and the question as to upon whom the burden of proof lies, see *Davies* v. *Jenkins* (1900), 1 Q.B. 133; *Nattrass* v. *Phair* (1875), 37 U.C.Q.B. 153; and with relation to the question of identity of the chattels, see *Ross* v. *Conger* (1857), 14 U.C.Q.B. 525; *Fitzgerald et al.* v. *Johnston et al.* (1877), 41 U.C.Q.B. 440; *Accountant* v. *Marcon* (1899), 30 Ont. 135; *Carr* v. *Allatt* (1858), 27 L.J., Ex. 385. With reference to the date being left out, see *Mowat* v. *Clement* (1886), 3 Man. L.R. 585. Unless we have title under the agreement of the 13th of January, we have no title: see *Black & Co.'s Case* (1872), 8 Chy. App. 254; *Re McCann Knox Milling Co.* (1910), 1 O. W. N. 579. As to the objection that the consideration is not truly set forth, we contend that on its face the mortgage is given as security for a past debt; even a slight discrepancy is not fatal: see Barron on Bills of Sale, pp. 45-6 and 428. There is no authority for the contention that the fact of the note not being attached to the mortgage is fatal to its validity: *Counsell* v. *London and Westminster Loan and Discount Co.* (1887), 19 Q.B.D. 512, cannot be applied here.

As to the contention that the agreement of the 13th of January is in contravention of section 76 of the Bank Act, see Falconbridge on Banks and Banking, 2nd Ed., 296; *Re Ontario Bank* (1909), 21 O.L.R. 1; *McFarland* v. *Bank of Montreal* (1911), A.C. 96.

MacInnes, in reply.

Cur. adv. vult.

6th April, 1915.

MACDONALD, C.J.A.: The plaintiff's rights in this action are founded upon the chattel mortgage given by the defendant Whieldon to The People's Trust Company and assigned, as the plaintiff alleges, to it. The action was commenced to restrain the defendant Ball from disposing of goods and chattels of his co-defendant Whieldon, and which the plaintiff alleges to be covered by the mortgage. Ball's title depends upon an agreement entered into between himself and his co-defendant subsequently to the mortgage, by the terms of which Ball was authorized to dispose of the goods and chattels in question and to hold the proceeds in trust to pay the costs of the sale, to pay himself (Ball) an indebtedness which his co-defendant owed him, and to pay one May an indebtedness owing to May by defendant Whieldon, and if anything should remain it was to belong to defendant Ball. By consent, the goods and chattels were sold by Ball, and sufficient of the proceeds paid into Court to satisfy the plaintiff's claim if it should succeed in this action. Ball was in possession at the time the action was commenced, and therefore, the plaintiff must succeed, if at all, on the strength of its own title.

The defendants attacked the mortgage on several grounds; they said the consideration was not truly set forth in the mortgage as required by the Bills of Sale Act. It appears that Whieldon owed The People's Trust Company, on an overdue account, $1,119.92. He gave a promissory note to that company for $1,200, and gave the mortgage to secure the note. This paid off the indebtedness and left a small balance to his credit. In the mortgage the consideration was stated to be "a loan of $1,200 on a promissory note of even date." Therefore, any creditor, or other person interested in Whieldon's estate,

COURT OF APPEAL

1915

April 6.

ROYAL BANK OF CANADA v. WHIELDON

looking at the mortgage would, I think, be justified in concluding that the mortgage was given for a present advance. I think that is the effect of the statement of the consideration.

In the absence of authority, I should have thought that when a statute declares that the true consideration should be set forth, otherwise the mortgage would be void, that it meant the true consideration in substance and not merely in form, and that if the real object was to secure a past debt, the concealment of that fact by stating the consideration to be money lent on the security of a promissory note of even date with the mortgage would be an evasion of the statute. But I think I am bound by authority to hold otherwise. I refer to *Credit Co.* v. *Pott* (1880), 6 Q.B.D. 295, which has been referred to without disapproval in a number of subsequent cases.

Further attack was made on the ground that the promissory note was not attached to the mortgage. The mortgage, however, contains a full description of it, and I think that is sufficient.

It was also contended on behalf of the defendants that the description of the chattels in the mortgage was insufficient. Were this case governed by statutes similar to those in force in Ontario and Manitoba, I think this objection would be fatal. But our statute does not require a description of the chattels,

MACDONALD, C.J.A.

and therefore, if the instrument described the chattels in such a way as to leave their identity capable of ascertainment, I think it is sufficient. In other words, unless the description is so indefinite as to render the instrument void for uncertainty, I ought to hold the description sufficient.

The chattels are described as a certain number of horses and cows and 150 tons of hay, and all other goods and chattels in and upon the premises occupied by the mortgagor, or in and upon any other premises the property of the mortgagor, together with all other goods and chattels that may hereafter be brought upon the said lands, in addition to renewal of or substitution for the above-enumerated goods and chattels, all of which are then described as being in and upon lands therein specified.

Again, it was said that there was not sufficient evidence that

the goods taken possession of by the defendant Ball, and subsequently sold by him, were the goods, or any of the goods, described in the mortgage. I think the learned judge was entitled to draw the inference that the goods sold by Ball, and which realized between four and five thousand dollars, were all the goods and chattels on the premises of Whieldon—at all events, that there were more than sufficient of the goods covered by the mortgage to satisfy the plaintiff's claim.

It was further contended that there was no legal assignment of the mortgage to the plaintiff. I think the document of the 13th of January, 1913, was a sufficient assignment, hence it is unnecessary to consider the effect of the subsequent assignment of The People's Trust for the benefit of their creditors, and the later order for the winding up of that company's estate. The contention that the assignment should be accompanied by an affidavit of attestation and an affidavit of *bona fides* is not, in my opinion, a sound one. By the Bills of Sale Act it is provided that an assignment need not be registered. It is, therefore, in a different category to the bill of sale itself.

The only other substantial ground of attack upon the mortgage was that the transaction between The People's Trust Company and the plaintiff, evidenced by the agreement of the 13th of January, was, so far as this mortgage is concerned, a violation of section 76 of the Bank Act. I do not think it is. The law is not quite settled on the point, but it was discussed in *Bank of Toronto* v. *Perkins* (1883), 8 S.C.R. 603. Mr. Justice Gwynne, in that case, appears to adopt the *dicta* of Robinson, C.J. in *Commercial Bank* v. *Bank of Upper Canada* (1859), 7 Gr. 423 at p. 430, in which the *bona fides* of the transaction between the Bank and its customer is made the test. It is there said that if the mortgage was really and in truth taken to secure the loan upon the bill, and not that the bill was created for the purpose of upholding and giving colour to the mortgage, the transaction should be sustained. That question was treated as a question of fact, and deciding the question of fact in this case, I have no doubt that as between The People's Trust Company and the plaintiff, the transaction was one in

MACDONALD, C.J.A.

COURT OF APPEAL

1915

April 6.

ROYAL BANK OF CANADA v. WHIELDON

which neither party had any intention of evading the provisions of the Bank Act.

I think, therefore, the appeal must be dismissed.

IRVING, J.A.: I would dismiss the appeal for the reasons given by the Chief Justice.

GALLIHER, J.A.: This case has caused me no little trouble to decide, more especially upon one point, but on the best consideration I can give it I have come to the same conclusion as the Chief Justice, in whose reasons for judgment I concur.

The point I refer to is whether the mortgage truly sets forth the consideration.

GALLIHER, J.A.

Had it not been for the decision in *Credit Co.* v. *Pott* (1880), 6 Q.B.D. 295, which seems exactly in point here, I must confess I would have inclined to the view that the consideration was not truly set forth. However, I feel that I must defer to the better judgment of the eminent judges of appeal who tried that case, approved of as it is in later cases in the English Court of Appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In this case the appellant Ball claims that the chattel mortgage and assignment thereof, upon which the Royal Bank (the respondent) bases its claim to the money in Court (the goods and chattels were sold and to the extent of $1,082.18 paid into Court to await such disposition thereof as might be made in this action), is invalid and void upon a number of grounds. As to the chattel mortgage, the consideration is not truly set forth, being collateral security to a promissory note—the promissory note not attached thereto—subject to a defeasance not expressed; affidavit of attestation defective in that chattel mortgage not marked as exhibit; affidavit of *bona fides* not made by authorized officer, nor does it truly set forth consideration; description of the goods and chattels insufficient; and no proof that the promissory note was ever made or delivered. As to the assignment of the chattel mortgage, that same is not duly attested by affidavit and is without the affidavit of *bona fides* called for by the Bills of Sale Act, and was not executed by the proper officer of the Westminster Trust

Limited, liquidator of The People's Trust Company, Limited, as required by section 30 of the Winding-up Act, R.S.C. 1906, Cap. 144; that The People's Trust Company, Limited, having on the 29th of January, 1913, executed a general assignment of all its assets, real and personal, to assignees for the benefit of creditors, same became vested in the assignees, inclusive of the chattel mortgage in question, and, therefore, could not assign the chattel mortgage to the Bank on the 15th of September, 1913; that the Bank cannot set up any title to the goods and chattels under the agreement of the 13th of January, 1913, in that same was not pleaded, and in any event invalid by reason of section 76 of the Bank Act (R.S.C. 1906, Cap. 29), and that the Bank failed to identify the goods and chattels sold by the appellant Ball and there was failure to prove the specific goods and chattels of which conversion was alleged, or the measure of damages sustained by the Bank.

The appeal was very exhaustively argued by counsel for the appellant, but, in my opinion, the appeal really resolves itself into exceedingly small compass, as presented by the learned counsel for the Bank.

All the objections, both as to substance and technicality, to the chattel mortgage and the assignment thereof may at once be swept away when it is seen that the appellant Ball was in no way a purchaser for value, or otherwise entitled to the goods and chattels sold by him. The document under which title was claimed clearly disproves this, being the agreement of surrender of lease, of date the 11th of August, 1913, paragraph 2 thereof reading as follows:

MCPHILLIPS, J.A.

"2. The party of the first part [the appellant Ball] shall on or before the 31st day of October, 1913, cause to be sold by public auction, which shall be well and sufficiently advertised for a period of two weeks preceding the sale, all the said goods, chattels and effects, hay, crops, farm stock of whatsoever nature the property of the party of the second part [the defendant Whieldon] and situate on the premises hereinabove described or either of them."

It will be therefore seen that the appellant Ball in making the sale of the goods and chattels was selling not his goods and chattels but the goods and chattels of the defendant Whieldon, and there is no evidence whatever to substantiate any claim

COURT OF APPEAL

1915

April 6.

ROYAL BANK OF CANADA v. WHIELDON

that the goods were sold under distress for rent or that the appellant Ball was in any other way rightly entitled to the goods and chattels.

In the result of things, the sale was really a sale by the appellant Ball with the authority of the defendant Whieldon the mortgagor under the chattel mortgage to The People's Trust Company, Limited, which chattel mortgage was duly assigned to the Bank. This being the situation of matters, it is plain that all the exceptions taken as to the validity of the chattel mortgage wholly fail. However, were it necessary for me to decide upon the many exceptions taken to the validity of the chattel mortgage and the assignment thereof I do not hesitate to say that none of them have merit or in any way impugn the full force and validity of the chattel mortgage and the assignment thereof.

The defence which was most strongly pressed before this Court and the Court below was the invalidity of the transaction, and reliance was placed upon section 76 of the Bank Act; and that the transaction was one of lending money on goods in consideration of a present advance.

MCPHILLIPS, J.A.

I have carefully and anxiously scanned, weighed and considered the agreement of the 13th of January, 1913, between The People's Trust Company, Limited, and the Bank, and have come to the conclusion that it is an agreement that can be well supported—in the light afforded—as to what the law really is in respect to matters of this character. And it must be recollected that it plainly was not the intention of Parliament to render impossible that which is necessary in the carrying on of banking business and the safeguarding of business and financial affairs generally. The authorities which support the transaction here impeached in my opinion are the following: *Re Ontario Bank* (1909), 21 O.L.R. 1; *McFarland* v. *Bank of Montreal* (1910), 80 L.J., P.C. 83; *Ontario Bank* v. *McAllister* (1910), 43 S.C.R. 338; and see *per* Maclaren, J.A. in *Re Ontario Bank, supra,* at pp. 32-3.

This is not a case of the Royal Bank entering into a transaction with another Bank subject to the Bank Act as The People's

Trust Company, Limited, is not so subject, but that does not really affect the question of law. The People's Trust Company, Limited, had engaged in business—in some respects analogous to that engaged in by a Bank subject to the Bank Act—but not in contravention of it, and to acquire the business so carried on was, in my opinion, the doing of something by the Royal Bank appertaining to the business of banking.

It is contended that because of the fact that the promissory note of the defendant Whieldon was secured by the chattel mortgage in question that the Royal Bank in taking over the promissory note of the defendant Whieldon and the chattel mortgage securing the same contravened section 76 of the Bank Act when the Royal Bank in conformity with the agreement of the 13th of January, 1913, took from The People's Trust Company, Limited, the promissory note indorsed as agreed upon for $30,341.31, that note to be deposited to the credit of The People's Trust Company, Limited, in a special account to be opened as The People's Trust Company, Limited, account in trust for depositors of South Hill branch, but The People's Trust Company, Limited, were not to be at liberty to withdraw any portion of the proceeds of the promissory note until the whole of the depositors had been paid in full and the liability of The People's Trust Company, Limited, and the directors to the Royal Bank and the liability to the depositors of The People's Trust Company, Limited, was completely discharged, and only thereafter such sum as remained should be paid over.

This in effect amounted to what might be termed a guarantee to cover the amounts due to the depositors, it being a matter of estimate though that the deposit accounts would be met by the amount outstanding upon loans secured by promissory notes, bills of exchange and other securities—of which the chattel mortgage in question in this action was one—the amount of the loans being $25,578.50, the difference between this amount and the $30,341.31 being provided by The People's Trust Company, Limited, paying the Royal Bank as well in cash $4,762.81, that is, the amount of the loans being got in with this cash payment the total amount due the depositors would be met.

COURT OF APPEAL

1915

April 6.

ROYAL BANK OF CANADA v. WHIELDON

The agreement cannot be said to be one easy of construction, yet, after all, it would really seem to be more one of purchase than one of the borrowing by The People's Trust Company, Limited, and a lending by the Royal Bank, in fact, it can be said to be the former, but if the latter I am of the opinion that it is supportable and not affected by section 76 of the Bank Act.

It was in the agreement provided that within a period of six months certain of the promissory notes, bills of exchange and securities might—at the election of the Royal Bank—be rejected, but at the expiration of that period they were deemed to be taken over by the Bank, and The People's Trust Company, Limited, then became entitled to credit therefor—and amongst others so taken over and the securities held therewith was the promissory note and the chattel mortgage of the defendant Whieldon securing the same.

The evidence is that the agreement was carried out and the transfers made of the various properties, real and personal, by The People's Trust Company, Limited, to the Royal Bank, and the cash payments made by The People's Trust Company, Limited, to the Royal Bank—at least I so understand the evidence and it was not contended otherwise upon the argument of the appeal, *viz.*: the $4,762,81 provided for in paragraph 8, and the $12,500 provided for in paragraph 16, of the agreement. Therefore we have a completed agreement and an effective purchase which in my opinion the Royal Bank was at liberty to make and the transaction was not *ultra vires* in its nature and does not offend, in my opinion, any of the provisions of the Bank Act, but is a transaction which can be said to be one—in ordinary course—in the discharge of the business of banking and appertaining thereto.

MCPHILLIPS, J.A.

The present case has few features differing from that of *Re Ontario Bank, supra,* and *McFarland* v. *Bank of Montreal, supra,* and, in my opinion, it is unnecessary to further enlarge upon the analogy and similarity of the facts. It must be taken as an assumed fact that, in all cases where a transaction of the nature of that between the Montreal and Ontario Banks takes

place, that there will be securities which will be transferred, no doubt properly taken in the discharge of banking business and in conformity with the Bank Act, and when, in their nature mortgages upon real or personal property, so taken for debts past due to the bank, unquestionably these securities would be capable of being enforced. In the present case the chattel mortgage, which, in my opinion, the Royal Bank is entitled to claim under, was taken in due course by The People's Trust Company, Limited, when an advance was made, that company not being subject to the Bank Act, and it was a security it was entitled to take and being transferred to the Royal Bank under the provisions of the agreement of the 13th of January, 1913, it becomes a security enforceable by the Bank in the carrying out of the terms of that agreement.

In *Ontario Bank* v. *McAllister* (1910), 43 S.C.R. 338, Sir Charles Fitzpatrick, C.J. said at pp. 347-8, when dealing with the contention that there was a violation of the Bank Act:

"With respect to the alleged violation of the section of the Bank Act which prohibits trafficking in or carrying on the business of buying and selling goods, wares and merchandise, this was an isolated transaction entered into to enable the Bank to realize the amount of an indebtedness which had been legally contracted and anything done for that purpose cannot affect the legality of the transaction under which the bank acquired the assets of the company and assumed its obligation under the lease."

How destructive of the possibility of the entry into such an agreement as is in question in this case, to hold that the security under which the Royal Bank is claiming is unenforceable, an agreement which is in no way attacked, a *bona fide* agreement, and all to the end and purpose that the depositors of The People's Trust Company, Limited, be paid the moneys due and owing to them out of the assets of that company.

Further we have Davies, J. saying at p. 353 of *Ontario Bank* v. *McAllister, supra*:

"Banking business in Canada must from the very circumstances of the case, I should imagine, be conducted upon a broader and somewhat more elastic basis than in fully developed business communities such as Great Britain and in construing the powers conferred upon banks to carry on 'such business generally as appertains to the business of banking' it is fair that Canadian conditions should be fully considered and allowed for."

In my construction of section 76 of the Bank Act the taking

COURT OF APPEAL

1915

April 6

ROYAL BANK OF CANADA v. WHIELDON

of the assignment of the chattel mortgage called in question in the present case was not *ultra vires* of the Royal Bank and that the chattel mortgage was and is an enforceable security.

That the chattel mortgage was well and sufficiently assigned, in my opinion, cannot be successfully gainsaid. The assignment was duly carried out, following the terms of the agreement of the 13th of January, 1913, by The People's Trust Company, Limited, by its liquidator, the Westminster Trust Limited, through one J. J. Jones, its principal officer, designated by the Court pursuant to the order of GREGORY, J. under date the 24th of February, 1914, and was in my opinion sufficiently authorized.

That the appellant Ball is not to be admitted to contest the legality or validity of the chattel mortgage and the assignment thereof has already been passed upon—it being my opinion that he cannot—he was merely the agent for the sale of goods and chattels the property of the defendant Whieldon in no way a purchaser thereof for value or otherwise entitled to them, and as the defendant Whieldon admittedly cannot take any exception in the matter, it is clear that the appellant Ball cannot: see *Gray* v. *Stone and Funnell* (1893), 69 L.T.N.S. 282. The conversion was wrongful and the Royal Bank, in my opinion, was, and is entitled, to the moneys lodged in Court being representative of the goods and chattels to which the Royal Bank was entitled and wrongly converted and sold.

MCPHILLIPS, J.A.

In the result, in my opinion, the judgment of MURPHY, J. should be affirmed and the appeal dismissed.

Appeal dismissed.

Solicitors for appellants: *Affleck & MacInnes.*
Solicitors for respondent: *Tupper, Kitto & Wightman.*

IN RE CHARLESON ASSESSMENT.

COURT OF APPEAL

1915

April 21.

IN RE CHARLESON ASSESSMENT

Assessment—Court of Revision—Right of appeal—Mandamus—Vancouver Incorporation Act, B.C. Stats. 1900, Cap. 54, Secs. 38 and 49.

Where the members of a Court of Revision, on an appeal from an assessment, have considered the evidence before them and honestly applied their minds to the decision of the case under the provisions of the Act giving them jurisdiction, a *mandamus* to compel them to review their decision will not lie. (MARTIN, J.A. dissenting on the facts.)

Per MACDONALD, C.J.A.: By section 38 of the Vancouver Incorporation Act, the Legislature endeavoured to fix a basis upon which the assessments should be made. What the land would fetch at the moment at a forced sale is not the test. The assessor should look to the past, the present and the future. His view point should not be different from that of a solvent owner not anxious to sell, yet not holding for a fictitious or merely speculative rise in price.

APPEAL from an order of HUNTER, C.J.B.C. made at Vancouver on the 30th of March, 1915, on motion of Percy W. Charleson for an order *nisi* that a prerogative writ of *mandamus* do issue against the Mayor and Aldermen of the City of Vancouver on the ground that they acted as a Court of Revision on the 26th of February, 1915, and following days and heard the appeal of the said Charleson with regard to the assessment of lots 1 and 2, block 63, subdivision of lot 541 in said City, and refused to decide the appeal in the manner provided by section 38 of the Vancouver Incorporation Act, the Court having sustained the assessment of said lots. The lots in question were assessed at $136,500 for land and $18,500 for buildings, the net profits in rents from the property for that year being approximately $4,000. In the previous year both land and buildings were assessed at $125,000, and during the latter part of 1914 and the fore part of 1915 rents throughout the City dropped from 35 to 50 per cent. The assessor was required to assess all property under section 38 of the Vancouver Incorporation Act, 1900, which is as follows:

Statement

"All rateable property shall be estimated at its actual cash value as it would be appraised in payment of a just debt from a solvent debtor, the

COURT OF APPEAL

1915

April 21.

IN RE CHARLESON ASSESSMENT

value of the improvements, if any, being estimated separately from the value of the land on which they are situate."

The learned Chief Justice granted the order, and the City appealed on the following grounds: That the Court of Revision, in relation to the assessment roll in question, met according to law and heard and determined all appeals that came lawfully before it, and the sittings of the said Court are concluded and its members are *functus officio* as members of said Court and cannot meet again for the hearing of appeals from such assessments; that the learned judge below had no power, jurisdiction, or authority to make the order appealed from; that the members of said Court of Revision did not refuse to decide the appeal of said Charleson in the manner provided for in section 38 of the Vancouver Incorporation Act, 1900, but on the contrary decided said appeal in the manner provided for in said section; that the theory that the assessment must be based upon the capitalized value of the income produced by the property assessed at the date of assessment, is clearly erroneous and would entirely ignore the prospective or potential value of the property within the reasonably near future; and on other grounds.

Statement

The appeal was argued at Vancouver on the 9th and 12th of April, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Ritchie, K.C. (*E. J. F. Jones,* with him), for appellant: It is wholly a question of misconduct, and there is no evidence of misconduct on the part of the Court of Revision. It has done nothing but assess values, and this Court cannot go into the system of assessment: see *In re Sisters of Charity Assessment* (1910), 15 B.C. 344; 44 S.C.R. 29; *Prudhomme* v. *Licence Commissioners of Prince Rupert* (1911), 16 B.C. 487 at p. 492; *Board of Education* v. *Rice* (1911), A.C. 179. The aldermen said they considered in their best judgment the value of the property in accordance with the provisions of the Act, *i.e.,* "as it would be appraised in the payment of a just debt": see *In re Vancouver Incorporation Act and Rogers* (1902), 9 B.C. 373; *The King* v. *Moncton Land Co.* (1912), 13 Ex. C.R. 521 at p. 522; *Re Municipal Clauses Act and J. O. Dunsmuir*

Argument

(1898), 8 B.C. 361; *The Queen* v. *Land Tax Commissioners* (1851), 16 Q.B. 381; *Reg.* v. *Fry; Ex parte Masters* (1898), 19 Cox, C.C. 135. In a case where there is no assessment at all, *i.e.*, in the case of an assessor simply plastering an amount on the premises and not making an assessment, there is no appeal from the Court of Revision; the proper procedure is by *certiorari*: see Short & Mellor's Crown Office Practice, 2nd Ed., pp. 81-2. Any one who has a judicial duty or quasi-judicial duty to perform and does not do it, the remedy is by *certiorari*. They must act judicially and in accordance with the Act: see *Rex* v. *Woodhouse* (1906), 2 K.B. 501 at pp. 512-13. The provisions in the Vancouver Incorporation Act are the same as subsection (3) of section 135 of the Municipal Clauses Act, R.S.B.C. 1897, Cap. 144: see *Re Smith Assessment Appeal* (1898), 6 B.C. 154; *Rex* v. *Local Government Board. Ex parte Arlidge* (1914), 1 K.B. 160. The members of the Court of Revision considered the matter and gave their decision forthwith in proper form; there cannot be a *mandamus* in regard to this Court for after the revision is made the Court is no longer in existence. The *Prudhomme* case can be distinguished, as in that case the board was still in existence.

Martin, K.C., for respondent Charleson: There is no dispute as to the evidence and there is no evidence upon which the assessment can be upheld. The Court increased the assessment so that there would be equalization in the assessment all around. Such a system of assessment may bring about a fraud on the public generally, and there is no evidence upon which the Court of Revision came to the conclusion they did: see *Reg.* v. *Adamson* (1875), 1 Q.B.D. 201; *United Buildings Corporation, Limited* v. *City of Vancouver Corporation* (1915), A.C. 345. We say without reservation that the statement in the affidavits filed that they found the property, on the evidence, worth $155,000 in accordance with section 38 of the Vancouver Incorporation Act, is not true.

Argument

Ritchie, in reply: The fact that Charleson says he will take $150,000 for the property has no bearing on the issue. Even if the Court made a mistake in principle it cannot be attacked by *mandamus*: see *Board of Education* v. *Rice* (1911), A.C.

COURT OF APPEAL

1915

April 21.

IN RE CHARLESON ASSESSMENT

179. A *mandamus* will not issue where it would be futile: see Halsbury's Laws of England, Vol. 10, p. 101; *Rex* v. *Mayor and Aldermen of Axbridge* (1777), 2 Cowp. 523; *Reg.* v. *Wilson and others* (1880), 43 L.T.N.S. 560. The members of the Court are accused of perjury, but they were not examined on their affidavits. As to the Court being *functus officio* see *In re Sisters of Charity Assessment, supra,* and *Rex* v. *Shann* (1910), 79 L.J., K.B. 736.

Cur. adv. vult.

21st April, 1915.

MACDONALD, C.J.A.: For several years prior to 1913 what in popular parlance and in the evidence is called a "real-estate boom" dominated the inhabitants of the City of Vancouver. Land values, population, building and municipal works and improvements increased enormously. Two or three years ago the inevitable happened. The bubble burst and the pendulum swung to the opposite extreme. In these circumstances the assessor was called upon to assess the lands within the City under section 38 of the Vancouver Incorporation Act, 1900.

He assessed the land in question in this appeal at $136,500 and the building at $18,500. Mr. Charleson, the owner, complained to the Court of Revision that the land was assessed beyond its actual cash value and offered evidence in support of his complaint. The Court of Revision, after taking time to consider, confirmed the assessment. Mr. Charleson then applied for a *mandamus* to compel the Court of Revision to re-hear the complaint and to adjudicate thereon according to law. The submission of Mr. *Martin,* his counsel, was that the Court of Revision had ignored section 38. Affidavits of all the members of the Court of Revision who had adjudicated on the case were filed. Each deposed that the Court had proceeded on the footing of the said section. Nevertheless the learned judge ordered the writ of *mandamus* to issue and from that order the City has appealed to this Court.

MACDONALD, C.J.A.

The assessor is, by law, required to make oath to the correctness of his roll, *i.e.,* that he has made his assessment in accordance with law and that I must take it he did in this case.

Putting aside technical objections to the order appealed from and to the appropriateness of the form of relief sought, which, in the view I take of the merits of the case, I am not called upon to consider, I come to the important question involved in this appeal. It is not denied by Mr. *Martin* that if the members of the Court of Revision honestly applied their minds to the decision of the case on the footing of said section 38, no Court of law can interfere. The order appealed from can only be upheld, if at all, on the ground boldly taken by Mr. *Martin* that the Court of Revision deliberately and dishonestly ignored section 38 and upheld the assessment on extraneous grounds, and did not in law adjudicate at all, but only pretended to do so.

The only evidence upon which he can ask us to infer that there was no real adjudication of Mr. Charleson's complaint, is that of Mr. Nicolls, an assistant assessor. Mr. Nicolls took part in the cross-examination of Mr. Charleson and his witnesses and at the close was called to the witness box by Mr. *Martin* and asked if he would pledge his oath to the truth of the remarks and opinions expressed by him during such cross-examination, which he did.

Speaking of the valuation of Mr. Charleson's lands Mr. Nicolls said:

"It is merely the present value of what the future will be."

And again:

"My contention is I am saying your future value is not $150,000, it is a great deal more."

And again:

"We attempted to make the figures what they would be in a normal town, in a normal time. Our highest assessment is $2,650 [per foot]. We say that is a fair normal figure.

"An Alderman: You took into account the present conditions? Not the war. We tried to equalize the assessment and put it up to the Council what general reduction they could make. The Council do not contend we could sell that property at that price today."

By section 38 the Legislature endeavoured to fix a basis upon which assessments should be made. What the land would fetch at the moment at a forced sale is not the test. I think the assessor should look to the past, the present, and into the future. His view point should not be different to that of a solvent

COURT OF APPEAL

1915

April 21.

IN RE CHARLESON ASSESSMENT

owner not anxious to sell, but yet not holding for a fictitious or merely speculative rise in price.

The assessment in question is on a valuation of $2,300 per front foot. There is evidence that at the height of the boom adjacent land of about the same relative value sold at $4,000 per front foot. At the time of the valuation complained of all these lands were practically unsaleable. There was no market. It was not suggested that this condition of things will continue indefinitely, though there may be a wide divergence of opinion as to how long it will prevail. Is then, the assessor to shut his eyes to the past and the future and to fix the value on the axiom that a thing is worth just what you can get for it? When these lands had a fictitious selling value of $4,000 per foot, the assessor, if he believed the value to be fictitious, could not honestly and in compliance with section 38, assess them at that figure. It is not the speculative value but the actual cash value which must rule, and that, in my opinion, is what the assessor honestly believed to be its worth in cash under normal conditions. Conversely, if the conditions are abnormal in the opposite direction, that is to say where there is no market, he must no less than in the first example endeavour to fix the value on a normal footing.

MACDONALD, C.J.A.

Mr. *Martin* contends that rentals are the most trustworthy criterion of value and that applying that test his client's land is overassessed. But this contention does not advance us any. The conditions which affect the selling market also affect rentals. This is made plain in the evidence in which it is conceded that rentals have dropped to about one-half of their former level.

While Mr. Charleson puts the value of his land at less than $100,000, yet in answer to a question by his counsel he said that he would be willing to sell the land and the building, which together are assessed at $155,000, to the City for $150,000, which may have indicated to the Court of Revision that he was not willing to sell for less than that figure. In other words, it was worth more than he could get for it under existing abnormal conditions. To that extent at least his ideas coincide with those of Mr. Nicolls.

With the soundness of the Court of Revision's judgment we

have nothing to do, but only with the honesty in this transaction of its members, and on a view of the whole case I find nothing to warrant the order appealed from.

In my opinion, the appeal should be allowed and the order set aside with costs here and below.

IRVING, J.A.: The respondent, Mr. Charleson, is the owner of two lots situate at the corner of Granville and Robson Streets, in the City of Vancouver, and was assessed in respect thereof, under the Vancouver Incorporation Act, 1900, for the year 1915, on the basis that the value of the property was $155,000, the land having been valued by the assessor at $136,500 and the building thereon at $18,500.

Mr. Charleson, feeling that he had been overcharged in the Roll, complained to the Court of Revision, and the Court of Revision, after hearing his evidence as well as that of Mr. R. C. Procter, who has been in the real-estate business in Vancouver for the last seven years, of Mr. Ames, also connected with the real-estate business, and the evidence of Mr. Nicolls, an assistant to the city assessor, reserved their judgment and some days afterwards confirmed the assessment. Mr. Charleson then applied to and obtained from the Chief Justice of the Supreme Court an order for a writ of *mandamus* directed to the appellants as members of the Court of Revision to hear the appeal in the manner provided in section 38 of the above-recited statute.

The respondent's complaint is that the Court of Revision in refusing his appeal and sustaining the said assessment—I quote from his affidavit—"Never considered the evidence offered by me as establishing the value of the said property for assessment purposes as provided in section 38." From the opening remarks of Mr. *Martin* made to the Court of Revision on the 26th of February, 1915, when he read to the Court the 38th section, it is clear that the Court must have appreciated that it was on that section that the appellant relied.

On the hearing of the application by the learned Chief Justice eight affidavits were read in which eight of the 13

COURT OF APPEAL

1915

April 21.

IN RE CHARLESON ASSESSMENT

aldermen pledged their oaths to the effect that they had carefully weighed the evidence given before the Court of Revision and after consideration they had honestly and impartially reached the conclusion that the actual value of the lots and improvements, as the same would be appraised in payment of a just debt from a solvent debtor, was substantially the amount found by the assessor and that in the event of their being required to reconsider the same question on the same evidence, they would reach the same conclusion.

When the appeal came on to be heard before this Court we ruled that the order was a "final" order within the rule, but Mr. *Martin* admitted that the personnel of the council had been changed since the 10th of March, the day on which the Court of Revision had given judgment, by the election to the Council of a new alderman, and the argument proceeded on that basis.

The writ of *mandamus* is a high prerogative writ and it issues to the end that justice may be done in all cases where there is a specific legal right and no specific legal remedy for enforcing such right: *In re Nathan* (1884), 12 Q.B.D. 461 at p. 478; 53 L.J., Q.B. 229; or where, although there may be an alternative legal remedy, yet such mode of redress is less convenient, beneficial or effectual. *The King* v. *The Bank of England* (1819), 2 B. & Ald. 620. Where the alternative remedy is equally convenient, beneficial or effective, a *mandamus* will not be granted. This is not a rule of law but a rule regulating the discretion of the Court in granting writs of *mandamus*: *In re Barlow* (1861), 30 L.J., Q.B. 271.

IRVING, J.A.

In the case of *In re Sisters of Charity Assessment* (1910), 15 B.C. 344; 44 S.C.R. 29, the point there involved was raised by *certiorari,* but it was doubted in the Supreme Court of Canada whether that was the proper method of procedure. In trying to ascertain the exact ground on which a refusal of a *certiorari* would be based, I have come across a case, *The King* v. *King* (1788), 2 Term Rep. 234, where it was held that *certiorari* would not lie to remove assessments to the land tax, because to remove them would result in delay and occasion grave public inconvenience. This case gives point to the

limitation of the right to appeal specified in section 56. I shall not rest my decision on the ground that *mandamus* is not the proper remedy. The decision of the Court of Appeal in *Rex* v. *Stepney Borough Council* (1901), 71 L.J., K.B. 238, looks as if *mandamus* was the proper remedy if the Court of Revision had neglected to consider the case in accordance with the standard laid down by section 38. For the purpose of this judgment, I will assume that it was the proper and only remedy without so deciding. The basis of my decision is that there was no solid reason for believing that the Court was guided by evidence of extraneous matters in reaching a conclusion which was quite properly open to it acting in observance of the statute.

Parliament has seen fit to commit to the Council sitting as a Court of Revision the duty of revising, equalizing and correcting the assessment roll, and it has constituted the mayor and aldermen, of whom five shall form a quorum, judges for that purpose, who shall meet and try all complaints in respect thereof. The Court is authorized to take evidence on oath, and an appeal is given from the decision of the Court of Revision to a judge of the Supreme Court (section 56), but this appeal is limited to the question whether the assessment in question is or is not equal and rateable with the assessment of other similar property in the City having equal advantage of situation against the assessment of other property of which no appeal has been taken.

IRVING, J.A.

In addition to the sworn testimony, the members of the Court of Revision are permitted "to use their own judgment as men of affairs," *per* Idington, J. in the *Sisters'* case (1910), 44 S.C.R. 29 at p. 36. In our own Courts we have recognized this privilege, and the Court is "entitled to assume the assessor's rating presumably correct and quite well warranted by the statute," *per* Idington, J. at p. 36.

At the hearing before the Court of Revision the respondent expressed himself satisfied with the assessment of the improvements at $18,000.

Mr. Charleson gave evidence that this property which had been assessed in 1914 for land $107,250, building $18,500;

COURT OF APPEAL

1915

April 21.

IN RE CHARLESON ASSESSMENT

total $125,750; and for 1915, land $136,500, building $18,500; total $155,000. His claim was that the rents of the day determined the value of property, and as there had been heavy falling off within the last few years, from 33 to 50 per cent., the property was overassessed according to its present value. He admitted that the property was well situated on the best street in Vancouver and that property on the street in the neighbourhood of his lots had been held at $4,000 a front foot.

In reply to the question as to the assessment on the property on the basis laid down in section 38, Mr. Charleson said:

"I am willing to sell that property to the City for $150,000."

He then proceeded to say that, tested by rentals, the property would not be assessable for anything like that sum. Having regard to the price placed upon it by himself and the powers entrusted to the members of the Court to use their own judgment as men of affairs, I say it is impossible to say that there was not evidence which would justify them in coming to the conclusion they did.

The assessment for 1914 does not concern us at present. The views of the Court of Revision for 1914 cannot control the members of the Court in 1915 on a question of fact. In an application for a *mandamus,* the Supreme Court does not sit as a Court of Appeal. If the Court of Revision, acting in a judicial temper, fairly and in good faith tackles the problem

IRVING, J.A.

put before them, they have done their duty even if they have made a mistake, and a writ of *mandamus* should not be allowed. It would be only a cloak to disguise an appeal, notwithstanding the limitation in section 56.

The learned Chief Justice, in reaching the conclusion that the Court of Revision had acted in defiance of section 38, had to consider the evidence given before the Court and the affidavits of the eight aldermen. In regard to the duty of an appellate or reviewing Court considering evidence, we are told that great weight must be attached to the conclusion reached by the Court which has seen and heard the witnesses. That principle presupposes that the Court is honestly endeavouring to do right.

After jury trials, we have verdicts set aside because there was no evidence upon which the jury could find a verdict, and

we have verdicts set aside on the ground that they are against the weight of evidence, such a verdict that a jury reviewing the whole of the evidence reasonably could not properly find: *Metropolitan Railway Co.* v. *Wright* (1886), 11 App. Cas. 152; 55 L.J., Q.B. 401. Lord Halsbury at p. 156 put it this way:

"If reasonable men might find the verdict which has been found, I think no Court has jurisdiction to disturb a decision of fact which the law has confided to juries, not to judges."

In a recent case, *Lendrum* v. *Ayr Steam Shipping Co.* (1914), 84 L.J., P.C. 1, on appeal to the House of Lords from Scotland, the decision of an arbitrator under the Workmen's Compensation Act was being canvassed. The arbitrator's finding had been upset by the Court of Session of Scotland and a difference of opinion existed in the House of Lords. Three supported the arbitrator and two the Court of Session. Earl Loreburn, at p. 5, said in part:

"When the question is whether or not an arbitrator as a reasonable man could arrive at a particular conclusion, I find that in some instances Courts have held that he could not, while some of the judges have actually agreed in the conclusion. That is my position to-day. I hope that I am a reasonable man, and if I had been the arbitrator I should have come to exactly the same conclusion on the facts which he has found. I think that the moral is that we should regard these awards in a very broad way, and constantly remember that we are not the tribunal to decide. I shall always be slow to say that no reasonable person could think differently from myself."

Lord Shaw, at p. 9, said:

"Had I been the arbitrator, had the noble earl on the woolsack been the arbitrator, had Lord Parmoor been the arbitrator, we should each of us have reached the same conclusion as that reached by the arbitrator in this case. Had either Lord Dunedin or Lord Atkinson been the arbitrator they would have reached an opposite conclusion. I grant freely that we are all reasonable men, and that as such each of us is willing to concede of the others that the conclusions which we respectively reach on the same facts, although quite opposite conclusions, are such as may be reached by a reasonable man. I ask myself, what right have we to deny similar treatment to the arbitrator appointed by the Legislature to determine the facts in the first instance?"

IRVING, J.A.

I think the principle taught in this case is respect for and toleration of the opinion of others. In such a case as this, where we are called upon to review the action of the Court of Revision, we should take a broad view of the evidence and of the right of the members of that Court to form their opinion

COURT OF APPEAL

1915

April 21.

IN RE CHARLESON ASSESSMENT

and to refuse a *mandamus* unless we are satisfied they acted without *bona fides*.

The affidavits filed by the eight aldermen are unanswered. There was no cross-examination thereon, and, although Mr. *Martin* before us plainly charged the deponents with falsehood, I am not prepared to accept that view, or that they misconducted themselves in the Court of Revision. The observation of Duff, J. as to our duty to assume, unless there is solid reason for otherwise diciding, that the Court of Revision followed the statute in the discharge of their functions is very much in point. I think that irrespective of these affidavits we would be bound to decide against Mr. Charleson on the authority of the *Stepney* case where the Court of Appeal expressed the opinion that if there was any evidence before them that the Council had exercised its own discretion the *mandamus* should not be allowed to issue.

Mr. *Martin* relied on *Reg.* v. *Adamson* (1875), 1 Q.B.D. 201; 45 L.J., M.C. 46. That was an application for *mandamus* to magistrates who had refused to issue a summons to certain persons charged with conspiring to break the peace at a meeting held by sympathizers of the claimant in the *Tichborne Case*. The evidence of the breach of the peace was plain and of an organized arrangement beforehand to disturb the meeting, but the magistrates who filed affidavits, in refusing to issue the summons, thought that the persons applying for it were applying in such a manner as to disentitle themselves from the law. The order for the *mandamus* was made with hesitation on the part of Blackburn, J., with some perplexity by Cockburn, C.J. The case is authority for the principle that the decision of a case by a judicial body on evidence of extraneous conditions is ground for *mandamus*. See also *Rex* v. *London County Council* (1915), 31 T.L.R. 249.

IRVING, J.A.

But the vital difference between that case and this is to be found in the affidavits filed in opposition to the application. There the magistrates said they thought they would not, acting in the interests of the community, be justified in granting summonses for conspiracy. Here we have affidavits saying that the magistrates recognized and were governed by section 38

as establishing the standard of valuation and that they are not convinced by the evidence of Mr. Charleson or his witnesses.

They have heard all that was offered to them, including extraneous matters urged by the assistant assessor in, as he supposed, the interest of the City, but their determination of the appeal was founded on section 38.

I would allow the appeal.

MARTIN, J.A.: This is an appeal from an order of Chief Justice HUNTER for a writ of *mandamus* directed to the Court of Revision for the City of Vancouver "to hear the appeal" of P. W. Charleson from said City's assessment of certain property "in the manner provided for in section 38 of Cap. 54 of the statutes of British Columbia for 1900, being the Vancouver Incorporation Act."

The order is appealed from on the ground (1) that a *mandamus* will not lie because the said Court has already *bona fide* heard and determined the matter as the statute directs; (2) that the proper remedy is *certiorari* to the assessor to bring up the roll; or (3) an appeal to a judge of the Supreme Court under section 56. With respect to the last objection it can be shortly disposed of by saying that there is no appeal in the present circumstances because the case is not within the sole question limited by subsection (3) as being appealable, *viz.*: "Is the assessment . . . . equal and rateable with the assessment of other similar property . . . ." With great respect I am unable to take the wider view of the section which was adopted in *Re Smith Assessment Appeal* (1898), 6 B.C. 154.

MARTIN, J.A.

To do justice to the unusual situation certain facts must be clearly understood, and my understanding of them is as follows: To begin with, it is admitted that the two lots in question were assessed last year for $125,750 (being $107,250 for the land and $18,500 for the building) while this year the assessment has been raised to $155,000 ($136,500 for the land and $18,500 for the building) an increase of over 27 per cent.; that rents have fallen all over the city to about one half the former prices

COURT OF APPEAL

1915

April 21.

IN RE CHARLESON ASSESSMENT

during the last 18 months or two years owing to a recent period of very bad depression caused in part by the war (since the 4th of August last) and in part by general business depression in Vancouver, and it was proved beyond contradiction that the value of property, apart from a rental basis, had decreased at least 25 per cent. during the last two or three years, and on a rental basis it had decreased 50 per cent. No one suggested during the hearing that conditions had improved since the last assessment was made; on the contrary, the situation had got worse, and the tendency was downward because the outbreak of the war in August of last year had added to the depression and the consequent drop in rents at the time of the present assessment was formally admitted by the assessor and by counsel for the City and by the Court itself, one of the members of it remarking that "this evidence is completely unnecessary because we admit that." Now the assessment for 1914 was sworn by the oath of the assessor under section 39 to be the "true and lawful" value of the property, *i.e.*, according to section 38 "the actual cash value" as therein defined, and yet we have the extraordinary result that though it is admitted that the property had decreased in value since 1914 yet the assessment has been increased over 27 per cent.! It was suggested that the statutory oath of the assessor as to the value of the property on the present assessment was some evidence which would justify the Court in acting, but in my opinion, in the present circumstances, it is not, because if his statutory oath is to be taken to support his valuation of this year it has also to be taken to support his valuation of last year and we are back again to the same anomalous position of an increase in assessment based upon a decrease of rents and values. And furthermore, there is this, to my mind, insuperable obstacle to attaching any weight to the oath on this year's assessment, *viz.*: that the assessment was made by the assistant assessor, Nicolls (who not only cross-examined witnesses to support his assessment but was sworn as a witness himself, and his statements agreed to be taken as sworn) and he, in answer to a question from a member of the Court, gives the basis upon which he made the assessment, and frankly admits that there was no

MARTIN, J.A.

attempt made to fix values upon present conditions but upon "what they would be in a normal time." He goes on to explain:

"Mr. Nicolls: All the evidence submitted now is going to prove something we do not deny; we do not deny the drop in rent, that it is only about one-half the former prices, we are going through a very bad depression caused partly by the war, but we have faith in the City and the figures will come up to some extent, to a fair basis of something between the two, but we don't deny the rents have dropped.

"An Alderman: Mr. Nicolls, when you made these assessments did you take into consideration the fact that the rents had been and were being reduced?

"Mr. Nicolls: We attempted to make the figures what they would be in a normal town in a normal time. Our highest assessment is $2,650. We say that is a fair normal figure.

"An Alderman: You took into account the present conditions?

"Mr. Nicolls: Not the war; we tried to equalize the assessment and put it up to the Council what general reduction they should make—the Council do not contend we could sell that property at that price today and if they care to make a general reduction, of course they can.

"An Alderman: You wish to remove all inequalities and make the thing fair and square?

"Mr. Nicolls: Yes, we know rentals have dropped.

"An Alderman: This evidence is completely unnecessary, because we admit that.

"Mr. *Martin*: Following up Alderman Byrne's question when fixing this assessment of $136,000 you considered the fall in rents?

"Mr. Nicolls: That would be a fair assessment in normal times and does not consider the peculiar circumstances under which we are now for the reason we considered that if the Germans were occupying Warsaw, Calais and Paris that would be cut to 20 per cent.

"An Alderman: At the time you were preparing this the depression was on, not only from the war but other circumstances?

MARTIN, J.A.

"Mr. Nicolls: It is hard to say how much was due to the war. We believe there would be within six months of the termination of the war a sharp change, but we couldn't take into account what was due to the war. We tried to get an equalization."

"Mr. *Martin*: Ald. Byrne asked you the question whether in valuing this property at $155,000 you considered the fall in rents which had taken place?

"Mr. Nicolls: No, we didn't, because that doesn't make a proportionate fall in prices because the fall in rents is more or less a temporary matter.

"Mr. *Martin*: That is quite so—if you had to consider the fall in rent we admit has been general all over the City you would not have increased the value of this property as you did?

"Mr. Nicolls: We do not regard the execessive fall in rents for that property.

"Mr. *Martin*: In spite of the excessive fall in rents, in order to equalize this and make it a similar assessment to the others you found it necessary to add 27.3 per cent.?

COURT OF APPEAL

1915

April 21.

IN RE CHARLESON ASSESSMENT

"Mr. Nicolls: Most decidedly, yes."

And the explanation of these extraordinary views and proceedings becomes plain from the evidence of Nicolls while cross-examining Charleson, as follows:

"But we are on top of the slump. We cannot cut the assessment in two, we might reduce it 75 per cent., but the City has to raise a certain amount of money and if the Council sees fit to cut the assessment in two, and increase the rate well and good, but I don't think it is in the interests of the City that they should do it."

It is impossible to contend, in my opinion, in the face of the foregoing admissions of the manner in and the object for which this assessment was made that there was any attempt made to comply with the statute, or that the assessment can be considered seriously. It was an obvious and illegal design to increase the assessment in order to keep up the revenue of the City and maintain statutory borrowing powers based thereon fictitiously and in defiance of the facts and the rights of property owners. What possible justification the assessor had in ignoring the direct and admitted consequences of the war, which was and is still raging fiercely, and the general depression and assuming that the fall of rents and values thereby caused is going to be merely "temporary" is beyond my comprehension. How can the "actual cash value" be fixed if existing conditions are ignored? And what does "temporary" in this relation mean? One year, two years, three years? This question of "actual cash value" was considered by WALKEM, J. in *Re Municipal Clauses Act and J. O. Dunsmuir* (1898), 8 B.C. 361, and later by IRVING, J. in *In re Vancouver Incorporation Act and Rogers* (1902), 9 B.C. 373, the latter decision not referring, strangely, to the former. In neither is there any hint that the question should be considered other than upon the basis of existing conditions, and it was so considered in each of them, as a perusal of the reports shews. In the former case it was not suggested that the actual cash value of a big and very costly house and grounds this year should be affected by the chance of a millionaire coming to town next year and buying it and so taking a "white elephant" off the owner's hands; it was simply dealt with on the basis that though it had cost $185,000 yet no one would take it now from a solvent debtor at a higher figure

MARTIN, J.A.

than $45,000 and so its value was fixed thereat, and the decision of the Court of Revision was reversed, the learned judge applying the Act and laying it down that "a valuation on the basis of the cost of a structure is not permitted."

The only piece of evidence that was seriously referred to in support of the assessment was the statement of Charleson that he would sell the property for $150,000. But that is explained by him in several places as not being his opinion of the present price of the property (for which there is admittedly at present no market), which price he repudiates as the "actual cash value" and he swears to it as being of a much lower value and is confirmed by Procter and Ames and by Nicolls's own admission that "the council do not contend we could sell that property at that price today," but he named it because he had bought the property as a permanent investment to build a modern and adequate building on when the time should be ripe to do so and he did not want to sell at all (being in the fortunate position of being able to hold on to his property till prices should advance) but if a purchaser came forward now prepared to give him $150,000 he was "perfectly willing" to take it. This explanation has been wholly ignored and a wrong meaning given to his evidence, which is clearly no evidence at all of actual cash value, and the evidence is uncontradicted that the three-story building he has now on the property is of the most economical and productive nature possible in the present depressed conditions. It is an error to contend, as was done before us, that Charleson fixed the values solely upon a rental basis; he stated that another means of arriving at it was what the property could be sold for, but there is no market now. But it is shewn by Nicolls himself that Charleson is correct in this explanation of the $150,000 valuation, because Nicolls admits in reply to Charleson's objection that that figure "is merely the present value of what the future will be," and see also the admission already quoted. It is useless, in my opinion, in the light of such evidence to contend that there was even an attempt made to comply with the statute in the fixing of the valuation; on the contrary, it was further admittedly done with the intention (in addition to what I have already noted)

MARTIN, J.A.

COURT OF APPEAL

1915

April 21.

IN RE CHARLESON ASSESSMENT

of equalizing the assessment so that the Council could deal with it as a Board of Equalization under section 54, which, however, could only be done, in any event, after "the actual cash value as defined by section 38 of this Act" had been ascertained, subsection (9). This peculiar fact destroys all the value of the illegal assessment that was made and leaves it without any evidence to support it, or without any evidence upon which the Court of Revision could act. In my opinion it is clear that it simply adopted the illegal manner upon which the assessor proceeded, and deliberately disregarded the section which was drawn to its attention. My reason for saying so is that there was no evidence before the Court which could justify it in reaching the decision it did, *viz.*: raising the assessment over 27 per cent.; such a result could only have been arrived at by ignoring the statutory requirement of an "actual cash value as it would be appraised in payment of a just debt from a solvent debtor." Not a solitary witness ventured to say that the property could be "appraised" at a valuation of $155,000 on the statutory basis. Such a result would only be arrived at by excluding present conditions and yet how can present conditions be excluded? Though they may not be the only factor to be considered in carrying out the Act, yet they are the most important factor, and if the conditions of today continue, or even get worse, next year, as is quite possible, are they still to be continued to be ignored and the "actual cash value" to be continued to be extracted solely from disappointed expectations and prophetic anticipations? Is no place, at any time, to be found for conditions as they really are? In other words, are the facts never to be faced? No one in his senses on this evidence and in the present condition would, on a business basis, now take this property from a solvent debtor in payment of a debt of $155,000.

MARTIN, J.A.

I have not overlooked the suggestion made that the Court of Revision could act on its own opinion as to values and we were referred to the language of Idington, J. at p. 36 of the *Sisters of Charity of Providence* v. *City of Vancouver* (1910), 44 S.C.R. 29, wherein he stated:

"Courts of revision are not bound of their own motion to call evidence. They may be entitled when the assessor's action is thus presented incidentally to hearing complaint against his ruling to use their own judgment as men of affairs and often do so, as was done here to reduce the assessment."

It will be seen at once that his Lordship's remarks have no application to the present circumstances and should be restricted to those special ones he was speaking of—*Quinn* v. *Leathem* (1901), A.C. 495 at p. 506. He was dealing with a case where "no witnesses had been tendered" on either side and in such an informal proceeding he was of opinion that there was no obligation on the Court to call evidence and that "they may be entitled" when the matter was "thus presented incidentally" to use their own judgment as men of affairs. Nothing could be more unlike the present important case which the Court had met to "try" under section 50 and which was formally fought out by counsel and by swearing all the witnesses and taking their evidence and conducting the whole proceedings like any other trial. It was decided in the same case by a majority of the Court, agreeing to Mr. Justice Duff's judgment (p. 37) that the Court in so trying the case exercised "no administrative authority" whatever. "It is quite clear, I think, that the function thus vested in the Court of Revision is quasi-judicial and must be exercised in each case with respect to the merits of that case alone." And he refers on p. 39 to

"the importance of a proper observance by courts of revision and the like bodies of the broad rules of judicial conduct when exercising judicial functions."

MARTIN, J.A.

And it is obvious that in such cases as this where the Court itself, being formed of a quorum of the City Council (section 50) and entertaining an appeal from an act of its own officer affecting its own property and revenue, is at once in the position of judge and litigant, special care should be taken to see that such "rules of judicial conduct" are observed and that nothing should be done to prejudice the rights of the opposite party. In *Reg.* v. *Sharman. Ex parte Denton* (1898), 1 Q.B. 578, licensing justices were held to have adopted the proper course in requiring all witnesses to be sworn. In *Board of Education* v. *Rice* (1911), A.C. 179, the House of Lords said, *per* Lord Chancellor Loreburn at p. 182, on the duty of the Board of Education conducting an inquiry:

COURT OF APPEAL

1915

April 21.

IN RE CHARLESON ASSESSMENT

". . . . they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."

In the case at bar it will be remembered that the statute says the Court shall "try" the "complaint," and it has power to administer oaths (sections 50-1) and it exercises a quasi-judicial function. But in any case the "fair opportunity" to meet "relevant statements" must be given. In *Rex* v. *Local Government Board. Ex parte Arlidge* (1914), 1 K.B. 160, the remarks of the Lord Chancellor above quoted are considered and applied at pp. 175, 180, 182, 185, 187-9, and it is pointed out that unless a party to a *lis* has an opportunity of meeting statements prejudicial to his case, either by way of fact or argument, natural justice has been violated, Buckley, L.J. saying, *e.g.*, at p. 188:

"Natural justice requires that the mind of the deciding officer shall not be affected by original statements of fact not communicated to the person to be affected by the decision and upon which he has never been heard."

And I also refer to the observations of Cockburn, L.C.J. and Field, J. in *Reg.* v. *Adamson* (1875), 45 L.J., M.C. 46; 1 Q.B.D. 201; on the necessity of the magistrates deciding the matter only on the "evidence before them."

MARTIN, J.A.

Applying the foregoing reasons to the case at bar I am clearly of the opinion that this matter can only, in fairness to the respondent, be determined by the sworn evidence that was before the Court, and that we should not allow to be imported into it the speculation that the Court acted (in my opinion improperly, if it did so) upon its own knowledge, a thing which "they do not purport to do" as the Master of the Rolls said in *Rex* v. *Board of Education* (1910), 2 K.B. 165 at p. 175. And I derive, under this statute, support for this view from the fact that in the case of an appeal to a Supreme Court judge under section 56, from the Court of Revision, it would not, I think, be contended that the judge should act upon his own knowledge, even though the appeal is a re-hearing. He has been held to be not a Court but a *persona designata* from whom

there is no appeal—*In re Vancouver Incorporation Act and Rogers* (1902), 9 B.C. 373—and yet if it is desirable (and obviously it is) that he should not act upon his own knowledge and thereby supplement the sworn evidence which is taken before him on such occasions (*e.g.,* in the last-cited case and in *Re Municipal Clauses Act and J. O. Dunsmuir* (1898), 8 B.C. 361) why should the Court below be permitted to do so? There should not be different standards of evidence in two appeals (re-hearings) of the same nature under the same statute.

Such being my view of the facts I have no difficulty in coming to the conclusion that the Court ignored the statute and wrongly adopted the illegal intentions of the assessor, and never applied its mind to the determination of the real question before it; in short, evaded its duty and in such case it is well established by the authorities hereinafter cited, that there has been no hearing in the proper sense of the word and that a *mandamus* will compel it to hear and determine as the statute directs.

I pause here to say that said authorities shew in such a case *certiorari* is not a proper or an adequate remedy, assuming that it should be granted with respect to proceedings in a Court of Revision, which assumption has been stated to be "a pretty strong one" by Idington, J. in *Sisters of Charity of Providence* v. *City of Vancouver, supra,* p. 35, though the other members of the Court refrain from expressing an opinion on the point, p. 38; and *cf.* the decision of the House of Lords in *Leeds Corporation* v. *Ryder* (1907), A.C. 420, where it was held that the writ would lie to justices who had acted administratively. But even if it were a proper remedy it would be granted as a concurrent one on such an application as this, and we were asked by respondent's counsel to do this and grant an amendment, and I think it should be done, if necessary, though, in my opinion, it is not: see *The Queen* v. *Justices of Middlesex* (1877), 2 Q.B.D. 516 at p. 518.

MARTIN, J.A.

I have not overlooked the fact that affidavits have been filed by certain members of the Court stating that they did attempt to comply with the Act, and I have also noted the final statement in each of the said affidavits to the effect that if the matter

COURT OF APPEAL

1915

April 21.

IN RE CHARLESON ASSESSMENT

were sent back to them the deponents would arrive at the same result, and, in my opinion, this statement should not have been made; it is a significant indication of the spirit in which the proceedings were entertained and viewed by the Court. But where the circumstances are such that the deponents could not properly have done the act or reached the conclusion they did on the facts before them the Court will not allow their affidavits to stand in the way of justice being done, any more than, *e.g.*, affidavits from jurors could be read to support their verdict by swearing that they acted as reasonable men in finding a verdict which a Court of Appeal was of the opinion could not, on the evidence, reasonably have been found. There is nothing in *Reg.* v. *Adamson, supra,* with respect to the affidavits therein that is in conflict with this view. It there so happened that the affidavit of the magistrates itself proved that they had acted upon some extraneous knowledge or belief "based upon matters which were not in evidence at all" (*per* Cockburn, L.C.J.) and therefore the Court decided that on their own shewing they had "really declined jurisdiction." In the words of Field, J., "I am forced to the conclusion that they did not decide on a question of fact." But the same result would have been brought about if it had been shewn by other evidence, *e.g.*, by the record, or accurate stenographic report of the proceedings, that they had done or omitted to do something which was equivalent to declining a jurisdiction or had mistakenly exercised one. And, in like manner, in the case at bar, it is alleged that the admittedly accurate report of the proceedings before us shews that the Court "did not decide on (the) question of fact" which the statute specifically directed them to determine. This view is supported by the Court of Appeal in *Rex* v. *Shann* (1910), 2 K.B. 418, where the chairman of the Licensing Committee of Justices (a compensation authority styled a "Court" at p. 437), whose proceedings had been questioned by *mandamus,* stated in an affidavit that the committee had "decided the matter solely upon the merits as appearing from the facts stated in the licensing justices' report," etc. But Farwell, L.J. said at p. 433:

MARTIN, J.A.

"The chairman of the committee has filed evidence to shew that the

committee were not influenced by the offers. I agree with the Lord Chief Justice that it is impossible to act on such evidence, and that the real question is whether the course of procedure adopted by the committee is justifiable or not. I am of the opinion that it is not";

and he concludes at p. 435:

"The committee have acted, in my opinion, on a wrong principle, and this appeal should be allowed."

On pp. 439, 441, Kennedy, L.J. says that even though the committee "honestly believed" that they were deciding according to the merits, yet, if they adopted a course which was "improper" or "unjustifiable" it could not stand, "although, no doubt, it was taken in perfectly good faith." In *Reg.* v. *Cotham* (1898), 1 Q.B. 802, the Divisional Court held at p. 807:

"Another instance is the case, referred to by my brother Kennedy, of *Reg.* v. *De Rutzen* (1875), 1 Q.B.D. 55, where again the justices had taken into consideration matters outside the statutes under which they purported to act, and the Court granted a *mandamus* to hear and determine the application before the justices according to law. Here the matters which the justices have taken into consideration apart from the statute are not stated upon affidavit, but it is sufficient if it can be demonstrated that they must have considered such matters."

Seeing that the tribunal in question is at once in the position of judge and litigant as already noted affidavits such as those before us made to bolster up its decision can only be expected to carry little if any weight, and none at all where they are in conflict with the course of procedure at the trial.

The *Cotham* case was cited in the recent instructive decision of *Rex* v. *Hyde Justices* (1912), 1 K.B. 645, wherein the King's Bench Division (Lord Alverstone, C.J. and Hamilton and Bankes, JJ.) were unanimously of the opinion that *mandamus* lay to the licensing justices because they had, while professing to hear and determine the application of one Atherton, gone beyond the statute and taken into consideration matters which they were not entitled to consider in determining the question of his being a "fit and proper person" as defined by the statute to hold a licence, even though the justices in their affidavit, filed in reply (p. 649) stated that such extraneous matters were "not the sole or even the chief ground of refusal." Lord Alverstone says at p. 657:

MARTIN, J.A.

"While I agree that they could inquire as to whether he was a fit and proper person, they allowed considerations beyond their jurisdiction to influence their judgment to a substantial extent in this case."

COURT OF APPEAL

1915

April 21.

IN RE CHARLESON ASSESSMENT

And Hamilton, J. at p. 660:

"The justices have in this case been actuated, not by those matters on which the Legislature requires them to exercise their discretion, but by considerations which are beyond the purview of their jurisdiction, and which, therefore, they should not have taken into account. That being so, the licence was refused upon grounds which were not open to the justices to act upon."

And Bankes, J. at pp. 663-4:

"It would not be right that this Court should interfere in any case where upon proper materials the justices have exercised an honest discretion. On the other hand, the Court should not hesitate to intervene in cases where it is satisfied that, under cover of an inquiry into the question whether a particular person is or is not a fit and proper person to hold a licence, the justices have inquired into and been influenced by considerations which are wholly foreign to any such inquiry."

In my opinion this decision is singularly applicable to the case at bar. See also *Reg.* v. *Evans and others* (1890), 62 L.T.N.S. 570, another decision of the King's Bench Division *coram* Lord Coleridge, C.J. and Lord Esher, M.R. in which the former said, p. 571:

"I have, with the greatest reluctance, come to the conclusion that a *mandamus* must go. Never, if I can possibly avoid it, will I interfere with the discretion of a magistrate, even where it has been exercised in a way in which I perhaps should not have exercised it myself, and still less where I am satisfied with the discretion. But it is an established rule of this Court that the discretion of magistrates must be exercised upon fitting materials, and if a decision, and possibly a determination, has been come to on grounds not fitting, and outside those which by law a magistrate is entitled to consider, there the Court will look at the matter as if the discretion had not been exercised at all, and will by *mandamus* compel the magistrate to exercise that discretion which he has, in truth and in contemplation of law, not exercised."

MARTIN, J.A.

And further:

"We do not bind the magistrate to decide one way or the other. I only desire to guard myself against it being supposed that by sending this case back to the magistrate we give him any hint as to the way in which we think he ought to determine it. He will no doubt give judgment according to the principles of law."

And Lord Esher, commenting upon the leading case of *Reg.* v. *Adamson, supra,* much discussed before us, says, pp. 571-2:

"Now the case of *Reg.* v. *Adamson* shews at all events under what circumstances the Court is bound to say that a magistrate has exercised his discretion illegally. That is stated by Cockburn, C.J., who there lays it down that if the magistrates had exercised their discretion on something extraneous or something illegal, it is the same as declining jurisdiction; and if a magistrate declines to exercise his jurisdiction, he must be

compelled to exercise it by a writ of *mandamus*. The question here therefore is whether in exercising or attempting to exercise his jurisdiction in adjourning this summons the magistrate has acted upon facts which, legally, he ought not to have taken into consideration. Well, now, on what did this magistrate act?"

And after dealing with that point he finds that a *mandamus* must go as "the magistrates' action in this case is brought directly within the rule of *Reg.* v. *Adamson.*" See also *The Queen* v. *Vestry of St. Pancras* (1890), 24 Q.B.D. 371 decided by the Court of Appeal earlier in the same year (on February 1) wherein Lord Esher sat, and wherein a *mandamus* was granted because the Vestry had not exercised their discretion fairly because they "must . . . not take into account any reason for their decision which is not a legal one," and again (p. 377) that they "did not bring their minds to the question which they had to decide [but] took into account circumstances which they ought not to have taken into account, and so did not properly exercise their discretion" in determining the allowance the applicant was entitled to receive under the statute in question. And Fry, L.J. says, p. 378:

"There was a duty in the vestry to consider that proposal properly and fairly; Mr. Westbrook had an actual and personal interest in the performance by the vestry of that public duty, therefore, if it has not been performed a *mandamus* should go."

Rex v. *Stepney Borough Council* (1901), 71 L.J., K.B. 238, is a similar case to the same effect, wherein it was decided that a *mandamus* would lie to compel a borough council to perform their duty in assessing the compensation due to a vestry clerk under a statute on the ground that the council had not exercised their discretion in making the assessment as directed by the particular section in question but had wrongly adopted the practice of the Treasury as being binding upon them. The case is further noticeable because of the fact that an appeal lay to the Treasury from the refusal of the council, but a majority of the Court were of the opinion that there had really been no determination of the case by the council, as it had not exercised its discretion; and the third member of the Court (Channell, J.) thought that though the appeal would lie at that stage, yet it was not a remedy which was "an equally convenient remedy" as *mandamus* (p. 244), and therefore *mandamus*

MARTIN, J.A.

COURT OF APPEAL

1915

April 21.

IN RE CHARLESON ASSESSMENT

would lie on that additional ground. This case is in principle and on the facts indistinguishable from the one at bar because here, in my opinion, the Court of Revision has clearly adopted as its view the wrong principle which admittedly actuated the assessor.

In Rex v. *Board of Education, supra,* affirmed *sub nom. Board of Education* v. *Rice, supra, mandamus* was directed to the defendant Board because they had acted on the wrong view that they were entitled to discriminate between certain schools (Cozens-Hardy, M.R. in Court of Appeal at p. 175) and had "evaded the real point" that was before them for consideration (Farwell, L.J. at pp. 177, 179):

"In this case the Board, by acting on a wrong construction of the Act, have not exercised the real discretion given to them thereby."

And at pp. 180-2:

"Further, they have by answering a question not put to them, and avoiding any answer to the real question, declined jurisdiction: see the judgment of Cockburn, C.J. in *Reg.* v. *Adamson* (1875), 1 Q.B.D. 201. [And after considering that case]: I apply that to the present case and say that, if the Board did know the law to be as it is now admitted to be, they must have acted upon a consideration of something extraneous and extra-judicial. . . . . Further, if the Board did not proceed on a mistaken assumption of the law, but deliberately disregarded it either on the question of the construction of the Act or on the entire want of evidence, then I should be of opinion that they had been guilty of misconduct so flagrant as to make it impossible for their decision to stand. The Board cannot disregard and proceed in defiance of facts: suppose the facts to be

MARTIN, J.A.

that the authority paid nothing, but that the non-provided schools were supported by voluntary subscriptions only, a finding by the Board that the authority maintained and kept efficient the schools would be perverse to such an extent that the Court would infer that they must have been influenced by extraneous and therefore improper considerations, and had not, in fact, exercised their discretion."

And see Buckley, L.J. at p. 190:

"Except upon the erroneous assumptions which I have stated, it was impossible, upon the materials to which they refer as being those upon which their decision was founded, for the Board of Education honestly and reasonably to arrive at that conclusion."

The House of Lords affirmed this decision of the Court of Appeal, Lord Loreburn, L.C. saying (1911), A.C. at p. 182:

"But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by *mandamus* and *certiorari*."

The other noble and learned Lords concurred, Lord Halsbury concluding, pp. 186-7:

"I cannot doubt that the local authority will willingly now acquiesce in that unanimous view, and perform the duty which, under a misapprehension of these rights, they have hitherto neglected. The Board ought to have answered the questions asked by Mr. Eden and none other."

The latest cases I have found in the English Reports are *The King* v. *Hudson* (1915), 1 K.B. 838, a decision of the Court of Appeal on the 26th of January last, and *Rex* v. *London County Council* (1915), 31 T.L.R. 249, a decision of the King's Bench Division on the 22nd of February. In the former, a commissioner under the National Insurance Act, 1911, was directed to proceed with an inquiry which he had declined to hold upon the mistaken view that a certain order of the Board of Trade did not give him jurisdiction. In the latter, which should be compared with *Rex* v. *Hyde Justices, supra,* it was held that a licensing authority might, in determining the question if applicants for music and picture licences under certain statutes were "fit and proper" persons, lawfully take into consideration the fact that they were alien enemies and therefore a proper discretion had been exercised in refusing the licence and *mandamus* would not lie as the licensing authority had not been "influenced by extraneous considerations." I note the earliest reported case on *mandamus* in this Province is *Phelps* v. *Williams* (1883), 1 B.C. (Pt. 1) 257, wherein BEGBIE, C.J. held that it would lie to compel a school teacher to hold a proper inquiry as to the expulsion of a pupil from a school, but would not direct him as to the opinion he is to form. And in *Tuck* v. *City of Victoria* (1892), 2 B.C. 179, it was held by the same learned judge that it would not be granted where it would be ineffectual, *e.g.,* in the case of directing a city council to admit a person to an office from which they could have dismissed him the next day. And in *In re Kanamura* (1904), 10 B.C. 354, *mandamus* to a licensing board was refused where, since the judgment under appeal, four out of the five members of the old board had been changed. But in the case at bar only one of the members of the Court has been changed and by section 50 of the Act only five members of the whole city council of seventeen are required to form a quorum

MARTIN, J.A.

COURT OF APPEAL

1915

April 21.

IN RE CHARLESON ASSESSMENT

of the Court of Revision, so no difficulty need be experienced in giving effect to the writ, despite the submission that was made to the contrary.

The last case I refer to is *Rodd* v. *Corporation of the County of Essex* (1910), 44 S.C.R. 137, wherein a *mandamus* to the County of Essex was refused as the Court was of the opinion that "a conscientious judgment had been exercised," Anglin, J. observing, p. 142:

> "While the courts may compel the performance of the duty of making the selection, [yet] where a conscientious judgment has been exercised by the body to whom that duty is committed, the court will not substitute its sense of fitness for that of such body. Judicial interference might be warranted if it were shewn that the discretion of the County Council had not been exercised 'in a manner fair, candid and unprejudiced.' Upon the evidence, such a case has not here been established."

MARTIN, J.A.

I have referred to all these cases to shew that the Courts exercise a wider and more varied control by *mandamus* over quasi-judicial and administrative bodies than has been recognized by some text writers or was conceded during the argument.

I differ with regret from the views of my learned brothers, but for the foregoing reasons I am of the opinion that the appeal should be dismissed. This judgment has reached an unexpected length, but as I feel this man (the respondent) has unwittingly been done an injustice by the Court of Revision his important case is entitled to receive very careful consideration in its true light.

GALLIHER, J.A.

GALLIHER, J.A.: I would allow the appeal for the reasons given by my brother IRVING.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: It is settled law that where there is cast upon any authority a duty of a public nature that duty must be discharged, and in default recourse may be had by way of *mandamus* to compel its performance, yet it is to be well remembered that it is only in the case where the inferior tribunal clothed with jurisdiction to hear and determine the matter has failed to exercise the jurisdiction that this remedy may be invoked, and when granted it cannot be in the way of directing that the jurisdiction be exercised in any particular

manner, that is *mandamus* is only available where it is plain that there has been no exercise of the jurisdiction conferred.

In the present case an appeal was taken to the Court of Revision sitting in pursuance of the provisions of the Vancouver Incorporation Act, 1900, and it is contended that there was refusal to hear and determine the appeal in the manner provided.

The next step taken was the application for a *mandamus,* which coming on before HUNTER, C.J.B.C. resulted in an order absolute for a *mandamus* being granted directing that the Court of Revision do proceed to hear the appeal with regard to the assessment of lots 1 and 2, block 63, subdivision of lot 541 in the City of Vancouver, being appeal No. 107 in the manner provided for in section 38, Cap. 54, B.C. Stats. 1900, being the Vancouver Incorporation Act, and amendments.

It is from the order absolute granting a *mandamus* that the appeal is brought and it would follow that the appeal should be dismissed if it is apparent upon the facts that there was failure to exercise the conferred jurisdiction, a jurisdiction which must be discharged. Upon the other hand if there was no such failure, and the Court of Revision did examine into the appeal brought before them and did exercise their judgment in proper compliance with the statute, then the appeal should be allowed.

Upon consideration of the evidence adduced before the Court of Revision it, in my opinion, was ample to admit of that body arriving at a decision in the proper exercise of the statutory duty imposed, and that was to determine whether there had been any overcharge in the assessment, that being the ground of appeal.

The Court of Revision was entitled at the outset to rely upon the assessment as being made in pursuance of the statutory provisions as contained in the Act, the onus being on the party complaining to adduce evidence of overcharge, and that onus, in my opinion, was not satisfactorily discharged. It cannot be said that upon an appeal to the Court of Revision, matters are to be looked at as if no assessment had been made and that then and there all considerations that led up to the assessment should

COURT OF APPEAL

1915

April 21.

IN RE CHARLESON ASSESSMENT

be a matter of inquiry. If so the duties of the tribunal might be said to be interminable, rather that the assessment is assumed to be proper, subject, of course, to displacement if the ground of complaint is established: see sections 38, 49, 50 and 54 of the Act. The Court of Revision in the main, in the present case, had merely to determine whether the land of the respondent had been assessed at too high a sum, and in arriving at their decision as to this, a great amount of evidence was led directed to establish that no proper assessment had been made in pursuance of section 38 of the Act, *i.e.*, the assessment as made was not the actual cash value of the land as it would be appraised in payment of a just debt from a solvent debtor.

It is not my purpose to, in detail, make reference to or analyze the evidence. I content myself in stating that there was evidence before the Court of Revision upon which they could arrive at the conclusion at which they did arrive and that was the confirmation of the assessment. I cannot, with all deference to the forceful argument of the learned counsel for the respondent, accede to the view that there is a total absence of evidence upon which the cash value of the land may be ascertained.

It is, of course, not the province of this Court to enter into the question of values, and upon this point I would refer to the following language of Robinson, C.J., in *In re Dickson and the Municipality of Galt* (1852), 10 U.C.Q.B. 395 at p. 398:

MCPHILLIPS, J.A.

> "It was rather pressed upon us, however, at the conclusion of the argument, that although there are several reasons which disable us from making these rules for *mandamus* absolute, it would be satisfactory, and might be extremely useful, if we were to express our opinion upon the soundness or unsoundness of the principle on which the Court of Revision under the assessment law acted in these cases, in estimating the actual value of the real estate of these several applicants. Upon consideration, we feel it more proper to forbear intimating any opinion that we may have formed on that point."

It being my opinion that the Court of Revision did proceed to hear the appeal and were seised of evidence sufficient in its nature to determine the appeal as advanced by the respondent and did decide the question, the granting of a *mandamus* which is appealed against, was wrong, as it is in effect the compulsion to rehear an appeal already decided which is not to be admitted. Abbott, C.J. in *The King* v. *The Justices of Monmouthshire*

(1825), 4 B. & C. 844 (S.C. Dowl. & Ry. 334; 28 R.R. 478), said at p. 849:

"I think that the rule for a *mandamus* ought to be discharged. It appears that, in this case, the court of quarter sessions have given their judgment. This Court is not a court of error from that court; it may compel the court of quarter sessions by *mandamus* to proceed to hear and decide the appeal; but when they have so determined it, this Court cannot compel them to correct their judgment if it appear to be erroneous. It is unnecessary to say whether the judgment pronounced by the court of quarter sessions was erroneous or not, because we are of opinion that even if it were so, we have no jurisdiction to compel them to correct it."

And it is to be noted that the case was cited and applied in the judgment of Cockburn, C.J. in *The Queen* v. *Overseers of Walsall* (1878), 3 Q.B.D. 457 at p. 468; 47 L.J., Q.B. 710 at p. 716; and by Lord Herschell, L.C., in *Ex parte Evans* (1893), 63 L.J., M.C. 81 at p. 83; (1894), A.C. 16 at p. 20, where Lord Herschell said:

"The justices have heard and determined it; here is the record; here is the determination; they may have gone wrong, but if they have determined it wrongly, we cannot interfere upon this application."

Reg. v. *Adamson* (1875), 1 Q.B.D. 201, was strongly relied upon by the learned counsel for the respondent as being a case where a *mandamus* issued. It is to be noted, however, that in that case it was held that the magistrates had not considered the evidence and given a decision upon it, a case not, in my opinion, similar to the one we have now before us, in that here there has been a hearing, the evidence has been considered, and a decision has been given upon it. *Reg.* v. *Adamson, supra,* was referred to by Farwell, L.J. in *Rex* v. *Board of Education* (1910), 2 K.B. 165 at p. 180 and in applying the decision to the case under consideration said:

MCPHILLIPS, J.A.

"Further, they have by answering a question not put to them and avoiding any answer to the real question declined jurisdiction: see the judgment of Cockburn, C.J., in *Reg.* v. *Adamson* (1875), 1 Q.B.D. 201."

And in his judgment at p. 181 said:

"Further, if the Board did not proceed on a mistaken assumption of the law, but deliberately disregarded it either on the question of the construction of the Act or on the entire want of evidence, then I should be of opinion that they have been guilty of misconduct so flagrant as to make it impossible for their decision to stand."

In the present case that has not occurred which so forcefully presented itself to Farwell, L.J. Here there was no declination

COURT OF APPEAL

1915

April 21.

IN RE CHARLESON ASSESSMENT

of jurisdiction, no entire want of evidence, but a determination upon consideration of the Act and the evidence adduced. *Rex* v. *Board of Education, supra,* went on appeal to the House of Lords under the name of *Board of Education* v. *Rice* (1911), A.C. 179, and the decision of the Court of Appeal (1910), 2 K.B. 165, was affirmed. Lord Loreburn, L.C. at p. 182 said:

> "The Board is in the nature of the arbitral tribunal and a court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by *mandamus* and *certiorari*."

In my opinion, the Court of Revision have, in the present case, acted judicially and have determined the question which they were required by the Act to determine and the present case is not one calling for remedy.

Some argument was addressed to the question of the futility of the proceedings were the order for the issue of a *mandamus* to stand. Upon this subject a case that may be usefully looked at is *Rex* v. *Bonnar* (1903), 14 Man. L.R. 467. It was there held, that the issue of a *mandamus* to the revising officer under the Manitoba Election Act, R.S.M. 1902, Cap. 52, as asked for should be refused as it would be fruitless and futile, as the revising officer and the board of registration were *functi officio*. *The King* v. *The Bishop of London* (1743), 1 Wils. 11; *The King* v. *The Bishop of Exeter* (1802), 2 East 462 at p. 466; and *The King* v. *Bateman* (1833), 4 B. & Ad. 553, were referred to and followed.

MCPHILLIPS, J.A.

It therefore follows that, in my opinion, the appeal should be allowed and the order absolute for the issue of a *mandamus* should be set aside, the appellants to have the costs here and in the Court below.

Appeal allowed,
Martin, J.A., dissenting.

Solicitor for appellant: *E. J. F. Jones.*
Solicitors for respondent: *Martin, Craig, Parkes & Anderson.*

IN RE HAINES AND THE BOARD OF LICENCE COMMISSIONERS OF THE CITY OF NEW WESTMINSTER. THE KING v. BRYSON *ET AL.*

COURT OF APPEAL

1915

April 6.

IN RE HAINES AND LICENCE COMMISSIONERS OF NEW WESTMINSTER

THE KING v. BRYSON

Liquor licence—Petition for licence—Non-compliance with statute—Certiorari—Licence commissioners—Liquor Licence Act, R.S.B.C. 1911, Cap. 142—Municipal Act, R.S.B.C. 1911, Cap. 170, Sec. 349.

The jurisdiction of the Licence Commissioners to grant a liquor licence is conditional upon a properly signed petition being before them.

Parties specially aggrieved, owing to the granting of a licence, in the sense that they have suffered an injury beyond that suffered by the rest of the public, are entitled to the relief prayed for *ex debito justitiae*, but it is in the discretion of the Court to grant or refuse relief to an applicant not specially aggrieved, in which case the decision is not subject to review on appeal.

APPEAL by the licensee from an order of MORRISON, J. made on the 22nd of October, 1914, whereby a bottle liquor licence issued by the Board of Licence Commissioners of New Westminster to one Leslie E. Haines was quashed. Prior to the 10th of December, 1913, Haines applied for a bottle liquor licence and filed with the petition a map and list of lot owners within the block in which the proposed licensed premises were situate. At the instance of certain ratepayers, Mr. *Hansford* appeared before the Board on the 31st of December, 1913, and objected to the granting of the licence on the grounds that the application when deposited was not accompanied by a list of the resident householders within the block in question; that the premises being a corner lot there was no list of the resident householders in the opposite block; that the map deposited did not shew in every case whether the lot owners were married or single; that the petitioners had failed to secure the signature of two-thirds of the residents in the block to the application; and the application was not accompanied by a statement shewing the approximate distance from the proposed licenced premises to the property of each person signing the petition. Upon the

Statement

COURT OF APPEAL

1915

April 6.

IN RE HAINES AND LICENCE COMMISSIONERS OF NEW WESTMINSTER

THE KING v. BRYSON

licence being granted three ratepayers applied for an order *nisi* for a writ of *certiorari* on the grounds already set out which was granted on the 16th of July, 1914, and an order absolute was granted on the 22nd of October, 1914. The licensee appealed on the grounds that the proper parties were not before the Court, as neither the Board who passed the resolution to grant the licence nor the City of New Westminster was served with notice of these proceedings; that the judge had no jurisdiction to make the order and heard no argument on the merits when application for the order was made; that the licence issued or a copy thereof was not sent up upon the return of the *certiorari* and was not before the Court; and the order was against the evidence.

Statement

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

Argument

Ritchie, K.C. (*Tulk,* with him), for appellant: The order appealed from was made on the material in an affidavit on information and belief (see marginal rule 523): first, the affidavit should not have been looked at; second, the material therein was not sufficient to set aside the decision of the Board. They say one petition was not signed by two-thirds of the ratepayers in the block. The Board is the proper tribunal to try that out, and it is the objector's duty to produce his evidence before the Board: see Halsbury's Laws of England, Vol. 10, p. 194; *Rex* v. *Woodhouse* (1906), 2 K.B. 501; *Leeds Corporation* v. *Ryder* (1907), A.C. 420 at pp. 422-3. The petition was before them for 14 days and they decided, first, whether he had complied with the law and, second, whether they would grant him a licence: see *Rex* v. *Howard* (1902), 2 K.B. 363 at p. 376. These ratepayers have no *locus standi* to set aside a licence; they had no interest and are not property owners or residents in the block: see Patterson's Licensing Acts, 21st Ed., pp. 110-1; *Reg.* v. *Nicholson* (1899), 2 Q.B. 455 at p. 470; *The Queen* v. *Justices of Surrey* (1870), L.R. 5 Q.B. 466. The judge below read an affidavit on information and belief and treated the whole affair as a matter of course.

C. W. Craig (*Hansford,* with him), for respondents: Allowing the appeal would be abortive as the time for renewing the licence has expired. Even if the question of the legality of the petition should be passed upon by the Board, it must be done in a judicial manner: see section 349 of the Municipal Act; and if they decide wrongly the licence is *ipso facto* void: see *Freeman* v. *Licence Commissioners of New Westminster* (1914), 20 B.C. 438. We have a right to appear before the Board and object and when our objections are not entertained we can take such action as is necessary to set aside the licence: see *The Queen* v. *Justices of Surrey* (1870), L.R. 5 Q.B. 466; *Rex* v. *Williams, Ex parte Phillips* (1914), 1 K.B. 608; *Reg.* v. *Bowman* (1898), 1 Q.B. 663 at p. 666. On the question of delay the Court below having exercised its discretion in our favour the Court of Appeal will not interfere.

Argument

Ritchie, in reply: On the right of a ratepayer to bring proceedings see Bryce on Ultra Vires, p. 751; *Corporation of Oak Bay* v. *Gardner* (1914), 19 B.C. 391.

6th April, 1915.

MACDONALD, C.J.A.: Several objections were taken by appellant's counsel to the procedure in the Court below which I think are not well founded. He also attacked the sufficiency of the affidavits relied on by the respondents, but in my opinion the affidavits were sufficient, and from these affidavits I think it is apparent that the petition was not signed by the requisite number of lot holders in the area in question.

The argument before us was principally directed to the question as to whether or not the Licence Commissioners were without jurisdiction in the absence of a sufficiently-signed petition. Counsel for the appellant contended that a sufficiently-signed petition was not a condition precedent to the founding of jurisdiction, and that if the Commissioners accepted the petition as sufficiently signed their decision was not open to review on *certiorari* proceedings. I cannot agree with that contention. I think the jurisdiction of the Commissioners is conditional upon a properly-signed petition being before them.

MACDONALD, C.J.A.

It was further contended by appellant's counsel that the

COURT OF APPEAL

1915

April 6.

IN RE HAINES AND LICENCE COMMISSIONERS OF NEW WESTMINSTER

THE KING v. BRYSON

respondents were not persons aggrieved by the granting of the licence, and therefore had no right to initiate these proceedings. While they were not specially aggrieved in the sense that they suffered an injury beyond that suffered by the rest of the public, they were in common with the rest of the public interested in having the law in respect of licences in the City of New Westminster observed. Had they been specially aggrieved, their right would have been to have the order set aside *ex debito justitiæ*. As they were not specially aggrieved it was discretionary with the Court either to grant or refuse the order. The learned judge appealed from has exercised his discretion in favour of the respondents, and I do not think we ought to interfere with such exercise of discretion and should dismiss the appeal.

MACDONALD, C.J.A.

I refer to *The Queen* v. *Justices of Surrey* (1870), L.R. 5 Q.B. 466.

IRVING, J.A.

IRVING, J.A.: I would dismiss the appeal with costs.

MARTIN, J.A.

MARTIN, J.A.: I would dismiss the appeal.

GALLIHER, J.A.

GALLIHER, J.A.: I agree with the Chief Justice.

MCPHILLIPS, J.A.

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

Appeal dismissed.

Solicitors for appellant: *Henderson, Tulk & Bray.*

Solicitor for respondents: *W. F. Hansford.*

Solicitors for Licence Commissioners: *McQuarrie, Martin & Cassady.*

GANZINI v. JEWEL-DENERO MINES LIMITED.

COURT OF APPEAL

1915

April 6.

GANZINI v. JEWEL-DENERO MINES

Master and servant—Mine—Negligence—Injury to servant—System of signalling for moving skip in shaft—Mistake in signal—Metalliferous Mines Inspection Act, R.S.B.C. 1911, Cap. 164, Sec. 31, r. (9).

Practice—Pleadings—Amendment of after case closed.

Where a statutory standard of signals is adopted, but miscarries owing to an imperfection, it cannot be made a basis of a negligence action on the contention that the system should have been supplemented by another such as the speaking tube system (McPHILLIPS, J.A. dissenting).

Clark v. *Canadian Pacific Ry. Co.* (1912), 17 B.C. 314, followed.

Where an application to amend the pleadings is made by the plaintiff after his case is closed, involving a change in the nature of the attack, the discretion of the trial judge in refusing the application should be reviewed only under exceptional circumstances (McPHILLIPS, J.A. dissenting).

Decision of CLEMENT, J. affirmed.

APPEAL from a decision of CLEMENT, J., taking the case from the jury and dismissing the action, tried at Greenwood on the 29th of June, 1914. The action was brought for damages for injuries received by the plaintiff while employed as a "mucker" in the defendant Company's mine. At the time of the accident the plaintiff was working on the 3rd or 300-foot level loading a car with rock, and it was his duty to bring the car to a skip (or car that was hauled to the surface on rails in an inclined shaft) and dump the load into the skip. While dumping the load, some of the rocks fell out and lodged on the rails in front of the car. He proceeded to clear the rocks away, but before he had finished the car started up and caught him beneath. He was dragged up about 20 feet and injured. The system of signalling was by means of bells, as prescribed by section 31, rule (9) of the Metalliferous Mines Inspection Act, but owing to improper signalling by a man engaged at similar work on the first or 100-foot level, the engineer started hauling up the skip, under the impression that the signal was from the plaintiff. The plaintiff pleaded negligence and a defective system in the condition or arrangement of the ways, works,

Statement

COURT OF APPEAL

1915

April 6.

GANZINI v. JEWEL-DENERO MINES

machinery, etc., but did not specifically plead that the Company was negligent by reason of its superintendent hiring green men and putting them to work in important positions without instructing them properly. After the plaintiff's case was closed and during the argument, counsel for the plaintiff applied for leave to so amend. The application was refused. The learned trial judge concluded that the accident was due to the mistake made by the man signalling from the first level and not that the system was wrong. He dismissed the action. The plaintiff appealed.

Statement

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

M. A. Macdonald, for appellant, applied to amend the pleadings. The case was withdrawn from the jury and the action dismissed. We say there was a defect in the ways, works, etc., of the defendant Company, and we should have been allowed to amend our pleadings. The evidence was given of want of room without objection, also that of the superintendent not giving proper instructions to new men brought on the works, and the amendment should have been allowed as a matter of course.

Argument

C. W. Craig, for respondent, *contra*: After a case is tried a person has no right to ask for a new trial unless he can shew evidence was given that would justify the Court in granting an amendment. The decision of the trial judge as to this should not be reviewed.

Per curiam: We are of opinion that the trial judge was right in refusing the application to amend (MCPHILLIPS, J.A. dissenting).

Judgment

Macdonald, on the merits: There was a bell system connected with the engineer's room. We say, first, the system was not in accordance with the rules of the Metalliferous Mines Inspection Act; second, there was not sufficient room around the skip, and the system was generally defective. The engineer had warned the superintendent previously to the accident that the man who gave the wrong signal was ringing too slowly and there was apt to be an accident, and the superintendent neg-

Argument

lected to instruct the man. It is no answer here to say it was the act of a fellow servant: see *Butler (or Black)* v. *Fife Coal Company, Limited* (1912), A.C. 149 at p. 155; *Grant* v. *Acadia Coal Co.* (1902), 32 S.C.R. 427. It is the duty of the defendant to see that proper warning is given and the onus is on them: see *Canadian Northern Railway Co.* v. *Anderson* (1911), 45 S.C.R. 355.

Craig: Our code of signals is in accordance with the Act, and when they are found to be so we cannot be found guilty of negligence: see *Clark* v. *Canadian Pacific Ry. Co.* (1912), 17 B.C. 314; *Dumphy* v. *Montreal Light, Heat and Power Company* (1907), A.C. 454. All the evidence there is as to a tube system is that it is used in one large mine. There is nothing in the record to shew that an application was made to amend the pleadings with relation to their not having sufficient room around the skip.

Argument

Macdonald, in reply.

Cur. adv. vult.

6th April, 1915.

IRVING, J.A.: In *Clark* v. *Canadian Pacific Ry. Co.* (1912), 17 B.C. 314, this Court held that a jury could not regard as negligence a standard of duty laid down by Parliament.

In the present case the statutory standard was adopted, but miscarried owing to the fact that it is not absolutely perfect. I think the learned judge was right in saying there was no evidence of negligence to go to the jury on that point. It was not suggested that either the hoistman or Morris was negligent, and the charge of lack of system of inspection was expressly abandoned.

IRVING, J.A.

But Mr. *Macdonald* insisted that he ought to have been allowed to amend after he had closed his case, so as to shew that the Company was negligent by reason of its superintendent hiring green men and putting them to work in important positions without fully instructing them as to their duties. As a rule, amendments should be allowed freely, provided the application is *bona fide,* and the other side can be compensated for the mistake, but where the application involves a change in the

COURT OF APPEAL

1915

April 6.

GANZINI v. JEWEL-DENERO MINES

nature of the attack, and is made after the evidence for the plaintiff is closed and a motion to dismiss is granted or about to be granted, the discretion of the trial judge, refusing an amendment, is difficult to review. In the present case I am not prepared to say the learned judge was wrong.

I would dismiss the appeal.

MARTIN, J.A.: I am of the opinion that the learned judge below took a correct view of the matter. I only add that so far as the employment of incompetent workmen is concerned, that point, in any event, is not open to the plaintiff in view of what occurred at the trial. As to the suggestion that there was a defective system of signalling because, though the one in use was that prescribed by section 31, rule (9) of the Metalliferous Mines Inspection Act as "the code of mine signals [which] shall be used . . . . in every mine where hoisting is employed," yet it should have been supplemented by a speaking tube system (which was shewn to be in use in one mine), so as to reduce the danger of mistakes to a minimum, all that I have to say is that no authority has been cited in support of it. What the Legislature has deemed a sufficient safeguard should not be open to have additions made to it by a jury.

MARTIN, J.A.

MCPHILLIPS, J.A.: In my opinion this case should have been allowed to go to the jury. There was evidence that the plaintiff, engaged in a work of a dangerous character, may have been subjected to a risk that cast responsibility upon the employer. There was evidence brought home to the superintendent that the man on the 100-foot level was incompetent, was "ringing slow," and that this man was the man to give the signal on that level, and he had never worked in a mine before, the instructions given him had only been given that morning at seven o'clock, the morning he went to work. This was evidence to go to prove that the operations were being carried on in such a way as to subject the plaintiff to unnecessary risk, and evidence that would tend to establish that the superintendent was not competent, and that competent men were not employed and reasonable precautions were not taken for the

MCPHILLIPS, J.A.

plaintiff's safety. Further, there was evidence that the place in which the plaintiff had to do his work was not a safe and proper place. All of these questions—evidence being led to substantiate them—were eminently questions to be determined by the jury, being questions necessary for determination in arriving at a decision as to whether the employer had or had not discharged that duty which is imposed, *i.e.*, did the employer exercise proper, that is to say, reasonable, care to prevent danger to the plaintiff? This issue of fact the plaintiff was not admitted to have passed upon by the proper tribunal, therefore, in my opinion, there should be a new trial: *Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326; *Smith* v. *Baker & Sons* (1891), A.C. 325 at pp. 353, 362; *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420; *Canadian Northern Railway Co.* v. *Anderson* (1911), 45 S.C.R. 355; *Butler (or Black)* v. *Fife Coal Co.* (1911), 81 L.J., P.C. 97; *City of Vancouver* v. *Cummings* (1912), 46 S.C.R. 457 at p. 470; *Bergklint* v. *Western Canada Power Co.* (1914), 50 S.C.R. 39.

MCPHILLIPS, J.A.

I would, therefore, allow the appeal, the costs of the first trial to abide the result of the second.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellant: *A. Macneil.*

Solicitors for respondent: *Hamilton & Wragge.*

MURPHY, J.

1915

April 7.

REX v. EVANS. *IN RE* GEORGE FISHER.

Criminal law—Contempt of Court—Specific charge must be stated—Opportunity to answer before sentence.

REX v. EVANS. IN RE FISHER

Contempt of Court is a criminal offence and no one should be punished therefor unless the specific charge is distinctly stated and an opportunity of answering it given before sentence is passed.

Chang Hang Kiu v. *Piggott, In re Lai Hing Firm* (1909), A.C. 312, followed.

Statement

APPEAL from an order of THOMPSON, Co.J. of the County Court of Kootenay, whereby the accused was summarily fined $10 for contempt for prevaricating in giving his evidence in a prosecution against one Evans. Argued before MURPHY, J. at Vancouver on the 7th of April, 1915.

A. H. MacNeill, K.C., for accused.

W. M. McKay (*O'Brian*, with him), for the Crown.

Judgment

MURPHY, J.: The case of *Ex parte Pater* (1864), 5 B. & S. 299, shews that any Court of record has power to commit for a contempt perpetrated in the presence of such Court whilst sitting as a Court. Perjury is such a contempt and in ancient days was, at times, punished by commitment *instanter*: *Stockham* v. *French* (1823), 1 Bing. 365 and cases cited in that report.

Prevarication, which has several meanings (see Wharton's Law Lexicon, 9th Ed., 589), is also stated to be a contempt in works dealing with contempt of Court, and, for the purpose of this decision is assumed to be so, since, in the view I take of the law, the conviction cannot stand even if contempt were committed.

In the case of *In re Pollard* (1868), L.R. 2 P.C. 106 at p. 120, it is laid down that contempt of Court is a criminal offence and that no one should be punished therefor unless the specific charge against such person is distinctly stated and an opportunity of answering it given to him before sentence is passed.

Chang Hang Kiu v. *Piggott, In re Lai Hing Firm* (1909), A.C. 312, followed *In re Pollard* and decided that although the charge there had been stated sufficiently, yet, as no opportunity had been given to the parties committed of giving reasons against summary measures being taken, the committal order must be rescinded. On the material before me I think this case is on all fours with *Chang Hang Kiu* v. *Piggott, In re Lai Hing Firm.* The learned judge here did state sufficiently what the contempt was but pronounced sentence without allowing Fisher an opportunity of giving reasons against summary measures being taken. This is distinctly stated in the affidavit of Mr. *MacNeill* and appears inferentially from the affidavit made by the learned judge.

The conviction will be quashed. Protection to all parties concerned. No order as to costs.

Conviction quashed.

ROUNDY v. SALINAS.

Mineral claim—Sale by sheriff—Sold by auction to purchaser without free miner's certificate—Certificate issued to purchaser prior to execution and delivery of bill of sale—Validity of—Mineral Act, R.S.B.C. 1911, Cap. 157, Sec. 12.

A sheriff sold two mineral claims by public auction to a person who was not the holder of a free miner's certificate and four days later gave a bill of sale of the claims to the same person, who in the meantime had obtained the necessary certificate. An action by the former owner for a declaration that the sale was invalid was dismissed by the trial judge.

Held, on appeal (MARTIN and MCPHILLIPS, JJ.A., dissenting), that assuming the acceptance of the bid at the auction was void the completion of the transaction by the execution and delivery of the bill of sale by the sheriff would be a new contract, although based on the theory that the auction bid was good.

COURT OF APPEAL

1915

April 30.

Per GALLIHER, J.A.: Section 12 of the Act does not destroy the purchaser's capacity to contract, and when he has by procuring a free miner's certificate placed himself in a position to receive the fruits of that contract his position cannot be attacked.

Decision of YOUNG, Co. J. affirmed.

ROUNDY *v.* SALINAS

APPEAL by plaintiff from the decision of YOUNG, Co.J. delivered at Prince Rupert on the 11th of September, 1914, in an action arising out of the sale by the sheriff, under a writ of execution, of certain mineral claims. The claims were taken in execution on a judgment against the plaintiff and at the sale were purchased by the defendant. At the time of the purchase the plaintiff was not the holder of a free miner's certificate, but two days later procured one, and two days after that the sheriff conveyed the property to him. The plaintiff submitted that the property in the claims never passed and that they were still vested in him. The defence was that the property in the claims did not pass until the sheriff executed the bill of sale, at which time the defendant was the holder of a free miner's certificate. The trial judge was of this opinion, and gave judgment accordingly, with costs.

Statement

The appeal was argued at Victoria on the 20th of January, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

D. S. Tait, for appellant: The sheriff sold the claims to the defendant who was not a free miner; four days later the sheriff executed a bill of sale of the claims to the defendant, who in the meantime had obtained a free miner's certificate. When a sheriff sells, the property passes at the fall of the hammer: *Giles* v. *Grover* (1832), 1 Cl. & F. 72; 9 Bing. 128; *Playfair* v. *Musgrove* (1845), 14 M. & W. 239 at p. 245. Under section 12 of the Act no person shall be recognized as having any right or interest in mineral claims unless he shall have a free miner's certificate unexpired, the property therefore did not pass to the defendant: see *Barinds* v. *Green* (1911), 16 B.C. 433 at p. 439. The sheriff could not legally give a bill of sale of the property when he did; he must have another sale. With relation to the effect of section 12 of the Act, see *Naught et al.* v.

Argument

Van Norman (1902), 9 B.C. 131; 1 M.M.C. 516; *Woodbury Mines* v. *Poyntz* (1903), 10 B.C. 181; 2 M.M.C. 76. It is plain that the intention of the Act is to eliminate any interest of any one who has not a free miner's certificate unexpired. The receipt is sufficient evidence of a sale under the Act.

COURT OF APPEAL

1915

April 30.

ROUNDY v. SALINAS

Maclean, K.C., for respondent: The defendant obtained a certificate and later the sheriff completed the sale. Under section 75 of the Act no property passes until the bill of sale is delivered. *Playfair* v. *Musgrove* (1845), 14 M. & W. 239 applies in this case. It was there held that until the sheriff executed an assignment the property did not pass. The property does not pass until the sheriff does all that the law requires. [He referred to *Hernaman* v. *Bowker* (1856), 11 Ex. 760 and *Phillips* v. *Viscount Canterbury* (1843), 11 M. & W. 619.]

Argument

Tait, in reply.

Cur. adv. vult.

30th April, 1915.

MACDONALD, C.J.A.: I would dismiss the appeal for the reasons given by my brother IRVING.

MACDONALD, C.J.A.

IRVING, J.A.: The defendant certainly has a strong equity in his favour. It was his money that paid the execution creditor, and to that extent was a final discharge of the execution debtor. Notwithstanding this, the execution debtor now sues without offering to repay the money so paid on his account. His contention is that there was no sale on the 25th because the defendant was not eligible to purchase.

The defendant's position, I think, may be maintained on the following ground: sheriffs in England are required to sell by public auction under an execution for a sum exceeding £20; a failure to observe this statute is an irregularity only: see *Crawshaw v. Harrison* (1894), 1 Q.B. 79; 63 L.J., Q.B. 94. We have no such provision in British Columbia, and the sheriff here can sell by public auction or bill of sale. *Hernaman* v. *Bowker* (1856), 11 Ex. 760; 25 L.J., Ex. 69 is an authority for the proposition that the sheriff may sell in any way—a sale by auction or bill of sale is only a mode of exercising the authority which the law gives by the *fi. fa.*—"You cause to be

IRVING, J.A.

COURT OF APPEAL

1915

April 30.

ROUNDY v. SALINAS

made." Assuming, without deciding, what was done at the auction on the 25th of March was not a sale the special property and power to sell remained with the sheriff until the 29th, when he gave the bill of sale to the defendant. The bill of sale put an end to his power to sell under the *fi. fa.* and put an end to the plaintiff's general "property" in the claims. The acceptance of the bid at the auction we may assume was void, but the completion of the transaction on the 29th would be a new contract, although based on the theory that the auction bid was good. What was done in this case was at most an irregularity, and the authorities shew that Courts will uphold sales *bona fide* made where irregularities have occurred: see for example *Jeanes* v. *Wilkins* (1749), 1 Ves. Sen. 195, where a sheriff sold after the return day of the writ had expired, also *Doe* v. *Donston* (1818), 1 B. & Ald. 230; and *Hernaman* v. *Bowker, supra.*

IRVING, J.A.

If on the 26th of March the sheriff had been ruled by the present plaintiff to make a return to the writ, he would either return that the property remained unsold for want of buyers, in which case a writ of *venditioni exponas* would issue, to sell for the best price you can, or (more properly), make a special return saying that Salinas had at the auction made a bid, and paid $200 and he (sheriff) would complete by bill of sale as soon as Salinas had obtained his qualifying free miner's licence. There can be no doubt that if such a special return were made the Court would have extended the time for completion. As the Court could have adopted such a course there is no reason why we should not uphold the sale as made on the 29th. In considering how the Court would have dealt with such a return, we must have regard to the fact that up to the 29th the execution creditor had a legal right as against the owner to have the goods sold and to be paid out of the proceeds of the sale (*per* Lindley, M.R. in *In re Clarke* (1898), 1 Ch. 336; 67 L.J., Ch. 234.)

I would dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: On the admitted facts it appears that the sheriff of the County of Atlin took in execution two mineral

claims, the Alderbaran and I'll Chance It, the property of the present plaintiff, and on the 25th of March, 1914, sold them by public auction to the defendant for $200 cash and gave the defendant a receipt for the money, and two days later and in order to effectuate and carry out said sale the sheriff gave the defendant a formal bill of sale of said claims.

At the time the claims were knocked down to the defendant he was not the holder of a free miner's certificate, but he obtained one two days later, on the 27th, and before the bill of sale was executed. No question, it will be observed, arises here of what might be the position of the parties if the sheriff had decided to treat the sale by auction as void or invalid and had later sold privately to the purchaser, because the transfer that he subsequently gave was admittedly "pursuant to" and in furtherance of his sale by auction and therefore an attempted confirmation of it, and so the transfer relates back to said sale which was completed upon payment of the price and the giving of the receipt therefor. I say "completed" because section 75 only requires transfers of mineral claims to be in writing (not under seal) and here we have a written receipt for the money, and though it is not before us, yet, as it is admitted that it was given, it must be taken to include the essentials of the sale it relates to, *viz.*, the date, the price, the names of the claims sold, and the signature of the vendor, which is all that would be necessary to satisfy the section, which, it is to be noted, does not say that verbal transfers shall be void but merely that only written ones shall be "enforceable." *Cf. McMeekin* v. *Furry* (1907), 2 M.M.C. 432, 536; and *Grutchfield* v. *Harbottle* (1900), 1 M.M.C. 396. So here there was at least a written "document of title" that could be recorded under section 74, and it is furthermore, and in any event, an acknowledgment that the purchaser had acquired the right to obtain from the vendor a formal transfer to satisfy section 75, if the receipt were not deemed sufficient, and that right he could not be deprived of if he had the capacity to acquire the property at all. Therefore the position was that the sale was completed at the auction unless there was some other legal enactment which incapacitated the purchaser from acquiring the property.

MARTIN, J.A.

COURT OF APPEAL

1915

April 30.

ROUNDY v. SALINAS

These circumstances distinguish the case from *Playfair* v. *Musgrove* (1845), 14 M. & W. 239, because here, in my opinion, this chattel real—*Pope* v. *Cole* (1898), 1 M.M.C. 257; *McMeekin* v. *Furry, supra*; *Williams Creek Co.* v. *Symon* (1867), 1 M.M.C. 1—was by virtue of said receipt, both "bargained and sold," as well as knocked down, as Baron Rolfe puts it in the *Playfair* case, and so the question is, did the purchaser acquire "any right or interest" in the claims having regard to section 12 of the Mineral Act, which enacts as follows:

"Subject to the proviso hereinafter stated, no person or joint-stock company shall be recognized as having any right or interest in or to any mining property unless he or it shall have a free miner's certificate unexpired."

The would-be purchaser at the time of this sale, not being a "free miner," *i.e.*, "a person . . . . named in and lawfully possessed of a valid existing free miner's certificate and no other" (section 2), was, in my opinion, a member of a class prohibited from becoming, as he desired to be, a purchaser at said sale which was consequently a void one and all proceedings later taken to patch it up were inoperative. The situation is, perhaps, made clearer by the illustration that if immediately after the purchaser paid his money the sheriff had then and there executed and delivered to him a formal bill of sale he nevertheless took nothing because he was incapacitated by section 12 from holding "mining property," and no claim of his thereto could be "recognized," and so there was no sale in law, and it could not be made one afterwards by acquiring a capacity which he did not hold at the time, the statutory bar having intervened between the original disability and the attempted confirmation. As it is an impossibility to add something to nothing, therefore, since the original attempted sale was a nullity, it is inappropriate to refer to what was done later as having the effect of supplementing the void proceeding.

MARTIN, J.A.

A reference during the argument was made to the ordinary case of a purchase of real property by an infant, but that presents no true analogy because "Coke himself has it that an infant may make a purchase of land which is voidable only, for 'it is intended for his benefit, and at his full age he may either agree thereunto and perfect it, or, without any cause to

be alleged, waive or disagree to the purchase' ": Eversley on Domestic Relations, 3rd Ed., 754. And the general rule is "All acts and instruments of a solemn nature which are not to an infant's prejudice are valid and binding until set aside by him on attaining majority"—p. 756. It should in this relation be noted that by section 4 of the Mineral Act legal infants over 18 years may acquire the privileges of a free miner, and it is declared that:—

"A minor who shall become a free miner shall, as regards his mining property and liabilities contracted in connection therewith, be treated as of full age."

MARTIN, J.A.

It follows, therefore, that as was said in *Giles* v. *Grover* (1832), 9 Bing. 128 at p. 230, the claims "still remained the property of the debtor to whom they originally belonged," who is the plaintiff at bar, and therefore the defendant acquired no "right or interest" in them and consequently the appeal should be allowed and judgment entered for the plaintiff.

GALLIHER, J.A.

GALLIHER, J.A.: There is no law which prohibited Salinas from becoming a bidder at the sale. He did bid, and the property was knocked down to him by the sheriff; the money was paid by Salinas to the sheriff and a receipt given. This did not vest the title in Salinas. In order to do so it was necessary that the sheriff should execute a bill of sale to Salinas and until the sheriff did so the title in the property remained in Roundy. After the sale the sheriff was merely the conduit-pipe to transfer the rights of Roundy to Salinas.

The plaintiff relies on section 12 of the Mineral Act, Cap. 157, R.S.B.C. 1911 [already set out], and contends that as Salinas was not the holder of a free miner's certificate on the day of the sale when the property was knocked down to him that the sale was abortive. At the time the sheriff executed the bill of sale to Salinas he was the holder of a free miner's certificate.

So far as the sheriff is concerned, he was not, I think, bound to inquire as to whether Salinas was the holder of a free miner's certificate or not, at all events up to the time he executed the bill of sale, and finding him so at that time he did nothing he was not required to do by virtue of his office in execution of

COURT OF APPEAL

1915

April 30.

ROUNDY v. SALINAS

the writ. In order to succeed the plaintiff must go so far as to say that the defendant was at the time of the sale incapable of contracting with respect to a mineral claim.

The section in question, while it says he shall not be recognized as having any interest, does not destroy his capacity to contract, and when he has, by procuring a free miner's certificate, placed himself in a position to receive the fruits of that contract, and the person authorized has conferred upon him those fruits, the plaintiff cannot attack his position.

A person may contract in respect of something he is not at the time in a position to deliver. Why not also in respect of something which he is not at the moment in a position to receive, by reason of some disability as to receiving which is afterwards removed? I think the more liberal construction of section 12 should be applied, *i.e.*, that any person coming to the Crown, claiming an interest in mining property, shall not be recognized as having any interest unless he is the holder of a free miner's certificate, or that, in case of disputed rights between parties, a like result follows, and not the more technical construction that the section incapacitates any one not so holding from contracting in respect of a mineral claim so as to render a sale to him under execution abortive where the title to the property has to be afterwards conveyed by deed, the sale and giving of the conveyance being, I think, a continuous transaction. If the latter construction is to prevail, it narrows the field of bidders at public auction and is contrary to what is supposed to be the advantages of sales in open market, and it is hardly likely that the Legislature intended that. Moreover, I think the section is one which is designed for revenue, and is penal in its effect. Should I be in error in this conclusion, I agree with my brother IRVING on the other ground taken by him.

GALLIHER, J.A.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. [after stating the facts]: The action is one for a declaration that the appellant is the owner of the mineral claims notwithstanding the attempted sale made by the sheriff, the delivery up of the bill of sale for cancellation, and damages for trespass upon the mineral claims. The short point for determination is, was the sale a valid one in view of

the fact that the respondent was not, at the time of the sale to him by the sheriff, a free miner holding a certificate under the provisions of the Mineral Act, R.S.B.C. 1911, Cap. 157? [His Lordship read section 12 and continued]:

In my opinion a mineral claim is in its nature an interest in land—a realty interest; a chattel real. GREGORY, J. considered what the nature of the interest in a mineral claim was in *Barinds* v. *Green* (1911), 16 B.C. 433 at p. 438. Section 18 of the Mineral Act reads as follows:

"18. The interest of a free miner in his mineral claim shall, save as to claims held as real estate, be deemed to be a chattel interest equivalent to a lease for one year and thence from year to year subject to the performance and observance of all the terms and conditions of this Act."

Were it not for section 12 of the Execution Act, R.S.B.C. 1911, Cap. 79, a mineral claim would not be exigible and capable of being sold under an execution against goods and chattels. The section reads as follows:

"12. Any interest which a free miner has in any mineral claim before the issue of a Crown grant therefor, or in any mining property as defined by the Mineral Act, and any placer claim and mining property as defined in the Placer-Mining Act, may be seized and sold by the sheriff, under and by virtue of an execution issued against goods and chattels."

Now it is not contended that there was but the one sale by the sheriff, and the bill of sale is referable only to the sale made when the respondent was not possessed of a free miner's certificate and in pursuance of the sale made on the 25th of March, 1914. The bill of sale was executed by the sheriff, as grantor, to the respondent, as grantee, in recognition of a right or interest claimed to have been acquired by the sale of the 25th of March, 1914. This, in my opinion, offends against the law and the policy of the law, and I would again refer to the judgment of GREGORY, J. in *Barinds* v. *Green, supra,* at p. 439.

MCPHILLIPS, J.A.

In *Playfair* v. *Musgrove* (1845), 14 M. & W. 239 (69 R.R. 690), Rolfe, B. said at pp. 246-7:

"The Sheriff has pleaded that he was justified in entering the plaintiff's dwelling-house by the writ of *fieri facias*; and that before the return, he sold the lease, and the plaintiff's interest in the term, and continued in possession of the dwelling-house for the fuller execution of the writ. Now the word 'sold' seems to me to mean 'bargained and sold'; for the law knows nothing of the sale of a chattel real, except by instrument under seal; and the mere knocking it down at an auction is nothing more than making a contract to sell it."

COURT OF APPEAL

1915

April 30.

ROUNDY v. SALINAS

If, therefore, the act of the sheriff in the present case was the making of a contract to sell the mineral claims when knocking same down to the respondent at the auction—which contract of sale was evidenced by a receipt in writing—it was, in my opinion, a void sale, and the execution later of the bill of sale can in no way be curative of a void act. The respondent was incapacitated by statute from entering into an agreement for the acquirement of the mineral claims sold by the sheriff and they could not be knocked down to him at the auction sale, and the agreement was, therefore, invalid.

The present case raises the question of the protection of the revenue and it is abundantly clear that the Mineral Act, in its provisions, and the policy of the law generally, is that all persons and corporations engaged in mining, and holding or acquiring mineral claims, or any right or interest therein, shall, as of necessity, be the holders of certificates as free miners. It would follow that if the requirement be that—which, in my opinion, is the law—all those bidding at the auction sale should at the time be the holders of such certificates, and that it is not to be admitted that the taking out of the certificate at the later time—before the actual execution of the bill of sale by the successful bidder—is sufficient.

MCPHILLIPS, J.A.

In my opinion, therefore, the appeal should be allowed, and there should be a declaration that the appellant is the owner of the mineral claims in question, that the bill of sale be delivered up to be cancelled, and a reference to assess the damages, the appellant to have the costs here and in the Court below.

Appeal dismissed,
Martin and McPhillips, JJ.A. dissenting.

Solicitors for appellant: *Carss & Carss.*
Solicitors for respondent: *Williams & Manson.*

WOODWORTH, FISHER & CROWE v. GOLD.

COURT OF APPEAL

1915

April 28.

WOODWORTH, FISHER & CROWE v. GOLD

New trial—Judge's charge—Reference to proceedings in another action that was not in evidence—Misdirection.

In an action by a solicitor for payment of a bill of costs incurred in an action conducted by himself on behalf of the defendant, the trial judge (who sat on the former case) in his charge to the jury referred to matters within his own knowledge that took place at the former trial but was not in evidence on this trial.

Held (McPHILLIPS, J.A. dissenting), that there was misdirection and there should be a new trial.

APPEAL by plaintiffs from the decision of MORRISON, J. and the verdict of a jury in an action tried at Vancouver on the 28th of March, 1915, for the recovery of $1,040.30, balance due for solicitors' costs for work performed by the plaintiffs as the defendant's solicitors. The defendant employed the plaintiffs on the 1st of June, 1914, to take proceedings to upset the election of one Kerr as reeve of South Vancouver. The proceedings were carried through, including an appeal to the Court of Appeal, and terminated unsuccessfully. The plaintiffs rendered the defendant a bill for $1,149.40, of which $109.10 had been paid on account. The defendant refused to pay the bill, claiming that the plaintiffs had agreed to take the case for $200. Woodworth's explanation of this was that he agreed to take $200 and the taxed costs against the defendant if successful, but if they were unsuccessful he was only to get the taxed costs. He hoped to be able to dispose of the case by a Court motion, in which event he agreed to take $200 as payment in full, but that when the motion was heard and the judge came to the conclusion that there should be a trial, he told the defendant it would cost quite a heavy sum, and it was then they came to the arrangement as above stated. The plaintiff Woodworth's explanation is corroborated by his stenographer, who heard the conversation between him and defendant when the bargain was made. The action against Kerr was tried by MORRISON, J., and the main

Statement

COURT OF APPEAL

1915

April 28.

WOODWORTH, FISHER & CROWE v. GOLD

contention by the appellants' counsel was that on his charge to the jury the learned trial judge referred to matters that took place at the trial against Kerr that were not in evidence at this trial, the effect of which was to strongly prejudice the jury against the appellants.

The appeal was argued at Vancouver on the 27th and 28th of April, 1915, before MACDONALD, C.J.A., IRVING, GALLIHER and MCPHILLIPS, JJ.A.

Martin, K.C., for appellants: We hoped to succeed on a chamber application, in which case $200 was a reasonable fee, but it was outside of all proportion to expect us to go through the trial and the appeal for that sum, and our explanation that we arranged with the defendant for $200 and the taxed costs after we had failed on the motion before MURPHY, J. is a reasonable one for the work actually done. The trial judge, in his charge, referred to evidence in the first trial, and what happened at the first trial, that was not before the Court in this case at all. He suggested that Woodworth told Gold that the action would be an easy one, when there was no issue of whether the bill was reasonable or not. The whole question is whether there was a bargain or no bargain. We say the learned judge's charge was such as to entitle us to a new trial.

Argument

Rubinowitz, for respondent: Counsel for the appellant has inaccurately stated that there is no evidence to support the learned judge's charge. [He referred to *Harry* v. *Packers* (1904), 10 B.C. 258; *Lowenburg, Harris & Company* v. *Wolley* (1895), 25 S.C.R. 51 at p. 55; *Taylor* v. *Ashton* (1843), 12 L.J., Ex. 363.] In any case, if no substantial wrong has been done, as there was evidence upon which the jury might reasonably find as they did, this Court should not interfere: see *MacGill & Grant* v. *Chin Yow You* (1914), 19 B.C. 241; *Merivale* v. *Carson* (1887), 20 Q.B.D. 275; *Metropolitan Railway Co.* v. *Wright* (1886), 11 App. Cas. 152. It is a question for the Court to consider whether the judge's charge has brought about a miscarriage of justice.

Martin, in reply: What we say is that through the improper action of the judge the jury may have been led to a miscarriage

of justice: see *Hagemeir* v. *Canadian Pacific Ry. Co.* (1914), 25 Man. L.R. 1; *Anthony* v. *Halstead* (1877), 37 L.T.N.S. 433.

MACDONALD, C.J.A.: I think there should be a new trial. It is a very difficult case to reconsider or review in this Court. The issue between the parties was a very simple one. It was one which could have been very easily and clearly stated to the jury. The learned judge, apparently, thought it was necessary to make certain observations which, with great respect to him, I think he was rather unhappy in making; and the effect, taking all that has been said from beginning to end of his charge, I think would be rather prejudicial, in fact, decidedly prejudicial to the plaintiffs' case. I am afraid that in this case the learned judge did not make the real issue clear to the jury, and by reference to what was done in another action, in the election petition, and by reference to what was done before himself and before MURPHY, J. in connection with the particulars of the evidence which the learned judge required to be furnished, the jury have taken a wrong view of the effect of that upon the issue which they had to try. Reading all that has been said, and all the remarks that have been made by Mr. *Martin* in his appeal here, I am of the opinion that they must have affected the minds of the jurors, and that the plaintiffs have not received what section 55 of the Supreme Court Act entitled them to, that is to say, to have the issues in the action submitted to the jury with a proper direction with respect to the law and the evidence. There is no question, of course, of misdirection in law here, but I do not think the learned judge was quite happy in the way he expressed himself concerning the facts.

MACDONALD, C.J.A.

IRVING, J.A.: I agree. I do not think that I can add usefully anything to what the learned Chief Justice has just said.

IRVING, J.A.

GALLIHER, J.A.: I would grant a new trial. I regret very much that the time of the Court has been taken up in discussing a point that was not before us at all, I must say, against my protest yesterday. However, we have to, I suppose, bear with these things and do our duty as best we can. The question is

GALLIHER, J.A.

COURT OF APPEAL

1915

April 28.

WOODWORTH, FISHER & CROWE v. GOLD

not before us as to whether Mr. Gold is right or is not right, whether the jury came to the right conclusion or whether they did not. That is a matter that is outside of the question before this Court. I am satisfied, reading the charge of the judge, and on consideration of the evidence that has been pointed out to us affecting the different statements made, that the charge as a whole must have been very prejudicial to the plaintiffs in the action; and I may say that I know of no authority (and certainly none has been cited to us) which entitles a judge, on matters within his own knowledge which do not appear in evidence at all, to place that as evidence before a jury, and, in asking them to consider issues that are in evidence, to consider that in connection with such issues. If that is the law, then my view of it is wrong.

GALLIHER, J.A.

McPHILLIPS, J.A.: I must dissent, and I do so with the greatest respect to my learned brothers, as to the determination arrived at by them that there should be a new trial. In my opinion the case was one that might almost be said was conducted with heat. It was also a case between a solicitor and his client. I hope that I will refrain as much as possible from discussing the merits, following the view of Lord Ashbourne in *S. Pearson & Son, Lim.* v. *Dublin Corporation* (1907), 77 L.J., P.C. 1 at p. 5, where he makes the observation that a new trial being granted, he will say as little as possible on the merits of the case. Yet some observations are necessary in justice to the learned trial judge, whose charge is impugned. I must, at the outset, say that the charge must be taken as a whole, and upon the whole charge there must be substantial misdirection. *Blue & Deschamps* v. *Red Mountain Railway* (1909), A.C. 361, which went to the Privy Council, decides this. The learned trial judge was compelled, in the discharge of his duty, to canvas the evidence that was adduced before him. I consider that the learned trial judge did not travel outside of the evidence in his charge to the jury. There is high authority for a judge to state what has occurred before him. How, otherwise, could you carry on the administration of justice? Is the judge to be excluded from making any statement of what has occurred

MCPHILLIPS, J.A.

before him, or what has been the determination of the Court? The Court of Appeal take here every day the statement of counsel as to what took place at the trial; and the judge was rightly entitled to make reference to something which was of his own knowledge, and something which was of the *res gestæ* in the case and known to the parties litigant. He was thoroughly conversant with it, it was canvassed in the evidence, and it was pertinent for him to lay stress upon the fact that here a solicitor had made an agreement with his client for $200; and it was pertinent for him to say, and remark with considerable force, was that $200 to be paid merely for that application which came before Mr. Justice MURPHY? And it was also pertinent for him to enlarge upon the reasonableness or unreasonableness of this claim of $1,250. It seems to me that the learned trial judge very properly said to the jury: It is for you to say now whether or not you believe the plaintiff as against the defendant upon this matter which is before you, and that was, whether Mr. Woodworth, when he made this agreement with his client for $200, and found afterwards that it developed into a case of considerable magnitude, was to be entitled to claim that that agreement was not enforceable and not in existence? It was fair for him to call attention to all the facts, and it would have been fair, in my opinion, for the learned trial judge to have told the jury that upon the facts, a solicitor being the plaintiff, and dealing with his client as he had done, that the verdict must be for the defendant.

MCPHILLIPS, J.A.

Now, the duty that is cast upon a solicitor always is to establish and support his retainer, and if he makes an agreement with his client, that agreement stands unless he establishes another agreement, and it was right and proper for the learned trial judge to remark upon that. And, further, the legal profession must not be too thin-skinned. Here is a case where solicitor and client come in question before the learned trial judge, and he sees that the solicitor calls a stenographer into his office, and later interposes the stenographer as a witness in an action brought by him against his client; the highest form of confidence must be maintained between the solicitor and his client; the very minute that relationship of confidence ceases

COURT OF APPEAL

1915

April 28.

WOODWORTH, FISHER & CROWE v. GOLD

the solicitor should no longer presume to act. Yet the solicitor apparently went on. I must say that this charge, although in language which seems at first sight to be such that it might give rise to some prejudice, is couched in language which I think the learned trial judge was rightly and properly entitled to clothe it in.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellants: *A. R. Creagh.*
Solicitor for respondent: *I. I. Rubinowitz.*

COURT OF APPEAL

1915

May 6.

SCOTTISH CANADIAN CANNING CO. v. DICKIE

SCOTTISH CANADIAN CANNING COMPANY, LIMITED v. DICKIE AND SHERMAN

Company law — Managing director — Power of attorney — Agreement to vacate position upon certain terms—Delay in carrying out terms——Effect of where necessary to proceed with company's business.

The managing director of a canning company who held a power of attorney empowering him to lease the Company's property, agreed with the Company that upon certain conditions being complied with he would sever his connection with the Company, but owing to the Company's delay in fulfilling the conditions and the fact that the salmon run was on, he leased the property in order to carry on the season's work thereby rendering it impossible to carry out the agreement with the Company. In an action to set aside the lease and for an injunction the trial judge held in favour of the plaintiff.

Held, on appeal, reversing the decision of CLEMENT, J. (MACDONALD, C.J.A. and GALLIHER, J.A. dissenting), that as the conditions of the agreement had not been carried out and the defendant had the power to lease the property which appeared in the best interests of the Company, his acts should not be interfered with.

Statement

APPEAL from the decision of CLEMENT, J. of the 5th of August, 1914, on a motion for an injunction turned, by consent, into a motion for judgment. The plaintiff Company has

its head office in England and its business assets and property consist in freehold and leasehold lands being a cannery site and wharfage at Steveston, British Columbia, and the salmon cannery and plant located thereon. The defendant Sherman who was a shareholder in the Company was on or about the 6th of October, 1911, appointed managing director of the Company for a term of five years. He was at the same time given a power of attorney by the Company authorizing him, *inter alia,* to execute all deeds and instruments and make agreements, assignments, sales, transfers and mortgages as in his opinion might be necessary. On the 7th of April, 1914, an agreement was entered into by way of a memorandum setting out the terms upon which he would sever his connection with the Company. Clauses 4 and 5 of the memorandum were as follow:

"4. When the foregoing provisions as to the payment off of the debenture, the giving of the second mortgage for £3,500, the payment of £500 forthwith and the payment of the second £500 due on the six weeks' bill and the giving of the twelve months' bill for £1,000 and the settlement under Messrs. Buttar & Chiene's certificates shall have taken place and any money due thereunder is paid to Mr. Sherman, Mr. Sherman shall forthwith:

Statement

"(*a*) Hand over to the Company all the property in his possession and all documents relating to such property whether in his favour or otherwise and to facilitate in every way the taking possession thereby by the Company.

"(*b*) Hand over for cancellation the power of attorney by the Company in his favour and his agreements with the Company.

"(*c*) Procure the resignation of Mr. R. A. Maitland and Mr. P. Barder as directors.

"5. Until the provisions of clause 4 become operative Mr. Sherman to remain in control but provided the Company makes the necessary financial arrangements he will restart and carry on the business of the Company in Canada in consultation with any person nominated by the Company for that purpose. It is understood that Mr. Sherman will not enter into any contract on behalf of the Company without the consent of the said person nominated by the Company and that whilst he remains in control he will act as a loyal servant of the Company and do his best to further its interests."

In pursuance of the arrangement one J. W. Windsor, a shareholder in the Company who was appointed manager and was to take charge of the business when the settlement with Sherman had been completed, came to Canada to take part in the settlement of the matters set forth in the memorandum. On the 6th of June, 1914, Sherman, without consulting Wind-

COURT OF APPEAL

1915

May 6.

SCOTTISH CANADIAN CANNING CO. v. DICKIE

sor who was then present in Vancouver, leased the premises at Steveston to his co-defendant Dickie for one year. His excuse for so doing was that the plaintiff Company had so delayed the carrying out of the conditions of the agreement of the 1st of April that the salmon run was on and the best possible arrangement had to be made to go on with the season's work at once, as he had contracted for the supply of fish for 15,000 cases and for a large supply of nets in addition to other obligations in connection with the season's operations. The learned trial judge held that Sherman was not justified in taking the step he did, as the granting of the lease to Dickie rendered it impossible for him to carry out the terms of the agreement with the Company. The defendant Dickie appealed.

Statement

The appeal was argued at Vancouver on the 4th, 7th and 8th of December, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Ritchie, K.C., for appellant: Sherman was managing director, and had the power of attorney of the Company to deal with the property. The directors had no power to remove him from office: see *Nelson* v. *James Nelson & Sons, Limited* (1913), 82 L.J., K.B. 827; (1914), 2 K.B. 770. It is only the shareholders who could remove him. On the terms under which he was to step out from the managership not being complied with, he (as he was entitled to do under the agreement) leased the property to Dickie, who was to conduct the business. The directors were a party to the agreement that Sherman was to continue in charge until the terms of the arrangement whereby he was to drop out were carried through, Windsor having been appointed to take Sherman's position when he dropped out. The granting of the lease to Dickie was within Sherman's power: see *Doctor* v. *People's Trust Co.* (1913), 18 B.C. 382; *Picard* v. *Revelstoke Sawmill Co.*, *ib.* 416.

Argument

S. S. Taylor, K.C., for respondent: Windsor was regularly appointed to take Sherman's place before Sherman leased to Dickie, and Windsor's consent to the lease should have been obtained. The lease was a dishonest one and not in the best interests of the Company: *Windsor* v. *Windsor* (1912), 17

B.C. 105 at p. 112. A managing director is subject to the directions of the board of directors. Windsor's appointment took effect on Sherman giving up his position under the agreement, but Windsor was appointed to supervise his work in the meantime, and notwithstanding his knowledge of Windsor's authority he never told him of his granting the lease to Dickie. Dickie and Sherman were in collusion: see *Derry* v. *Peek* (1889), 14 App. Cas. 337. He had no power to make the lease by virtue of the agreement, also because he had disposed of his shares and it was made in bad faith. The evidence shews that Sherman financed Dickie to operate the cannery. The essence of the case is the granting of the lease.

Ritchie, in reply: There is no finding of fraud by the trial judge or of lack of *bona fides.* As to setting aside the trial judge on the facts see *Coghlan* v. *Cumberland* (1898), 1 Ch. 704; *Montgomerie & Co. Limited* v. *Wallace-James* (1904), A.C. 73.

Argument

No inference should be drawn from the refusal to produce a privileged document: see Phipson on Evidence, 5th Ed., 187.

Cur. adv. vult.

6th May, 1915.

MACDONALD, C.J.A.: The defendant Sherman was managing director of the plaintiff Company and on the 1st of April, 1914, the terms upon which it was agreed that he should sever his connection with the plaintiff, upon which all matters of account between them should be settled, were drawn up in the form of a memorandum to which both parties assented.

The memorandum, which was executed on the 7th of April, 1914, was a lengthy one, and I shall not attempt to summarize its contents, but need only refer to clauses 4 and 5 thereof. [His Lordship read the clauses and continued]:

MACDONALD, C.J.A.

In pursuance of the arrangement come to in the said memorandum J. W. Windsor, a shareholder in the Company, came to Canada to take part in the settlement of the matters set forth in the memorandum. Windsor had been appointed the Company's manager and was to take charge of its business when the settlement had been completed. He was present in Vancouver and in communication with the defendant Sherman when the lease

COURT OF APPEAL

1915

May 6.

SCOTTISH CANADIAN CANNING CO. v. DICKIE

made by the defendant Sherman to his co-defendant Dickie and complained of in this action was executed.

Sherman without consulting Windsor or the board of directors in England, leased the Company's cannery and plant and supplies to his co-defendant Dickie, the result of which would be to prevent or delay the consummation of the arrangement set forth in the memorandum. I agree with the learned trial judge that this was a breach of his agreement and was I think in contravention of at least implied instructions from the board of directors to keep the property intact until the arrangement mentioned in the memorandum should have been either completed or abandoned, which it had not been when the lease was granted.

I also agree with the learned judge that defendant Dickie took the lease with notice of Sherman's obligations under the memorandum. I am further of opinion that the transaction between Sherman and his co-defendant Dickie was not a *bona fide* one, but was made with Dickie in reality for the benefit of Sherman or for their joint benefit. Holding these views I find it unnecessary to express an opinion as to whether the granting of a lease was not beyond the power of a managing director.

The implication to be drawn from clause 5 already recited is that the cannery was not to be re-started save with money supplied by the Company, and that defendant Sherman was not to make any contract without the consent of the person nominated by the board to consult with him.

MACDONALD, C.J.A.

The board I think had a right to control him, and in the granting of the lease he acted in opposition to what he knew to be the directions and wishes of the board. The mortgages of lands, leaseholds and chattels to himself were rightly set aside. It is true that it was agreed in the memorandum that he should have security to cover any balance which might be found on the taking of the accounts to be owing to him by the Company, but it was not agreed that he should take the matter into his own hands, and execute mortgages, as attorney for the Company, in favour of himself without consulting the board of directors.

The only error in my opinion in the judgment appealed from

was in granting the relief set forth in paragraph 7 of the judgment. Sherman's appointment as managing director had not at the date of the trial been revoked. I think the Court ought not to do what the Company itself has power to do, namely, terminate Sherman's authority to intermeddle in the management of its affairs.

I would therefore vary the judgment by striking out said paragraph 7 and would in other respects affirm the judgment below with costs.

IRVING, J.A.: The appeal is brought by the defendant Dickie only who had obtained from Sherman (the other defendant) a lease of the Company's cannery. The learned judge came to the conclusion that although Sherman was to be allowed to remain in control under the agreement of the 7th of April, 1914, it did not authorize him to make a lease of the property to Dickie, as the granting of such a lease would render it impossible for Sherman to hand over the Company's property. Having placed that construction on the agreement, he holds the Company can attack the lease as against Sherman, and he therefore holds that as Dickie was an intimate acquaintance of Sherman, he, Dickie, is bound by the implied provision that the learned judge reads into it.

As I read the learned judge's reasons that was the only ground on which he gave judgment against Dickie.

He did not find that Dickie was guilty of any fraud, or that the lease was a sham transaction. The basis of his judgment was that the action of Sherman in entering into the lease for the season of 1914 was of such a destructive character to the Company's credit that the Court was justified in seeking the interposition of the Court to have him removed and the lease cancelled.

IRVING, J.A.

At present we are but indirectly concerned with Sherman. He has been attacked, and some things he has done seem ill-advised, but I am not able to say that Dickie has been guilty of fraud. To reach that conclusion you must be able to feel that you have looked into his mind and that evidence satisfies you of his guilt.

COURT OF APPEAL

1915

May 6.

SCOTTISH CANADIAN CANNING CO. v. DICKIE

The power of attorney of the 6th of October, 1911, authorizes Sherman "to do all such acts, matters or things and to execute all such deeds and instruments as in the opinion of the attorney may be necessary, convenient or expedient in relation to the property and business of the Company." This in my opinion would authorize a lease of the cannery and business as a going concern. The 14th clause reads:

"To enter into, make, sign, seal, and deliver all such contracts, receipts, agreements, payments, assignments, sales, transfers, mortgages, assurances, instruments and things as may in the opinion of the said attorney be necessary, convenient or expedient in relation to the property or business of the Company in the said Dominion and to act as a committee of the board of directors of the Company for any of the purposes of this clause."

The 17th clause is peculiarly strong. It is as follows:

"AND IT IS HEREBY DECLARED that the said attorney in exercising the powers hereby conferred upon him shall conform to the regulations and directions for the time being imposed on or given to him by the Company and may sub-delegate to any person or persons any of the powers hereby conferred upon such terms and conditions as may seem expedient and may at any time revoke any such sub-delegation, PROVIDED ALWAYS that no person dealing with the said attorney or any such sub-delegate shall be concerned or entitled to see or inquire whether the said attorney or sub-delegate is or is not acting in accordance with such regulations or directions and notwithstanding any breach of such regulations or directions committed by the said attorney or sub-delegate in regard to any act, deed, instrument, or thing the same shall as between the Company and the person or persons dealing with such attorney or sub-delegate be valid and binding on the Company to all intents and purposes."

IRVING, J.A.

The position of the managing director in May and June must have been one of great anxiety. The Company had placed him in control, and had not nominated anyone with whom it was his duty to confer. Mr. Windsor's appointment was conditional and the conditions had not been satisfied and the season for organization of the cannery was already at hand.

I would allow the appeal.

MARTIN, J.A.

MARTIN, J.A.: I would allow the appeal.

GALLIHER, J.A.

GALLIHER, J.A.: I take the view that the provisions of clause 4 of the agreement of the 7th April, 1914, do not become operative upon the signing of the same. At the same time I am satisfied the lease to Dickie is in reality a lease to Sherman and should be set aside. I also agree with the

learned trial judge in setting aside the chattel mortgage and the conveyance by Sherman as attorney for the Company to himself. The appeal should be dismissed.

MCPHILLIPS, J.A.: This is an appeal from the judgment of CLEMENT, J. pronounced upon a motion for an injunction which at first was made *ex parte*. The defendants, however, being given leave to oppose the same, cross-examination was had and evidence adduced, and when coming on again the motion was turned by consent of all parties into a motion for judgment in the action and the learned trial judge granted an injunction forever restraining and enjoining from and after the 8th of August, 1914, the defendant Dickie from occupying, entering upon, or otherwise interfering with the lands, wharves, canneries, etc., of the plaintiff at Steveston, and the defendants and each of them were required to give up to the plaintiff the possession thereof and the defendant Dickie was required to remove all property not the property of the plaintiff; and declared that the lease of the 6th of June, 1914, wherein the plaintiff is lessor and the defendant Dickie is lessee be set aside as being executed and delivered wrongfully and without authority by the defendant Sherman and that the defendant Dickie was a trespasser upon the premises of the plaintiff; that the defendants and each of them do pay to the plaintiff all losses and damages suffered and will suffer by the possession and interference by the defendant Dickie with the property and business of the plaintiff by reason of the lease or otherwise since the 6th of June, 1914, and that a reference be had to the district registrar to determine the losses and damages that the bill of sale by way of chattel mortgage of the 26th of May, 1914, made by the plaintiff to the defendant Sherman for $17,033.33 be set aside; that the mortgage upon the lands of the plaintiff of the 26th of May, 1914, made by the plaintiff to the defendant Sherman for $17,033.33 be set aside; that the mortgages upon the leasehold property made by the plaintiff to the defendant Sherman for $17,033.33 be set aside, and that the defendant Sherman be forever restrained from exercising any control over or interfering with the same or seal of the plaintiff

MCPHILLIPS, J.A.

COURT OF APPEAL

1915

May 6.

or in any wise dealing with the property or business of the plaintiff or hold himself out as the agent of the plaintiff and to return to the representative of the plaintiff all property books, etc., and seal of the plaintiff.

SCOTTISH CANADIAN CANNING CO. v. DICKIE

The argument upon the appeal was elaborate and exhaustive. The appeal, however, in my opinion, may be disposed of upon one very short ground, and that is that the defendant Sherman was in control of the affairs of the plaintiff, being managing director and clothed with all due and proper authority to manage the business and enter into the impeached instruments by way of mortgage and lease and otherwise carry on the business of the plaintiff in ordinary course.

The corporate name of the plaintiff was first C. S. Windsor, Limited, being incorporated in England under the Companies (Consolidation) Act, 1908, on the 9th of September, 1910, but later, in the year 1912, the name was changed to The Scottish Canadian Canning Company, Limited.

On the 6th of October, 1911, the defendant Sherman, then being the managing director, was given a very complete power of attorney, he being then about to proceed to Canada at the request of the C. S. Windsor, Limited, that being at that time the corporate name. The power of attorney, before mentioning in detail the powers conferred, has this provision:

MCPHILLIPS, J.A.

"NOW THESE PRESENTS WITNESS that the Company doth hereby nominate, constitute and appoint the said Alfred Henry Sherman the attorney of the Company in the name and on behalf of the Company to do all such acts, matters and things and to execute all such deeds and instruments as in the opinion of the said attorney may be necessary, convenient or expedient in relation to the property and business of the Company in the said Dominion AND IT IS HEREBY EXPRESSLY DECLARED that without prejudice to the general powers hereinbefore conferred the said attorney shall have power in the name and on behalf of the Company to do all or any of the following things, that is to say:"

The powers enumerated in detail include the taking possession of the property and business of the Company; the selling, mortgaging and improving the goods and property, the acting as a committee of the board of directors, the borrowing of money, the drawing, accepting and indorsing of bills of exchange and promissory notes, the giving of mortgages and charges to secure repayment of moneys borrowed on the Company's business or

property, the recovery and receipt of money; the giving of effective receipts and releases, the commencement of actions, the defending of actions, the adjustments of accounts, to pay debts to procure or consent to the transfer to the attorney (the defendant Sherman) or otherwise any mortgage or charge of the Company that might be paid off; appoint managers and employees generally and dismiss them; to confirm any agreement, charge or mortgage or other transaction purporting to have been entered into on behalf of the Company, to execute, sign, seal and deliver all contracts, receipts, agreements, payments, assignments, sales, transfers, mortgages, assurances, intruments and things as the attorney (the defendant Sherman) might think necessary, convenient or expedient, in relation to the property and business of the Company, and to affix the official seal of the Company under the provisions of section 79 of the Companies (Consolidation) Act, 1908, to any deed, contract, or other instrument, and to cause the power of attorney to be registered. It further provided that the attorney was to conform to the regulations and directions of the Company, but it was provided that no person dealing with the attorney should be concerned or entitled to see or inquire whether the attorney was acting in accordance with such regulations or directions, and notwithstanding any breach thereof by the attorney, the act, deed, instrument or thing done, should be valid and binding on the Company. The power of attorney was irrevocable for the period of twelve months from the 6th of October, 1911, and thereafter to remain in force until revoked.

MCPHILLIPS, J.A.

An agreement was also entered into on the 6th of October, 1911, between the Company (then the C. S. Windsor, Limited) with the defendant Sherman, which recited the passage of a resolution of the board of directors to that effect; and appointed the defendant Sherman managing director of the Company for the term of five years from the 25th of September, 1911, and empowering him to initiate, direct, and control the business and affairs of the Company and subject to any regulations and directions of the board of directors should carry on the business of the Company as he should according to his skill and experience deem most calculated to promote its success; that during

COURT OF APPEAL

1915

May 6.

SCOTTISH CANADIAN CANNING CO. v. DICKIE

his tenure of office as managing director he should not be liable to retire from the board of directors by rotation, but could resign upon three months' previous notice in writing, that he might engage in other business, that he should proceed to Canada and exercise any of the powers conferred by power of attorney.

On the 25th of March, 1914, J. W. Windsor was appointed manager of the Company's business in Canada and he was given a power of attorney, but it was provided by the resolution of the board of directors that the agreement and power of attorney were "to be executed on a condition that the same are only to become operative upon the agreement about to be entered into with Mr. Sherman (the defendant Sherman) being carried into effect or upon further instructions from the board to be given to Mr. J. W. Windsor to which Mr. A. H. Sherman is to be notified at the same time."

On the 1st of April, 1914, a meeting of the board of directors of the plaintiff was held at the registered offices of the Company, 17 Coleman Street, London, E.C., the defendant Sherman being one of the directors there present, the minutes of the meeting reading as follows:

"The terms arranged between the Company and Mr. A. H. Sherman were submitted by Mr. Fraser (Cameron, Kemm & Co.) and were read and approved, and it was resolved 'That the same be entered into by the Company and that Mr. Joseph Johnson and Mr. A. C. Hutchins, two of the directors of the Company, be and they are hereby authorized to sign such terms for and on behalf of the Company.'"

MCPHILLIPS, J.A.

The memorandum of terms speaks "of Mr. Sherman handing over control," that is to say admits that he, the defendant Sherman, then had control of the property, business and affairs of the plaintiff. It was provided that Messrs. Buttar & Chiene, chartered accountants of Vancouver, were to certify the amount due to or from the defendant Sherman by or to the Company and to include liabilities in Canada for which the defendant Sherman was personally liable (other than liabilities for forward contracts) and interest paid by him on account of the Company and salary and expenses to date of handing over control, the defendant to facilitate the taking of the accounts, payments to be made on the basis of Messrs. Buttar & Chiene's

certificates, the certificates to be binding on both parties and final. Amongst other things provided, the defendant Sherman was to sell the shares standing in his name or controlled by him, 4,000 in all, to some person nominated by the Company at 10s. per share and the method of payment therefor is set forth, and certain bills of exchange given, and it was provided as follows:

"It is understood that the Company is accepting the said bills in connection with and to facilitate the carrying out the necessary financial arrangements for the re-starting the Company's business in Canada which Mr. J. W. Windsor has arranged to make and that the Company will not directly or indirectly become the purchasers of any of the above-mentioned shares. Any payment made by the Company in respect of the said bills will be a question of account between it and the said J. W. Windsor."

Then there are provisions with respect to the giving of a second mortgage to the defendant Sherman for £3,400 as security for any balance found to be due the defendant Sherman by the certificates of Messrs. Buttar & Chiene and for the bills of exchange and the Company was to procure prior to the 8th of April, 1914, some person or persons to pay off certain debentures with interest and costs, the defendant Sherman to then transfer the mortgage on the Company's property in his name to such person or persons. It was then provided as follows: [reading clauses 4 and 5 as already set out in statement.]

It will therefore be seen that a number of events were to happen before the defendant Sherman was to hand over the property of the Company and give up for cancellation the power of attorney and the agreements between him and the Company, and it was urged upon the argument that even independently of the want of certificates from Messrs. Buttar & Chiene there was default in that the £500 on the six weeks' bill had not been paid. It is therefore apparent that at the time of the entry into the memorandum of terms, in part hereinbefore recited, there was recognition by the Company that the defendant Sherman was still clothed with the authority as previously set forth and as contained in the power of attorney and agreements with the Company, that is, was still the managing director and in control. This is all the more accentuated when clause 5 of the memorandum of terms is perused, considered and given

COURT OF APPEAL

1915

May 6.

SCOTTISH CANADIAN CANNING CO. v. DICKIE

its true and proper construction [reading clause 5 as already set out in statement.]

In my opinion, the conditions precedent necessary to be performed to divest the defendant Sherman of the control vested in him of the Company's property and business affairs were not performed, therefore the defendant Sherman stood in the position he stood in on the 6th of October, 1911, and was rightly entitled to justify all that he had done as being the exercise of powers conferred upon him by the power of attorney and the agreement, each bearing date the 6th of October, 1911.

With respect to one of the conditions precedent, that is, "the settlement under Messrs. Buttar & Chiene's certificates shall have taken place and any money due thereunder is paid to Mr. Sherman," the certificates had not issued or the award made at the time of the commencement of the action, namely—the 8th of July, 1914 (although apparently an award was later made by Messrs. Buttar & Chiene, that is, on the 21st of July, 1914, but by the order of CLEMENT, J. of the 29th of September, 1914, set aside), therefore it is plain that one of the events provided for has not occurred. Following out the construction I have put upon clause 5, that is that upon the facts clause 4 did not become operative, then it is a matter for inquiry as to whether the defendant Sherman remaining in control the further contin-

MCPHILLIPS, J.A.

gency happened, *i.e.*, the Company making the necessary financial arrangements, the defendant Sherman should re-start and carry on the business in consultation with any person nominated by the Company for that purpose. As to this I fail to see upon the evidence that the Company did make the necessary financial arrangements, nor was there any person nominated by the Company with whom the defendant Sherman was to consult.

The learned counsel for the respondent strongly argued that the latter part of clause 5 was an inhibition upon the defendant Sherman and prevented him entering into any contracts or instruments on behalf of the Company, save only, with the consent of the person nominated by the Company, and that that nominated person was J. W. Windsor. With deference I cannot agree with this contention as the evidence, in my opinion, does not support any nomination being made, and most certainly

there is an entire absence of evidence that the financial arrangements were made.

Finally, with regard to the construction to be placed on clause 5 my opinion is that the position of the defendant Sherman upon the facts remained unaltered and he was in control and further as provided by clause 5, being still in control he was under compulsion to "act as a loyal servant of the Company and do his best to further its interests."

The season of 1914 drew on and it is apparent upon the evidence that the defendant Sherman was anxious, in fact alarmed at the dilatoriness of the Company in not making the proper financial and other arrangements to enter upon the season's work.

It is to be remembered that the defendant Sherman was still the managing director of the Company and answerable, not only to his colleagues upon the board of directors, but to the shareholders for the due discharge of the duty imposed upon him, and it was his bounden duty to exercise the powers conferred upon him, the exercise of which he had undertaken; and being still in control was it not reasonable, in fact, was it not incumbent upon him to exercise his best judgment placed as he was? I am convinced that it was his duty to take all such steps as in accordance with his best judgment were necessary to conserve the interests of the Company. That being the case who is to be entitled to question his conduct or acts and deeds in the carrying out of that which, in his judgment, would best advance the interests of the Company? In answer it may be said that assuredly the Company would be entitled to do this. Did the Company though intervene? The answer upon the evidence is, no, it left the defendant Sherman in control, and entitled to, and, in my opinion, bound to act in the exercise of the powers conferred under the power of attorney and agreement of date the 6th of October, 1911. In clause 17 of the power of attorney it is true the defendant Sherman was called upon to "conform to the regulations and directions for the time being imposed on or given to him by the Company." The Company, upon the evidence, left him in control, and that control he was rightly, in my opinion, entitled to exercise.

MCPHILLIPS, J.A.

COURT OF APPEAL

1915

May 6.

SCOTTISH CANADIAN CANNING CO. v. DICKIE

Now to deal specifically with the judgment of the learned trial judge, with which with all respect I entirely disagree. There is first the injunction restraining the defendant Dickie from all right of entry upon the premises leased to him or the enjoyment thereof, the cancellation of the lease, and the imposition of damages against both defendants by reason of the possession taken by the defendant Dickie and the granting of the lease. Now, with respect to this portion of the judgment in what way can it be sustained? The defendant Sherman was, and I think it can be said admittedly in control; in any case it can be said that the learned trial judge was of the opinion that he was in control. When referring to the memorandum of terms the learned trial judge uses this language:

> "That agreement provides for the necessary transfer of stock, the issue of certificates and so on; for a reference to a firm of accountants in Vancouver to audit the Company's accounts and certify as to how the balance stood, and in the meantime the defendant Sherman was to 'remain in control.' That is the expression used in the agreement. Whatever that may mean, I do not think it authorized Sherman to take such a step as granting the lease to Dickie which would render it impossible for Sherman to carry out the terms of the agreement."

MCPHILLIPS, J.A.

It is to be remembered that the business of the plaintiff was a cannery business, the canning of salmon and the season to be taken advantage of is well known, *i.e.*, the salmon-run season, and the arrangements to take advantage of the annual salmon run must be always made in the springtime of each year if not before. This is a matter of common knowledge in British Columbia, and it is to be noted that not until the 6th of June, 1914, did the defendant Sherman act. Then absolutely despairing, as I read the evidence, of anything possible being done in the way of the Company carrying on the season's work, and not until then did he take the step he did of leasing to the defendant Dickie. To have remained idle and done nothing would have been, in my opinion, a serious dereliction of duty upon his part. The policy or impolicy of what he did is not for the Court, but if I were to express my opinion, which may be said to be of course extra-judicial, he did a prudent act in the interests of the plaintiff in executing the lease and it was an act plainly within the scope of the authority vested in him and in the due exercise of the duty imposed upon him.

The evidence shews that to maintain a cannery business in good standing, *i.e.*, to preserve the goodwill and keep it a going concern is vital and this means continuous operation and the keeping together of the fishermen attached to its operation, and this means advances to the fishermen and continuation of employment to reimburse the Company for not only present advances but for past due advances.

The Japanese fishermen presented a petition outlining the situation of affairs under date the 3rd of June, 1914, and in that petition is to be noted this language:

"If you cannot protect us we will be forced to go elsewhere, as we cannot afford to lose the only work we depend on for our living. Last winter was a very hard one on us as we had not much work. And we cannot live on promise much longer, as our friends at other cannery have received their wants long ago, whereas our position looks very hopeless if we continue to wait. Please accept this statement, for when other canneries hear we are leaving in a body they willingly receive us and would be hard to get the men back again. Hoping you will give this your immediate consideration."

Independent of the lease granted to the defendant Dickie, an agreement was entered into between the plaintiff and the defendant Dickie of date the 6th of June, 1914, and from a recital therein it is seen that the Japanese fishermen were indebted to the plaintiff and the arrangement made was to have the defendant Dickie get in these moneys, which could only be accomplished by the carrying on of the business during the season of 1914. In fact the transaction was one throughout, in my opinion, conceived with the honest intention of safeguarding the interests of the plaintiff in every way. To enter into the details and the matters of account would be a task that, in my opinion, is not cast upon the Court in this appeal.

The defendant Dickie was, as the evidence shews, to pay for all stock in hand and taken over, and to indicate that he at once undertook the burden of matters to keep the business intact and as a going concern it is only necessary to refer to the statement of the cash paid out commencing with the 6th of June, and ending with the 8th of July, 1914, as contained in the statement thereof, in the whole $9,575.73. Included in this amount is the sum of $500 on account of the rent which was

COURT OF APPEAL

1915

May 6.

SCOTTISH CANADIAN CANNING CO. v. DICKIE

$3,000 for the term leased, namely, until the 31st of December, 1914.

The defendant Sherman, according to my view of the evidence, made a truthful disclosure of all that he did in his letter to W. E. Holland, the secretary for the plaintiff, being of date the 8th of June, 1914, and it is to be remembered that the defendant Sherman was acting under the power of attorney and agreement entered into with him, and was the managing director with power to act as a committee of the board of directors, and, in my opinion, all that he did was binding upon the plaintiff, and it is idle argument to contend otherwise.

When the defendant Dickie was considering the proposition that he should lease the property of the plaintiff and carry on the cannery for the season of 1914 he proceeded, in my opinion, in the manner a careful and prudent man would in the circumstances and amongst other things he took legal advice as to the authority in the defendant Sherman to make the lease and the other business arrangements, and was advised that the defendant Sherman could make the lease and in fact the defendant Dickie himself saw the power of attorney. In view of these facts and in particular of clause 17 in the power of attorney reading as follows: [already set out in the judgment of IRVING, J.A.] can it be contended with any possibility of success that the lease is not good and sufficient and of legal effect, even if the defendant Sherman were acting not in accordance with regulations and directions imposed upon him or given to him by the board of directors? It would seem to me that upon the facts it can only be said that the lease is unassailable, and is binding upon the plaintiff. As a matter of sequence it then follows that, in my opinion, the lease was a good and subsisting lease, and the learned judge was in error in setting the same aside and declaring it null and void, and in declaring that the defendant Dickie was a trespasser and in granting an injunction against him and in finding damages by reason thereof against both of the defendants, and that the judgment should be reversed.

MCPHILLIPS, J.A.

There is still to be considered the remaining portions of the judgment setting aside the bill of sale of the 26th of May,

1914, the real estate mortgage of the same date and the mortgage of the leasehold property also of the same date made by the plaintiff to the defendant Sherman and the injunction against the defendant Sherman. The learned trial judge erred, in my opinion, in this as well. It would seem to me that these securities were contemplated in the memorandum of terms. It is there set out that there is to be a mortgage in the defendant Sherman's favour for £3,500 as security for any balance found to be due to him, and it would appear that the security was to be given before the taking of the accounts and the making of the certificates, the giving of the several instruments, namely, bill of sale, real estate mortgage, and mortgage of leasehold property, was merely a matter of conveyancing, convenient and perhaps necessary, and it will be noted all securities were for the same amount, $17,033.33, the presumed equivalent of £3,500, and it is apparent all three instruments were securing only the one sum of $17,033.33.

With regard to the injunction against the defendant Sherman exercising any control and acting as the agent of the plaintiff in any way, I fail to see upon what evidence the learned judge proceeded and with all respect, in my opinion, there was no warrant for any such holding or authority to make any such declaration. It, therefore, follows that in my opinion, the whole judgment should be reversed, the action dismissed, the appeal to this Court being allowed, and the appellant to have the costs here and in the Court below.

MCPHILLIPS, J.A.

Appeal allowed,
Macdonald, C.J.A. and Galliher, J.A. dissenting.

Solicitors for appellant: *Dickie, DeBeck & McTaggart.*
Solicitors for respondent: *Boak & King.*

MACDONALD, J.

1914

Dec. 23.

COURT OF APPEAL

1915

May 7.

GAGNON v. NELSON

NELSON v. GAGNON

GAGNON AND MACKINNON v. NELSON. NELSON v. GAGNON, MACKINNON AND HEIDMAN.

Misrepresentation—Vendor and purchaser—Evidence—Rescission—Finding of fact by trial judge—Non-interference by Court of Appeal.

In an action for rescission of a contract for the sale of land on the ground of misrepresentation it must be proved that the misrepresentation complained of was the inducing cause of the purchase, and whether it was or not is a question of fact to be determined by the trial judge and will not be interfered with by the Court of Appeal without strong reason (MACDONALD, C.J.A.; and MARTIN, J.A. dissenting on the facts).

Smith v. *Chadwick* (1884), 9 App. Cas. 187 and *Sweeney* v. *Coote* (1907), A.C. 221, applied.

APPEAL from the decision of MACDONALD, J. in an action tried by him at Vancouver on the 26th of November, 1914.

Statement

On the 20th of March, 1913, plaintiffs, by an agreement in writing under seal, agreed to sell the defendant lot 22 in block 26 in the subdivision of district lots 757 and 758, group one, New Westminster District. This lot was in the County of New Westminster, in that portion known as Queensborough. Defendant covenanted to pay the sum of $1,400 for the property, of which $150 was paid on the execution of the agreement, and $100 was to be paid by monthly instalments. Defendant continued to make payments as stipulated until the 20th of June, 1914, when he became in default, and an action was brought on the 24th of September, 1914, to recover payments overdue under the agreement. Defendant, on the 1st of October, 1914, brought an action against the plaintiffs and one Heidman to rescind the said agreement on various grounds, and such action was consolidated and tried with the action already launched by the plaintiffs against such defendant. Want of title on the part of the plaintiffs was alleged as one of the grounds for rescission, but this was abandoned at the trial, and two points only remained for consideration, upon which the defendant Nelson accepted the onus and sought to set aside the agreement. Fraud was not alleged, but it was submitted that

Heidman, as agent for the plaintiffs, had misrepresented the property as being "high and dry," and that adjoining lots had either been sold or were selling at the time for $1,200 per lot for inside ones and $1,400 for corner lots. Heidman was not available to be called as a witness on behalf of the plaintiffs at the trial, so that the statements made by the defendant remained uncontradicted.

McCrossan, for plaintiffs.

S. S. Taylor, K.C. (*Robert Smith,* with him), for defendant.

23rd December, 1914.

MACDONALD, J. (after reciting the facts as set out in the statement): As to the alleged representations with respect to the value of the property adjoining the lot sold to the defendant, there was contradictory evidence. Defendant did not give evidence in support of the specific representations as outlined in the statement of defence, but said that Heidman had represented, as to adjoining property, that lots which were not in as good a location were selling for from $1,200 to $1,500. Assuming the correctness of this statement on the part of Heidman, as agent for plaintiffs, I find it was not untrue, and in any event, it would be a very indefinite representation upon which to base a rescission. The other point upon which the defendant relied was that Heidman had represented the lot in question was "high and dry." In considering this ground I approach the subject in a critical mind, as I believe the defendant bought the property for speculation. While the real-estate market at the time was certainly not at its height, and was rather on the decline, still there appears to have been a temporary revival in the locality in question. This lot formed part of a subdivision of New Westminster which it was supposed would be beneficially affected by prospective harbour improvements and the establishment of further industries. These benefits were pointed out to the defendant at the time of the sale, and assisted in its consummation. There is no clear evidence as to the extent to which these improvements and industries developed, but the defendant continued to make payments until, becoming in arrears, he was pressed for settlement. On the 4th of June,

MACDONALD, J.

1914

Dec. 23.

COURT OF APPEAL

1915

May 7.

GAGNON v. NELSON

NELSON v. GAGNON

1914, he was notified of an instalment maturing on the 20th of June, and in reply, wrote the plaintiff Gagnon on the 22nd of June, stating that he was sorry he was not in a position to meet the payment. He referred to the general depression in business and that his earnings had been affected thereby. He stated that he needed money, and if he were given $100 he would abandon any claim to the lot upon the agreement being returned to him. Defendant would thus be losing a large amount of money paid on account of a purchase concerning which he had no fault to find at that time. He also suggested that if the time were extended for payment he might "get things straightened out to go ahead with the payments later on." Plaintiffs did not accept either of these propositions. Defendant states that at the end of June or July he met a Mr. Parsons, and it was not until the month of July that he made up his mind that the lot was not as represented. He inquired of Mr. Parsons as to the condition of the place, prices, and one thing and another, and Parsons told him that he could not see how the lot could be worth the price paid. After his conversation with Mr. Parsons defendant met plaintiff Gagnon for a short time, but nothing was said as to repudiating the agreement. Subsequently the defendant and some other parties who had purchased lots in the plaintiffs' subdivision got in touch with one another and concluded to obtain rescission of their agreements if possible. Having already disposed of the ground as to misrepresentation of the value of the property, the point remains as to whether, assuming that the statement made by the defendant is correct as to Heidman representing the lot as being "high and dry," rescission should result therefrom. It is not necessary that a misrepresentation should be the sole cause operating to induce the defendant to make the purchase. The matter for consideration is whether the statement, even though innocently made, was untrue, and whether the defendant acted on it and was thus to any extent induced to purchase. Although defendant is a railway conductor and of necessity brought in touch with a large number of people while pursuing his vocation and could thus acquire information, he states that he did not know that the land adjoining the Fraser

MACDONALD, J.

River was dyked, and that when he found that the locality in which this lot was situate was so protected and was not, in his opinion, high and dry, he took this as a ground of misrepresentation. I think that the statement as to a lot being high and dry, when applied to a building lot, is a relative term. If the defendant were purchasing an area of land for agricultural purposes and it was represented to him that the property was high and dry, when it was simply dyked, and would require underdraining in order to carry on farming operations, then that would be a substantial misrepresentation, and beyond question would have influenced the purchaser. This particular lot is one of a number in the subdivision forming a portion of New Westminster, and many substantial houses have been erected in the locality. It is supplied with school accommodation, post-office facilities and improved highways. It might be more expensive to construct a comfortable basement in the event of a building being erected, but this is a condition which pertains to a large number of the building lots comprised in the cities of the lower mainland of British Columbia. Even if the statement was made by Heidman, I doubt whether, as applied to such a building lot, it is untrue. In any event, I do not think it operated in any way upon the defendant's mind in inducing him to purchase the property. I believe this ground is an afterthought. He doubtless expected he was making a purchase, on the advice of a friendly agent, that would bring him a profit through resale. The expected advance in price did not occur, and he now seeks to escape payment. I accept defendant's statement as to the influences that operated in his mind in making the purchase, as given to his own counsel:

MACDONALD, J.

1914

Dec. 23.

COURT OF APPEAL

1915

May 7.

GAGNON v. NELSON

NELSON v. GAGNON

MACDONALD, J.

"Now what influenced you to buy? Knowing Mr. Heidman and having full confidence in him and he was telling me what was doing there; there was a nail factory to be built right close, which would increase the value and also that he called this a water-front lot, being close to the water, and on account of the harbour improvements which were going on, that it was the best buy. He said they had been subdivided and put on the market, and it was the best buy at that price in that vicinity, as the other lots in not as good location were selling for more money."

It is thus quite evident that the condition of the lot for building purposes was not present to the mind of the defendant as a factor in his purchase.

MACDONALD, J.

1914

Dec. 23.

There will be judgment for the plaintiffs for the amount due under the agreement, with interest. The action of the defendant for rescission is dismissed. As the plaintiffs could have brought their action in the County Court, I think a proper disposal of the costs would be to allow the plaintiffs one set of costs on the Supreme Court scale.

COURT OF APPEAL

1915

May 7.

The appeal was argued at Vancouver on the 29th of April, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

GAGNON v. NELSON

NELSON v. GAGNON

S. S. Taylor, K.C., for appellant: The lot in question is on Lulu Island, between the north arm of the Fraser River and the main river to the south. The island is protected by dykes, but as a matter of fact, for two months in the year the lot is covered with water. It was represented to us that, first, the lot was "high and dry"; and second, that adjoining property was sold at the same price. The plaintiffs' agent, Heidman, on the above representation, induced Nelson to buy the lot. The evidence shews that adjoining lots were not selling at $1,200 to $1,400, and the lot was not "high and dry."

Argument

McCrossan, for respondents: There was evidence that adjoining lots were sold for the prices alleged, and the trial judge so held. There was no evidence other than that of the defendant as to our representing that the land was "high and dry." The agent and Nelson had several discussions about the property, and the burden is on them to shew that the misrepresentation was the inducing cause of the purchase.

Taylor, in reply.

Cur. adv. vult.

7th May, 1915.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would allow the appeal.

IRVING, J.A.

IRVING, J.A.: Two points have been argued before us. The first as to the value of surrounding lots. The learned trial judge has found the plaintiffs' agent's representations on that point were not untrue. His finding of fact can be supported by the evidence, and, therefore, we ought not to interfere.

The second point is that the agent represented the lot as

"high and dry.' The judge has found that he used that expression, and that the lots were high and dry in a relative sense. If that was all the defendant had to prove, I would allow the appeal, but in an action of misrepresentation you must also prove that the misrepresentation complained of operated on the mind of the purchaser to bring about the purchase. Whether it did or not is a question of fact—an inference of fact to be drawn from the conduct and statements of the witnesses putting it forward: *Smith* v. *Chadwick* (1884), 53 L.J., Ch. 873 at p. 875; *Sweeney* v. *Cooke* (1907), A.C. 221. The learned judge, on this point, has found that the representation did not bring about the sale. In his opinion the sale was brought about by the defendant's expectation of making a profit by a re-sale in consequence, or as a result of the expected development of Lulu Island into a large city, an anticipation which was to be realized by the construction of dockyards and other shipping facilities in the neighbourhood of the lot in question. On this point the learned trial judge had a better opportunity of forming his opinion as to the witnesses's varying statements, and I cannot say that he arrived at a wrong decision. The defendant endeavoured by his statement to make him believe that he would not buy such a lot under any circumstances, but the learned judge refused to give effect to this contention.

IRVING, J.A.

I would dismiss the appeal.

MARTIN, J.A.: At the close of the argument we reserved judgment to consider the question of the inducing cause of the misrepresentation that the lot was "high and dry," which misrepresentation a majority of the Court was of the opinion had been proved, though we thought the alleged misrepresentation as to the selling value of the lots had failed in proof.

MARTIN, J.A.

A consideration of the cases of *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1 at pp. 21-2 (*per* Jessel, M.R.); *Smith* v. *Chadwick* (1884), 9 App. Cas. 187 at p. 196 (*per* Lord Blackburn, approved by Lord Watson at p. 202); *S. Pearson & Son, Limited* v. *Dublin Corporation* (1907), A.C. 351; and *Wells* v. *Smith* (1914), 3 K.B. 722, as applied to the evidence, shews, I think, with all respect to the learned trial judge, that he took

MACDONALD, J.
1914
Dec. 23.
COURT OF APPEAL
1915
May 7.
GAGNON v. NELSON
NELSON v. GAGNON

a wrong view of the matter in confining the question of what induced or influenced the defendant to the single extract he cited from his evidence. By so doing, the additional and preceding positive specific and uncontradicted statement of the defendant on the point was entirely lost sight of, though it is apparent that it should have been read with the said citation, and even if it were considered necessary in the circumstances at bar that the defendant should have been called as a witness to swear that he acted upon the inducement (*per* Lord Blackburn, *supra*), he has actually done so in recounting the representations that Heidman made to him, as follows:

"Yes, I got somewhat interested, [he] telling me how good a proposition he had and during our conversation I told him I didn't feel very anxious about it; that I would like to see it; that formerly I had had a lot in Coquitlam which had later turned out to be low and wet, and that I wouldn't buy a lot like that again under any consideration. He laughed—he says 'This lot is nothing like that.' He says 'This lot is high and dry.' I asked him if he had been over the property and knew it and he said he had been over it personally and knew what it was like. He said, 'I won't sell you a lot, Nelson, unless I knew what it was like.'"

I cannot help feeling that the learned judge has overlooked this all-important and very strong piece of evidence as to the inducing cause, and has not given effect to the views of Jessel, M.R. and Lord Blackburn, the latter saying at p. 196:

MARTIN, J.A.

"I do not think it is necessary, in order to prove this, that the plaintiff always should be called as a witness to swear that he acted upon the inducement. At the time when *Pasley* v. *Freeman* [1789], 2 Sm. L.C., 11th Ed., 66; [3 Term Rep. 51 (1 R.R. 634)] was decided, and for many years afterwards, he could not be so called. I think that if it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract . . . . it is a fair inference of fact that he was induced to do so by the statement."

But, in any event, there can be, on the misrepresentation as found here, and detailed in the evidence above cited, no "matter of doubt," as Lord Blackburn later puts it, on the same page, that the misrepresentation must have been not only the cause, but the main cause "likely to induce" the defendant to enter into this contract, and therefore there was no necessity that he should have been called to swear to the inducement, assuming he has not done so, though it is clear to me he has, *viz.*: "I wouldn't buy a lot like that (low and wet Coquitlam)

lot again under any consideration." Could any inducement be more clearly stated that a "high and dry" lot was an essential thing?

It follows that the appeal should be allowed.

GALLIHER, J.A.: I would dismiss the appeal.

MCPHILLIPS, J.A.: This is an appeal from the decision of MACDONALD, J. directing that judgment be entered for an instalment due in respect of an agreement for the sale of land, and dismissing the counterclaim for rescission and damages, founded upon alleged misrepresentations. I do not find it necessary to allude in detail to the evidence adduced at the trial, as I fully and entirely agree with the conclusion arrived at by the learned trial judge upon the facts, and I also am of the opinion that his judgment is right, applying the law to the facts of the case. It is amply proved that the defendant Nelson entered into the purchase of the land as a matter of speculation, influenced by the potential features of the neighbourhood for business purposes, that is, the likelihood of great harbour improvements, the establishment of factories and other developments. It was not the acquisition of the land for other purposes. It is idle to advance the contention that the land was to be "high and dry," save relatively so, and the evidence, keeping in mind the locality, establishes that the land sufficiently satisfies any representation made. I cannot accede to the view that the defendant Nelson was unaware of the general topography and the situation of the land in question. Apart from this, the land cannot be in any way said to be situate in low, wet, peat lands.

MCPHILLIPS, J.A.

The leading case upon the subject which requires attention upon this appeal is *United Shoe Machinery Company of Canada* v. *Brunet* (1909), A.C. 330, and at pp. 338-9, Lord Atkinson, delivering the judgment of their Lordships of the Privy Council, discusses the considerations which must be given attention and the facts which must be proved, *i.e.*, (1) that the representations complained of were made; (2) that they were false in fact; (3) that when made were known to be false, or were recklessly made, not knowing whether false or true; (4) that

MACDONALD, J.

1914

Dec. 23.

COURT OF APPEAL

1915

May 7.

GAGNON v. NELSON

NELSON v. GAGNON

by reason of the complained of representations the contract was entered into; (5) that within a reasonable time from the discovery of the falsity of the representations, election was made to avoid the contract. Now, have these facts been established in the present case? In my opinion, they have not. The representation chiefly relied upon, and the only one which needs consideration, is that the land in question was high and dry. As I have previously pointed out, in my opinion, upon the facts of the case, and taking all the surrounding circumstances into consideration, the truth of this representation has been established, but if I should be wrong in this, then it can be said that it was not this representation complained of that was the inducing cause of the entry into the contract. The inducing and propelling cause was undoubtedly that which the defendant Nelson apparently very frankly stated to his own counsel—the question and answer being fully set out in the judgment of the learned trial judge—and what appealed to the defendant Nelson was the likely increase in value consequent upon the development going on in the way of harbour improvements and business advantages, that is, the suitability of the land for factory or business purposes, not the utilization of the land for purposes other than the purposes that neighbouring lands could be put to. I cannot satisfy myself that the defendant Nelson, in entering into the contract, only did so upon the faith of the representation that the land in question was high and dry, or that he would not have given his assent to the contract unless in that belief; therefore, to the extent that there was such representation, and to the extent that it might be possible to say it was false—if there be disregard of the locality and the defendant Nelson be credited with want of knowledge thereof—then, upon the facts, the representation was not the effective cause of the defendant Nelson entering into the agreement. In *Smith* v. *Kay* (1859), 7 H.L. Cas. 750, Lord Wensleydale at pp. 775-6 said:

MCPHILLIPS, J.A.

> "Fraud gives a cause of action if it leads to any sort of damage; it avoids contracts only where it is the ground of the contract, and where, unless it had been employed, the contract would never have been made."

In *Attwood* v. *Small* (1835), 6 Cl. & F. 232, Lord Lyndhurst at p. 395 said:

"Where representations are made with respect to the nature and character of the property which is to become the subject of purchase, affecting the value of that property, and those representations afterwards turn out to be incorrect and false, to the knowledge of the party making them, a foundation is laid for maintaining an action in a Court of Common Law to recover damages for the deceit so practised, and in a Court of Equity a foundation is laid for setting aside the contract, which was founded upon a fraudulent basis."

MACDONALD, J.

1914

Dec. 23.

COURT OF APPEAL

1915

May 7.

GAGNON v. NELSON

NELSON v. GAGNON

The facts, however, of the present case do not warrant it being held that the representation complained of was the inducing or effective cause of the defendant Nelson entering into the agreement, and this Court is not embarrassed as the Court of Appeal was in *Smith* v. *Land and House Property Corporation* (1884), 28 Ch. D. 7, as here the learned trial judge has held that the purchaser did not purchase on the faith of the representation; there, it was otherwise, Fry, L.J. saying at p. 17:

"The second question is whether the purchasers purchased on the faith of that representation. The learned judge has found that they did. On that question I feel the same difficulty as Lord Justice Bowen, and on the evidence as read before us I should have felt inclined to come to the conclusion that the contract was not induced by that representation; but as Mr. Justice Denman, who saw and heard Alderman Knight, was satisfied with his evidence, I cannot give my voice for reversing his decision."

MCPHILLIPS, J.A.

In the present case MACDONALD, J. saw and heard the defendant Nelson, and was satisfied that the agreement was not induced by the representation complained of, and no case has been made out by the appellant such as would warrant the disturbance of the judgment of the learned trial judge, and we ought not to differ from his conclusion.

It follows, therefore, that in my opinion the appeal should be dismissed.

Appeal dismissed,
Macdonald, C.J.A. and Martin, J.A. dissenting.

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

Solicitors for respondents: *McCrossan & Harper.*

HUNTER, C.J.B.C.

1914

Feb. 19.

COURT OF APPEAL

1915

May 7.

McLAREN v. McPHEE

McLAREN *ET AL.* v. McPHEE.

Mining law—Option to purchase—Assignment of by written agreement—Consideration for—Portion of claims to be acquired under option—Option abandoned—Damages.

A, who held an option for the purchase of certain mineral claims, entered into a written agreement with B whereby he assigned to B all his interest under the option, the consideration therein set out being an undivided two-sevenths' interest in the claims mentioned in the option when acquired. The agreement also provided that A would superintend the development work on the claims at a salary to be paid by B and that he would stake claims in the immediate vicinity for the benefit of both parties in the same ratio as the claims to be acquired under the option. The option provided that the purchaser was to pay for the claims by instalments and expend a certain sum in development work. B failed to expend the required amount in development work and was in default on the second and later payments under the option. In the meantime A had staked and recorded six other claims in accordance with the agreement, but refused to transfer the interest agreed upon to B. B thereupon sued for a five-sevenths' interest in the claims so staked by A and A counterclaimed for damages for breach of the original agreement. The trial judge held that the agreement being a conditional one, B was not obliged to complete the contract, nor was it obligatory upon A to stake claims, but having done so he must comply with the agreement and transfer to B an undivided five-sevenths' interest in the claims he staked.

Held, on appeal, reversing the decision of HUNTER, C.J.B.C. (GALLIHER and McPHILLIPS, JJ.A., dissenting), that it was a positive agreement on the part of B to give A a two-sevenths' interest in the claims to be acquired under the option and he is liable in damages for the loss A has suffered owing to the agreement not having been carried out.

Statement

APPEAL by defendant from the decision of HUNTER, C.J.B.C. in an action tried by him at Vancouver on the 19th of February, 1914. The facts relevant to the issue are as follows: The defendant, a miner, obtained an option on the 18th of April, 1912, to purchase three mineral claims (Red Point No. 1, Red Point Extension and Black Bear, all in the Skeena Mining District) for $36,000 payable as follows: $1,000 on the 12th of May, 1912; $5,000 on the 10th of October, 1912; $15,000 on the 1st of July, 1913, and $15,000 on the 1st of July, 1914; he

was also obliged to make an expenditure in actual development work of $5,000 in the year 1912, and to commence work not later than the 18th of May. On the 13th of May, 1912, the defendant entered into a written agreement with the plaintiffs whereby, in consideration of the plaintiffs agreeing to assign to the defendant a fully-paid interest representing two-sevenths of the property to be acquired through the above-mentioned option the defendant transferred to the plaintiffs all his interest in the said option. The plaintiffs also agreed to pay the $1,000 due the owners on the 18th of May, and to commence development work at once and spend $6,000 thereon; they were also to pay the unpaid amounts accruing due to the owners of the claims under the option. It was also agreed that the defendant should immediately proceed to the claims and supervise all development work in respect of the $6,000 expenditure on a salary of $200 per month and make fortnightly reports on the progress made. There was also a stipulation that the defendant should prospect for minerals in the immediate neighbourhood and stake claims for the purpose of extension of the claims to be obtained under the option and that the parties should share in such claims in the same proportion as they were to hold the claims under the option. The defendant supervised the development work under the agreement until $3,500 was expended, when he was notified by the plaintiffs to cease work and incur no further expenditure. In the meantime the defendant located and recorded six mineral claims in the immediate vicinity of the said claims, but did not transfer any interest therein to the plaintiffs. The plaintiffs made the $1,000 payment under the option but failed to make the second or further payments, and the option lapsed. The plaintiffs brought action for a declaration that they were entitled to an undivided five-sevenths' interest in the six claims located by the defendant, and the defendant counter-claimed for damages for breach of the agreement in that the plaintiffs failed to take up the option and transfer to the defendant an undivided two-sevenths' interest in the claims.

Statement

Davis, K.C., for plaintiffs.
W. J. Taylor, K.C., for defendant.

HUNTER, C.J.B.C.
1914
Feb. 19.
COURT OF APPEAL
1915
May 7.
MCLAREN v. MCPHEE

HUNTER, C.J.B.C.: I cannot see where I can gain anything by reserving my judgment in this at all. It seems to me that it is entirely left to the honesty of these people (that is to say, the plaintiffs) if they see fit to pay up the $3,600 and expend the $6,000, and whether or not they expend the $6,000 that they are obliged to give you the two-sevenths' interest; but it is not incumbent upon them to do so; and it seems to be unreasonable to suppose that these people intended to obligate themselves to pay that money in any event, whether the property was a good proposition or not. And one would expect to find when they were dealing with the matter of payments in respect of the option that they would be obligated to pay all these amounts if that was the intention, instead of being simply obligated to pay the $1,000 in order to start the thing going. Neither is there any obligation to expend the $6,000 which seems to me to shew it was left to their judgment. It depended on whether the nature of the mineral claim opened up was such as to make it worth while going on paying this money. I think the agreement was conditional all around. There was nothing to obligate McPhee to locate any of these claims if they were worth locating; but if he did locate them they were to go in at a ratio of five to two. And on the other hand there was nothing to obligate the other people to take up the option unless they saw fit in their own judgment on doing some development work on it; and in that event the proportion was to be five to two. As to the question of consideration, the only thing I can say about that is that I must have regard to the nature of the transaction as a whole; and it is proverbial, of course, that these mining propositions are very precarious and uncertain; and I think it was the manifest intention of these people simply to leave matters largely to the future; and if self-interest prompted the people who had got the benefit of the assignment of the option to take it up, they would have to pay the other man the two-sevenths, and they had also undertaken to keep these two-sevenths clear of all charges for recording fees and the like. And on the other hand, if he thought in his own judgment it was worth while to locate these, he was to retain the two-sevenths and the other people were to take the five-sevenths, and he was

drawing this advantage out of the bargain, that he was in the meantime having employment at the rate of $200 per month.

HUNTER, C.J.B.C.

1914

The appeal was argued at Vancouver on the 7th of May, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Feb. 19.

COURT OF APPEAL

1915

W. J. Taylor, K.C., for appellant: We did not give the plaintiffs the five-sevenths' interest because they did not carry out their agreement. The consideration for the assignment of the option was that they were to give defendant a two-sevenths' interest in the claims to be acquired under the option; they could not do this without carrying out all the conditions of the option: see *Inchbald* v. *Western Neilgherry Coffee Co.* (1864), 17 C.B.N.S. 733; *Stirling* v. *Maitland* (1864), 5 B. & S. 840. The plaintiffs under the agreement undertook to do certain things that became impossible owing to their default in regard to the option. This is an equitable relief and when the damage to the defendant is adjusted he is ready to transfer the five-sevenths' interest in the claims he staked to the plaintiffs.

May 7.

MCLAREN v. MCPHEE

Argument

C. B. Macneill, K.C., for respondents: We were to hand over the two-sevenths' interest only in the event of defendant taking up the option, and there is no covenant or undertaking to spend the whole amount stated on development work. It would be absurd to spend more money after sufficient work had been done to shew the claims were worthless. The option was dropped after we had spent $3,500.

Taylor, in reply.

MACDONALD, C.J.A.: I would allow the appeal. My sympathy is the other way, but that does not affect the matter. I think I understand what the parties intended by this agreement, but I have to interpret the agreement by the language used by the parties, which to my mind is not at all ambiguous, although there are certain terms in the agreement that perhaps would lead one to suspect that it was only intended that the two-sevenths should be given to the defendant in case the option were taken up. I refer particularly to the clause which provides for the $1,000 instalment to be paid by the plaintiffs. No

MACDONALD, C.J.A.

HUNTER, C.J.B.C.

1914

Feb. 19.

COURT OF APPEAL

1915

May 7.

McLAREN v. McPHEE

similar covenant is made for the other deferred payments in the original option. But as I say the language is clear and I think I would be doing violence to that language if I were not to hold that it was a positive agreement on the part of the plaintiffs to give the defendant the two-sevenths' interest in any event. Therefore it became obligatory on them to acquire the property so as to carry out that agreement. They have failed to acquire the property, and that being so they are liable in damages for the loss which the defendant has suffered.

There will be a reference to ascertain the damages, and further directions and costs may be reserved to the Court below in which the reference will be had.

IRVING, J.A.

IRVING, J.A.: I hold the same opinion.

MARTIN, J.A.

MARTIN, J.A.: I also think the appeal should be allowed, because there is no escape from the wording of this document.

GALLIHER, J.A.

GALLIHER, J.A.: I would dismiss the appeal. There is no difficulty to my mind in construing the agreement on its face. There certainly is no doubt in my mind as to what the intentions of the parties were. As I view it it is clear on its face that it is open to the construction suggested by Mr. *Macneill.* In such a case I have a right, as I understand it, to look at the surrounding circumstances to lead me to a conclusion. It seems to me entirely unreasonable that parties should enter into an agreement such as this, namely, that they would obligate themselves to pay $36,000 for a property, under option, whether it is worth a dollar or whether it is not, in order that they might turn over a two-sevenths' interest for a five-sevenths' interest in property that might be acquired under other auspices and which might be located and which when located might be valueless. I quite appreciate this, that if it would be doing violence to the language of the agreement in coming to that conclusion then we could not so hold, but I am firmly convinced in my own mind that the Chief Justice below took the right view of this case, in all the circumstances, and on the agreement itself.

McPHILLIPS, J.A.: With the greatest deference to the opinion of the Chief Justice—who has had a large experience in mining matters, which I have not—it seems to me the agreement should be scanned, weighed and analyzed in view of the circumstances under which it was made and the subject-matter to which it refers, and I say this, with the greatest respect to the views of my learned brothers who differ from me, that it would offend against common sense in the carrying on of mining business and mining affairs, which are so prevalent in this Province, that a person who had taken an option on a mine and had assigned the option to some one else should be compelled to pay a large sum of money whether the property was a rock pile or a mine. The question must always be to determine if it is a property that is fit to be acquired. Apparently it was estimated that $6,000 would be a sum of money which would prove whether it was a mine or not, but when they had expended $3,500 it was proved not to be a mine, and in accordance with the view of the parties interested, and they were the parties who had to pay the money, they decided that it was not a mine, and decided they would not go on. Now, in the face of that I cannot conceive how a construction could be put upon this agreement which offends against the custom and usage and ordinary good judgment that ought to obtain in mining affairs as well as in other business affairs. I, therefore, am quite in accord with the view of HUNTER, C.J.B.C., who took all the facts into consideration, and rightly, in my opinion, construed the agreement in the light of all the facts and circumstances and, in so doing, did no violence to the language of the agreement itself.

Appeal allowed,
Galliher and McPhillips, JJ.A. dissenting.

Solicitors for appellant: *Eberts & Taylor.*

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

COURT OF APPEAL

1915

May 11.

IN RE CHARLESON ASSESSMENT

IN RE CHARLESON ASSESSMENT. (No. 2.)

Practice—Appeal—Privy Council—Application for leave to appeal to—Privy Council Rules, 1911, r. 2.*

An application for a writ of *mandamus* directed to the members of a Court of Revision to hear an appeal from an assessment in the manner provided by section 38 of the Vancouver Incorporation Act, 1900, is not "a matter of public importance" within the meaning of subsection (*b*) of rule 2 of the Rules regulating appeals to the Privy Council (MCPHILLIPS, J.A. dissenting.)

APPLICATION for leave to appeal to the Privy Council from the judgment of the Court of Appeal, reported *ante*, p. 281.

Statement The application was heard at Vancouver on the 11th of May, 1915, by MACDONALD, C.J.A., IRVING, GALLIHER and MCPHILLIPS, JJ.A.

Martin, K.C., for the application: We contend first, that under rule 2 (*a*) of the Privy Council Rules an appeal lies as of right, as there is more than £500 in jeopardy and it is a question respecting property of far greater value than £500 and this is a test case that involves over $2,500,000. Second, if we have to resort to clause (*b*) we submit the issue is of very grave public importance and the Court should exercise its discretion in our favour. We contend there has been an illegal assessment of $3,500.

Argument

Ritchie, K.C., contra: It should be shewn by affidavit that the amount involved is over £500. We submit there is no question of great and general importance to raise; the point is discussed in *Corporation of St. John's* v. *Central Vermont Railway Co.* (1889), 14 App. Cas. 590 at p. 595. Whether the assessment is too high or too low is not a question of general public importance. It is a pure question of the amount of the assessment only. They must bring themselves specifically

*The rules are set out in the B.C. Gazette, 1911, p. 5251, and the Supreme Court Rules, 1912, p. 5.

within the sections: see *Beardmore* v. *City of Toronto* (1910), 21 O.L.R. 505.

Martin, in reply.

MACDONALD, C.J.A.: I would refuse the application. I have no doubt that I ought to refuse it if it is a matter of discretion under rule 2 (*b*). I think this is not a matter of public importance, in the sense in which those words are used in that subsection. It is a transient question; the assessment is made for a year. If anything wrong has been done by the assessor one year, we are not to presume that that wrong will be committed next year. The question involved is purely a question of fact; it is not the construction of the legislation—that is clear enough in its language—but it is a question of fact as to whether the members of the Court of Revision applied their minds to the complaint which was made by Mr. Charleson and decided that complaint in accordance with the section of the Assessment Act which was applicable thereto. We decided in this Court that it had not been proved that the Court of Revision had acted dishonestly or had not applied their minds to the decision of the complaint. That is a question of fact as to the honesty of the members of the Court of Revision in their consideration of the applicant's complaint.

MACDONALD, C.J.A.

On the other point I have some doubt. I am speaking now of rule 2 (*a*). If the applicant comes within that clause, then he is entitled to leave from us as of right, and any other considerations could not, of course, weigh with us; but I am not satisfied that the applicant comes within that clause; I am rather inclined to the opinion that he has not brought himself within it.

Therefore, being in doubt and the applicant having the right to go to the Privy Council itself for leave, I would resolve that doubt by refusing the leave.

IRVING, J.A.: I agree with the reasons given by the Chief Justice.

IRVING, J.A.

GALLIHER, J.A.: The Chief Justice has expressed my view of the case.

GALLIHER, J.A.

COURT OF APPEAL

1915

May 11.

IN RE CHARLESON ASSESSMENT

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I think that we have no power under the rule to withhold leave. We are under compulsion to grant leave in this case, as we have been in many other cases. The rule reads in part: ". . . some claim or question to or respecting property . . . . of the value of £500 sterling." We have no discretion in such a case.

How can one read this particular provision in any other way than having reference to property of the value of £500? The value of the property affected by this appeal which is before us is admittedly very much greater than £500, and it is in respect of that property that the appeal is desired. If Mr. Charleson did not own that property, he could not be assessed for it; therefore he is being assessed in respect of property of a much greater value than £500.

It seems to me somewhat anomalous that applications of this nature have to be made to us, when, as I construe the rule, we have no discretion whatever.

It follows, in my opinion, that if we were of the view that this was not a proper case to give leave, we are, notwithstanding, powerless to stay the appeal, the appeal goes as a matter of right.

I consider that this application is one that we must accede to.

Leave refused,
McPhillips, J.A. dissenting.

MACKENZIE v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

COURT OF APPEAL

1915

May 11.

MACKENZIE v. B.C. ELECTRIC RY. CO.

Negligence—Contributory negligence—General verdict—Jury disagree on questions submitted to them—Effect of on general verdict.

It is competent for a jury to disagree with respect to questions submitted by the Court and then bring in a general verdict. It must be assumed that the jury acted properly, unless it is clear from the evidence that they acted dishonestly (MARTIN and MCPHILLIPS, JJ.A. dissenting, the former on the facts.)

APPEAL by the defendant Company from the decision of MURPHY, J. and the verdict of a jury on the second trial of an action at Vancouver on the 28th of October, 1914. On the first trial before MORRISON, J. and a jury the jury disagreed. A motion for nonsuit was dismissed, and the defendant appealed, the Court of Appeal ordering a new trial. On the second trial the following questions were put to the jury:

"(1.) Was the defendant guilty of negligence which was the proximate cause of the accident?

"(2.) If so, what was such negligence?

"(3.) Was the plaintiff guilty of contributory negligence, which was one of the proximate causes of the accident?

"(4.) If so, of what did such contributory negligence consist?

"(5.) Could the motorman, after the condition of danger to the plaintiff became, or ought to have become apparent to him by the exercise of reasonable care, have prevented the accident?

"(6.) If so, how could he have done so?

"(7.) Damages?"

Statement

In giving the verdict the foreman of the jury said:

"With regard to the questions asked by his Lordship, we were unable to come to a unanimous decision, therefore we gave a general verdict in favour of the plaintiff, damages in $2,500."

The facts are set out in the report of the first trial: see (1914), 19 B.C. 1.

The appeal was argued at Vancouver on the 7th of May, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Ritchie, K.C., for appellant: The facts are made clearer on the second trial. The jury disagreed on the questions, but gave

Argument

COURT OF APPEAL

1915

May 11.

MACKENZIE v. B.C. ELECTRIC RY. CO.

a general verdict for $2,500. The car running south on the east track is shewn clearly to have been a phantom car, which is the strong difference from the evidence on the first trial: see *Allen* v. *North Metropolitan Tramways Company* (1888), 4 T.L.R. 561; *Jones* v. *Toronto and York Radial R.W. Co.* (1911), 25 O.L.R. 158; *Todesco* v. *Maas* (1915), 7 W.W.R. 1373. There was no negligence of defendant that caused the accident, the only fault complained of as against us was excessive speed: see *Ramsay* v. *Toronto Rw. Co.* (1913), 24 O.W.R. 953; *Cotton* v. *Wood* (1860), 29 L.J., C.P. 333; *Grand Trunk Railway* v. *McAlpine* (1913), A.C. 838. The jury could not agree on the defendant being guilty of negligence. In such a case where a jury refuses to answer the questions it cannot afterwards bring in a general verdict.

Argument

George Duncan, for respondent: The plaintiff took every reasonable precaution before starting to cross the road: see *Newberry* v. *Bristol Tramway and Carriage Company (Limited)* (1912), 29 T.L.R. 177; *Macleod* v. *Edinburgh and District Tramways Co., Limited* (1913), S.C. 624.

Ritchie, in reply.

Cur. adv. vult.

MACDONALD, C.J.A. [oral]: I think the appeal should be dismissed. I do not think the objection to the general verdict can be sustained.

The suggestion is that, because the foreman stated that the jury could not agree in respect of the questions submitted to them, that therefore their general verdict could not have been an honest one. I cannot take that view of the matter. I think it was quite competent for the jury to disagree with respect to the questions submitted, and then bring in a general verdict, without being open to the imputation that they really avoided the finding of facts and found for the plaintiff under cover of a general verdict. It seems quite possible that the jury may have disagreed with respect to the third question; that is to say, the question of ultimate negligence. They could have found the verdict which they found without answering the third question, and we must assume that the jury acted properly, unless it is

MACDONALD, C.J.A.

clear that they acted dishonestly. The finding cannot be successfully attacked in the circumstances of this case.

On the other question, the sufficiency of the evidence to sustain the verdict, I think that there was evidence upon which the jury could properly have come to the conclusion which they came to.

The appeal will be dismissed.

IRVING, J.A.: I would dismiss the appeal. The learned judge was right in refusing a nonsuit. There was evidence to go to the jury both as to negligence and contributory negligence. As pointed out in *Smith* v. *South Eastern Railway Co.* (1895), 65 L.J., Q.B. 218; (1896), 1 Q.B. 178; it must be a very remarkable case for a judge to say that he will weigh the evidence himself, and, finding it exactly the same on both sides, will withdraw it from the jury. The jury have found a general verdict on a matter peculiarly suitable for their consideration: *Ogle* v. *B.C. Electric Ry. Co.* (1913), 18 B.C. 692, affirmed by the Supreme Court of Canada: see (1914), 6 W.W.R. 683. No appeal is taken from the judge's charge. There is no exception taken in the notice of appeal in regard to the jury's conduct in finding a general verdict instead of answering questions.

As to the foreman's statement that "with regard to the questions they were unable to come to a unanimous decision," there is a certain amount of ambiguity. He might have meant that the jurors were unable to frame answers satisfactory to themselves, or he might have meant that, having regard to the instruction they had received, the jurors were unable to come to a unanimous decision that they would accept the invitation to give their verdict by answers. The matter seems now immaterial. The judge was right in not interrogating them after they had given a general verdict: see *Arnold* v. *Jeffreys* (1913), 83 L.J., K.B. 329; (1914), 1 K.B. 512.

As to the presence of the waggon, that point was much debated in this Court. At the trial its presence was sworn to positively by the plaintiff and there was no suggestion then made to him that it was a creation of his own. Other witnesses

COURT OF APPEAL

1915

May 11.

MACKENZIE v. B.C. ELECTRIC RY. CO.

say they did not see it, but the positive testimony of one man who said he did see it may easily outweigh the negative testimony of those who did not see it, or of those who said there was no waggon. The jury might very properly infer that those who had, in fact, seen the waggon might have forgotten it in the excitement of the moment. It seems to me there would have been sufficient time for the waggon—if the team was on the devil's strip when plaintiff left the pavement—to have got clear of the western tracks so as to permit the northbound car to pass. In any event that point was not raised by counsel in his cross-examination at the trial. As to the speed of the northbound car there was much conflicting evidence. One witness testifies that the driver of that car says "he hit him (plaintiff) hard" and the body was thrown, or was carried and then thrown, some 40 feet from the point where he was struck.

The evidence of Crighton as to the southbound car having passed before the man was hit and the evidence of the plaintiff that it was in order to avoid the southbound car that he stepped backward, do not conflict in any way. The witnesses were speaking of different periods of time and of different places. The admission by plaintiff's counsel is quite understandable if we bear that in mind. Crighton, who was not on Main Street, said the car must have passed his line of vision, *i.e.*, northwest along Dufferin Street, before the man was hit. The plaintiff said that he stepped back to avoid the car before he was hit. It was an affair of seconds and feet—not of minutes and yards.

IRVING, J.A.

The cases relating to the rule that a verdict is to stand unless the jury reviewing the whole of the evidence reasonably could not properly find as it has done are conveniently collected in a note on Practice and Procedure in Halsbury's Laws of England, Vol. 23, p. 205.

MARTIN, J.A.

MARTIN, J.A.: When the plaintiff's story is carefully analyzed, it in my opinion prevents him from recovering any damages because it clearly establishes that he was the author of his own wrong, and the case should have been withdrawn from the jury.

GALLIHER, J.A.

GALLIHER, J.A. [oral]: I have considerable hesitation in

coming to the conclusion that the appeal should be dismissed.

I am not at all clear as to what the foreman of the jury meant when the jury returned into Court. It seems to me from his language it is clear that the jury could not agree upon the answers to the questions then, or that they could not agree as to whether they would answer the questions or not. However, it is with hesitation, I say, that I think we should give the jury the benefit of believing that in the general verdict they rendered they acted honestly, and therefore must be taken to have found the facts necessary to entitle the plaintiff to recover.

I am also confronted with some difficulty with that part of the evidence where the plaintiff states that when he was standing and first saw the southbound car he was so close to it that he then felt that he could not take the two or three steps which it would have been necessary for him to take to have cleared the track of that car, but that instead he turned and took two or three steps back at that point, when he was struck by the northbound car. The same number of steps, had he taken them forward, would have cleared him of the southbound car, if he had taken them in time. From that statement I am rather impressed that his story was right, with regard to the southbound car being where he states it was when he first saw it, and that he feared he would be crushed between the cars when they passed each other. But it appears from the evidence that the cars crossed further down and not at that point, and I cannot account for plaintiff standing where he did and not being able to get off the track before he was struck. However, this Court is in this position with regard to the verdict of a jury, that while we may not be satisfied in our own minds that we would have come to the same conclusion upon the evidence as the jury did, yet we are not in a position to say—unless their verdict is absolutely contrary to what a reasonable jury could be presumed to render upon the evidence—that it shall be disturbed.

GALLIHER, J.A.

On the whole, I say, with hesitation I have come to the conclusion that the verdict should stand and the appeal be dismissed.

McPHILLIPS, J.A.: This is an appeal in a negligence action, being an appeal from the result of the second trial, *i.e.*, judgment

MCPHILLIPS, J.A.

COURT OF APPEAL

1915

May 11.

MACKENZIE v. B.C. ELECTRIC RY. CO.

entered for the plaintiff for damages to the extent of $2,500, following upon what was looked at by the learned trial judge as a general verdict in favour of the plaintiff. The first trial resulted in a disagreement of the jury. The defendant moved for the dismissal of the action which the learned trial judge refused and the defendant then appealed to this Court, which dismissed the appeal. I was not in agreement with the majority of the Court and would have allowed the appeal and entered judgment for the defendant. My reasons for so holding are to be found in the report of the case in (1914), 19 B.C. 1 at pp. 4-13.

Upon the second trial the learned trial judge submitted questions to the jury and here follows the manner in which the questions were submitted, the questions as put and what the jury did in respect thereof. It is to be noted that the jury did not await the lapse of three hours which would have admitted of the bringing in of a verdict of three-fourths of the jurors (R.S.B.C. 1911, Cap. 121, Secs. 70 and 71).

"I am going to put some questions to you gentlemen, which it is your privilege, if you are desirous, to bring in a general verdict, that is, not to answer these questions, bring in a verdict for the plaintiff, or the defendant, but it is probably more in the interest of the parties to this litigation that you should answer the questions. If you choose not to do so, the law of British Columbia says that you can bring in a general verdict; the questions are: [already set out in statement.]

MCPHILLIPS, J.A.

The jury retired at 4.42 p.m. and returned at 6.12 p.m.

"Registrar: Have you returned a verdict?

"Foreman: Yes.

"Registrar: What is your verdict?

"Foreman: With regard to the questions asked by his Lordship, we were unable to come to a unanimous decision, therefore we gave a general verdict in favour of the plaintiff, damages in $2,500.

"Mr. *McPhillips*: May I ask your Lordship to find out how they have answered the questions?

"Court: I understand them to say that they have found a general verdict for $2,500. That seems to be the course that was recommended in the case of *Rayfield* v. *B.C. Electric Ry. Co.* [(1910), 15 B.C. 361], a definite answer should be obtained from the jury before they are dismissed. Now, I have a general verdict, and if I begin to ask them questions, I will get into the difficulty that arose there. I understand you just did bring in a general verdict, is that right?

"Foreman: Yes, my Lord.

"Court: I think I will have to take that. Judgment according to the verdict."

It will be seen that the jury were not able to answer the questions by a unanimous decision and so stated, but nevertheless undertook coincidentally with such statement to render a general verdict in favour of the plaintiff. In my opinion this cannot be taken to be a general verdict. It implies and must necessarily imply that the jury were unable to agree that the defendant was guilty of negligence. In this connection the case of *Newberry* v. *Bristol Tramway and Carriage Company (Limited)* (1912), 29 T.L.R. 177, is a decision which I consider supports the view that I have taken. There the jury found for the plaintiff, but in answer to the judge they said they found that the defendants had been guilty of negligence because they had not taken sufficient precaution to ensure the safety of passengers when the detachable trolley arm was plucked off but they said they could not suggest what ought to have been done by way of precaution. Cozens-Hardy, M.R., upon the appeal at p. 179 said:

"Now if the jury had simply given a general verdict his Lordship thought they could not have interfered. But they had told the Court what they meant by their verdict. They had negatived all the alleged acts of negligence—or at least they had held that no one of these alleged acts of negligence was established to their satisfaction. He thought they, in substance, treated the tramways company as insurers—as being bound to ensure the safety of their passengers. In other words, they thought the company ought not to carry passengers on the car unless they could carry them safely, and this without any question of negligence on the part of the Company."

MCPHILLIPS, J.A.

And Lord Justice Hamilton (now Lord Sumner) at the same page—

"did not think that a jury could fix a defendant with liability for want of care, without proof given or reason assigned, out of their own inner consciousness and on their own notions of the fitness of things."

It is plainly evident in the present case that the jury upon the second trial, as at the first trial, found themselves in a position of embarrassment and were unable to agree that the defendant was guilty of negligence, but affected by sympathy, but ignoring the evidence undertook to say through their foreman:

"With regard to the questions asked by his Lordship we are unable to come to a unanimous decision, therefore we give a general verdict in favour of the plaintiff, damages in $2,500."

This action of the jury plainly imports that they treated the

COURT OF APPEAL

1915

May 11.

MACKENZIE v. B.C. ELECTRIC RY. CO.

defendant as an "insurer" of the safety of pedestrians and should compensate the plaintiff for injuries sustained by him although they were unable to agree upon it that the defendant was guilty of negligence, and in my opinion it is not permissible (adopting the language of Lord Sumner) "that a jury could fix a defendant with liability for want of care, without proof given or reason assigned, out of their own inner consciousness and on their own notions of the fitness of things." Therefore, in my opinion, it must be held that the plaintiff failed to obtain from the jury a verdict which entitled judgment being entered in his favour, and in the result the defendant was entitled to judgment. If, however, I should be wrong in this, I remain of the same opinion as expressed by me upon the first appeal to this Court —(1914), 19 B.C. 1 at pp. 4-13. It is clear beyond dispute that the plaintiff was negligent and the injury was one owing to the negligence of the plaintiff, inevitable and immediate, not admitting of any possible opportunity of being obviated. The truth is that the plaintiff's story is a visionary one, and is it to be marvelled at that the juries have been unable to reconcile the evidence, in fact, as reasonable men, they have found themselves unable to fix negligence on the defendant. The second jury, however, in their perplexity, think that as they may bring in a general verdict they will do so, but the frankness of the foreman in making the explanation of how it has been arrived at renders it of no value, and it cannot be held to be such a verdict as warranted the learned judge in entering judgment for the plaintiff. Since giving expression to my opinion as reported in *Mackenzie* v. *B.C. Electric Ry. Co., supra,* I have had the benefit of reading the judgment of the Supreme Court of Canada in *McPhee* v. *Esquimalt and Nanaimo Railway Co.* (1913), 49 S.C.R. 43, and I would, in particular, refer to what was said by Duff, J. at p. 53:

MCPHILLIPS, J.A.

> "By the law of British Columbia, the Court of Appeal in that Province has jurisdiction to find upon a relevant question of fact (before it on appeal) in the absence of a finding by a jury or against such a finding where the evidence is of such a character that only one view can reasonably be taken of the effect of that evidence. The power given by Order LVIII., r. 4, to draw inferences of fact . . . . and to make such further or other order as the case may require, enables the Court of Appeal to give judgment for one of the parties in circumstances in which the Court

of first instance would be powerless, as, for instance, where (there being some evidence for the jury), the only course open to the trial judge would be to give effect to the verdict; while, in the Court of Appeal, judgment might be given for the defendant if the Court is satisfied that it has all the evidence before it that could be obtained and no reasonable view of that evidence could justify a verdict for the plaintiff. This jurisdiction is one which, of course, ought to be and, no doubt, always will be exercised both sparingly and cautiously: *Paquin* v. *Beauclerk* (1906), A.C. 148 at p. 161; and *Skeate* v. *Slaters* (1914), 30 T.L.R. 290."

Now I thought that the case when coming before us on appeal after the first trial was one in which judgment should be given for the defendant, being satisfied that all the evidence that could be obtained was before the Court and that no reasonable view of the evidence could justify a verdict for the plaintiff. Since then there has been the second trial, and, in my opinion, the case for the plaintiff is even weaker than before. It follows that I am still further confirmed in my view, and that the duty in such a case cast upon this Court must be discharged, and that is to declare that the defendant is entitled to judgment. In addition to the authorities referred to by me in *Mackenzie* v. *B. C. Electric Ry. Co., supra,* I may say I have considered the following: *Macleod* v. *Edinburgh and District Tramways Co. Limited* (1913), S.C. 624; *Long* v. *Toronto Railway Co.* (1914), 50 S.C.R. 224; *Allen* v. *North Metropolitan Tramways Company* (1888), 4 T.L.R. 561; *Todesco* v. *Maas* (1915), 7 W.W.R. 1373; *Cotton* v. *Wood* (1860), 29 L.J., C.P. 333; and *Mehners* v. *Winnipeg Electric Ry. Co.* (1915), 8 W.W.R. 517.

MCPHILLIPS, J.A.

It therefore follows that, in my opinion, the appeal should be allowed and judgment entered for the defendant.

Appeal dismissed,
Martin and McPhillips, JJ.A. dissenting.

Solicitors for appellants: *McPhillips & Wood.*
Solicitor for respondent: *George Duncan.*

GREGORY, J.

1915

April 5.

COURT OF APPEAL

May 13.

LILJA v. GRANBY CONSOLIDATED MINING, &c., CO.

LILJA v. THE GRANBY CONSOLIDATED MINING, SMELTING AND POWER COMPANY, LIMITED.

Master and servant—Injury to servant—Negligence—Two defective systems alleged—Finding by jury of defective system without specifying which—New trial.

Practice—Right to compensation under Workmen's Compensation Act—Right of appeal—Plaintiff must elect at conclusion of trial—Workmen's Compensation Act, R.S.B.C. 1911, Cap. 244.

In an action for damages for injuries sustained by a blaster from an explosion of dynamite while in the act of inserting it into a hole in a mine for blasting, two defective systems were alleged, one, as to the storage and thawing of the powder and the other as to the manner of cleaning out the drilled holes before the insertion of the dynamite, the defendant Company alleging contributory negligence in that it was the plaintiff's duty to clean the holes before inserting the dynamite. The jury found a defective system without specifying which it was, also that the plaintiff was guilty of contributory negligence, and the learned trial judge dismissed the action.

Held, on appeal (MCPHILLIPS, J.A., dissenting), that there was no evidence to support the jury's finding of contributory negligence, or of a defective system in connection with the cleaning of the holes, but there was evidence upon which a defective system might be found as to storing and thawing the powder. The jury not having specified which of the two systems was defective, there must be a new trial.

On the dismissal of the action by the trial judge the plaintiff applied for an order that the judgment be without prejudice to his rights to apply for compensation under the Workmen's Compensation Act, pending an appeal to the Court of Appeal.

Held, that the plaintiff must elect either to appeal or to apply for compensation under the Workmen's Compensation Act at the conclusion of the trial.

Statement

APPEAL by plaintiff from the decision of GREGORY, J., setting aside the verdict of a jury rendered in his favour, in an action tried by him at Vancouver on the 20th, 21st and 22nd of January, 1915. The action was brought for damages for injuries received by the plaintiff while employed as blaster at the defendant Company's copper mine at Granby Bay. On the day of the accident 18 holes had been drilled into the mountain at the end of a tunnel. The plaintiff and two other workmen

were putting sticks of dynamite into the holes, it being the plaintiff's duty in particular to push the sticks into the holes with a wooden stick provided for the purpose. They had filled 17 holes, and the plaintiff was in the act of pushing a second stick of dynamite into the eighteenth hole when it exploded, the result being that the plaintiff's right arm had to be amputated above the wrist, and he sustained other injuries. The plaintiff claimed that the accident was due (1) to a defective system as to the manner in which the dynamite was stored and thawed, that the dynamite was over a year old and had been kept in a room that at intervals was overheated, whereby the nitro-glycerine in the stick would separate from the absorbent and settle in the end of the stick, rendering it more dangerous and more liable to explosion; and (2) that the system was defective as to the arrangement for properly cleaning and blowing the holes after the drilling was completed, there being small bits of granite and flint left in some of the holes, thereby rendering them highly dangerous, and caused the explosion. The defendant Company raised the defence that the injuries were caused by the plaintiff's own negligence in using too much force in inserting the stick of dynamite; that it was his duty to see that the hole was properly cleaned before he inserted the dynamite; also that if the injuries were caused by any negligence other than that of the plaintiff himself, it was caused by the negligence of a fellow servant in not cleaning out the holes before the insertion of the dynamite. Questions were submitted to the jury and answers given as follow:

Statement

"1. Was the defendant guilty of negligence? Yes.

"(*a*) If yes, what was it? Lack of proper system.

"(*b*) And also if yes, was that negligence the cause of the accident? To a certain extent.

"2. Was the plaintiff guilty of negligence? Yes.

"(*a*) If yes, what was it? Carelessness in not having the hole blown out before charging.

"(*b*) Did the plaintiff's negligence, if any, contribute to the accident? To a certain extent.

"3. (*a*) Did the plaintiff know and appreciate the danger and the risk which he incurred, and having regard to the risk, his connection with it and the other circumstances of the case, should it be inferred that he contracted, consented or undertook to run that risk and to exonerate his employer from liability in connection with it? No.

GREGORY, J.
1915
April 5.
COURT OF APPEAL
May 13.
LILJA v. GRANBY CONSOLIDATED MINING, &c., CO.

"(*b*) With the knowledge and appreciation of the risk and danger mentioned above did the plaintiff voluntarily expose himself to it? No.
"Damages? $10,000."

After argument, judgment was entered for the defendant Company. Counsel for the plaintiff then applied for an order that the judgment should be without prejudice to his rights to apply for compensation under the Workmen's Compensation Act, as he wished to appeal to the Court of Appeal from the judge's decision entering judgment against him. Judgment on this application was reserved.

J. W. de B. Farris (*Emerson,* with him), for plaintiff.
McPhillips, K.C., Ernest Miller, and *H. S. Wood,* for defendant.

5th April, 1915.

GREGORY, J.: There seems to be no doubt that plaintiff should elect to appeal or apply for compensation under the Workmen's Compensation Act at the conclusion of the trial.

GREGORY, J. There is, as counsel states, "considerable merit" in the plaintiff's position, and I would gladly do anything in my power to assist him, but I am not justified in endeavouring to circumvent the statute, and if the formal judgment is returned to me I will sign it as settled by consent if I can fairly do so.

The appeal was argued at Vancouver on the 13th of May, 1915, before MACDONALD, C.J.A., IRVING, GALLIHER and MCPHILLIPS, JJ.A.

J. W. de B. Farris, for appellant: The system was defective as to cleaning the holes, as they only used a scraper to clean when, in addition, they should have used a blow-pipe. It was not the duty of the blaster to clean the holes. Our main contention is that their system of keeping and storing the dynamite was defective. The evidence is clear that some sticks of dynamite were kept for over a year in a room that at times reached a heat of 95 degrees Fahrenheit; at this heat the nitro-glycerine runs out of dope (or absorbent) and collects at the end of the stick, where it is more subject to explosion. They used the thawing-room as a store-room; that in itself constitutes a negligent system. We contend, first, on

Argument

the answers given by the jury we are as a matter of law entitled to judgment; second, there is no evidence to support the jury's finding on the question of contributory negligence; third, by saying that there was not *volens* on the part of the plaintiff they must mean he is not guilty of contributory negligence, as it would be inconsistent with the finding to do so, and the fact of their giving damages substantiates that view. As a matter of law, what the jury find to be contributory negligence is not negligence at all. The plaintiff's obligation was only to clear the hole of obstruction, and not to blow it when he finds dust in it.

McPhillips, K.C., for respondent: We have the findings of the jury in our favour. The plaintiff must shew there was no evidence on which the jury could find contributory negligence. He first tried to shew that blowing the holes was necessary; later he turns around and says it was not. He tried the hole with his tamping-stick and found dust in it. He should then have had the hole blown before inserting the dynamite, and the jury has so found.

Argument

Farris, in reply.

MACDONALD, C.J.A.: I think there should be a new trial.

From the evidence brought to our attention I can find nothing to support the jury's finding of contributory negligence, or, as they put it, "negligence." That being so, it leaves the question of negligence on the part of the defendant to be considered in connection with the question as to whether we should give judgment for the plaintiff or send the case back for a new trial.

Now, I am not at all satisfied with the finding with respect to the employer's negligence. The pleadings allege two defective systems in connection with this accident, one a defective system in the storage and care of the powder, some of which was used in loading this hole, and the other a defective system in the manner of cleaning out the holes.

MACDONALD, C.J.A.

I can see no defective system at all in connection with the cleaning of the holes, so that if the jury's verdict is founded on a defective system in that respect it could not stand. Unfortunately, the jury have stated that there was a defective system, without specifying which system it was.

GREGORY, J.

1915

April 5.

COURT OF APPEAL

May 13.

LILJA v. GRANBY CONSOLIDATED MINING, &C., CO.

It is quite conceivable that this action arose from the system adopted by the defendant in the care of the powder, that is to say, that this powder had been kept for many months in the thawing-room under a system which permitted that to be done, that the nitro-glycerine had settled by long standing on one end or one side of the stick, it being well known that nitro-glycerine in its pure state may be exploded very easily, much more easily than when it is distributed through the matrix.

I think, owing to the uncertainty of the jury's finding as to which system was defective, there must be a new trial.

IRVING, J.A.: I am of the same opinion.

GALLIHER, J.A.: I take the same view.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would dismiss the appeal. I am in entire accord with the learned trial judge. I think the findings made by the jury are sufficiently consistent, and the jury found as reasonable men should find. There is no question of doubt in my mind that the trial proceeded on the question of whether or not the hole was in a fit and proper condition. It is quite impossible, in my view, to add to that finding, that it was the defective powder that caused the accident.

New trial ordered, McPhillips, J.A. dissenting.

Solicitors for appellant: *Farris & Emerson.*
Solicitors for respondent: *McPhillips & Wood.*

HAYES v. GODDARD.

COURT OF APPEAL

1915

May 14.

HAYES v. GODDARD

Vendor and purchaser—Easement—Compensation—Deficiency in frontage of lot—Relative deduction from purchase price.

A vendor is not liable upon an agreement to make compensation for the loss of a *quasi*-easement made by her agent with a purchaser unless it be shewn that the vendor authorized the agent or held him out as having authority to make such an agreement.

In the absence of fraud in respect of misrepresentation as to the size of a lot, the purchaser claimed compensation for a deficiency in its width, the lot being in fact only 30 feet wide, while the contract called for a frontage of 33 feet.

Held, that the purchaser is entitled to an abatement in the purchase price for the deficiency, the true basis of value being that at the time of the sale.

Held, further, that the purchaser having taken possession and made improvements covering the additional three feet to which title cannot be made, is not entitled to damages by reason thereof.

APPEAL by plaintiff from the decision of MORRISON, J. at Vancouver on the 17th of July, 1914, in an action for payment of an instalment of purchase-money and interest due on an agreement for sale of land. The defence was that the land in question was sold "with all the privileges and appurtenances thereunto belonging," and that one of these privileges appurtenant to the land was the use of a drain leading to a septic tank situated on another adjoining lot belonging to the plaintiff. On the same day as the agreement in question was made, plaintiff sold the lot containing the septic tank to another party, without reference to the easement of the defendant. The purchaser of the second lot closed the tank from use by the defendant. There was also a dispute as to area, and defendant counterclaimed for damages on both heads. The trial judge gave judgment for the plaintiff in the amount claimed as due, and allowed the defendant the sum of $1,400 on her counterclaim.

Statement

The appeal was argued at Victoria on the 8th of January, 1915, before MACDONALD, C.J.A., IRVING, MARTIN and MCPHILLIPS, JJ.A.

COURT OF APPEAL

1915

May 14.

HAYES v. GODDARD

C. B. Macneill, K.C., for appellant: The action is for an instalment due on an agreement for sale, but the appeal turns on the counterclaim, first, for damages in being deprived of an easement, and second, damages for deficiency in frontage of one of the lots sold. When defendant purchased, she knew the tank was not on her property; that is shewn in *Goddard* v. *Slingerland* (1911), 16 B.C. 329: see Halsbury's Laws of England, Vol. 11, pp. 241-2. This is not an easement of necessity, *i.e.,* one without which the property cannot be used: see *Union Lighterage Company* v. *London Graving Dock Company* (1902), 2 Ch. 557 at p. 573, in which the case of *Wheeldon* v. *Burrows* (1879), 12 Ch. D. 31 is dealt with. See also *Ray* v. *Hazeldine* (1904), 2 Ch. 17. There is no implied reservation of an easement unless it is an easement of necessity: see *Attrill* v. *Platt* (1883), 10 S.C.R. 425. On the question of shortage in the size of the lot, see *Fowler* v. *Henry* (1903), 10 B.C. 212.

Argument

Reid, K.C., for respondent: Even in the case of innocent error, compensation must be given for the error: Fry on Specific Performance, 615; *Wheeldon* v. *Burrows* (1879), 12 Ch. D. 31. The condition is on the same level as a warranty for which we are entitled to damages. We bought a house with the "privileges and appurtenances" attached thereto, and we are entitled to compensation when we subsequently find the property is not as represented: see *Wardell* v. *Trenouth* (1877), 24 Gr. 465; *Loughead* v. *Stubbs* (1880), 27 Gr. 387; *Kendrew* v. *Shewan* (1854), 4 Gr. 578; *VanNorman* v. *Beaupre* (1856), 5 Gr. 599. The word "appurtenances" is admitted of a secondary meaning: see *Thomas* v. *Owen* (1887), 20 Q.B.D. 225 at pp. 231-2; *Brown* v. *Alabaster* (1887), 37 Ch. D. 490 at p. 507; *Rudd* v. *Bowles* (1912), 2 Ch. 60 at pp. 65-6.

Macneill, in reply, referred to *Grasett* v. *Carter* (1884), 10 S.C.R. 105 at p. 114.

Cur. adv. vult.

On the 14th of May, 1915, the judgment of the Court was delivered by

Judgment

MACDONALD, C.J.A.: The plaintiff sued to recover the bal-

ance of purchase-money due her on the sale to the defendant of a house and five lots. The main dispute arises in this way: Prior to the said sale plaintiff was the owner of a tract of suburban land, on which was situate the house in question. Just prior to the sale the plaintiff subdivided the tract of land into building lots. Before the subdivision, the sewage from the house was carried by a drain to a septic tank some distance from the house. After the subdivision, the septic tank was on a lot numbered 56. The defendant's lots were numbered 49 to 53 inclusive. On the day defendant made her purchase, one Slingerland purchased lot 56. There is no evidence as to which agreement was first in point of time. Slingerland refused to permit the defendant to use the septic tank, and cut off the connection of the drain with his property. Suit was brought by the present defendant against Slingerland for interference with what she claimed as an easement appurtenant to the house. She ultimately failed in that suit. About the time that suit was commenced, her husband, Harry Goddard, who was her agent, complained to the plaintiff's sales agent, Calland, of the interference with the drain. He says that an agreement was entered into between himself and Calland that a new tank and drains should be put in at plaintiff's expense on defendant's own lots, in substitution for the old septic tank, and that plaintiff should also pay compensation for the loss of the so-called easement. Calland's testimony is that he only agreed to pay for the new drains and tank, and that that agreement was carried into execution by a competent person under the personal supervision of the said Harry Goddard, and that the cost was paid by the plaintiff. There is no evidence that plaintiff was apprised by Calland that Goddard was claiming compensation for the loss of the easement. She was apprised of the arrangement to put in the new tank, which Calland says was done for the sake of peace, but that she ever authorized Calland to enter into an agreement to make compensation for the loss of the *quasi*-easement was not proven in evidence, nor was it shewn that she had ever held Calland out as having any such authority. In my opinion, the only agreement entered into between the parties, binding on the plaintiff, was the agreement to instal the

Judgment

COURT OF APPEAL

1915

May 14.

HAYES v. GODDARD

new system of sewage. That system was completed about June, 1910, and no demand was thereafter made upon the plaintiff for anything further in connection with the matter until this action was brought. I think, therefore, the judgment below was wrong in awarding to the defendant, on her counterclaim, $900 as compensation for the loss of the so-called easement.

The defendant also counterclaimed for compensation for a deficiency in the area of one of the lots, namely, lot 53. The lots were sold by descriptive number, and on the registered plan the area of this lot is truly shewn. Defendant, however, contended that before and at the time of sale Calland represented that this lot had a frontage of 33 feet on the street, whereas its frontage was almost three feet less than that.

I think I must accept the finding of the learned judge that the representation was made and acted upon, and that, therefore, the defendant is entitled to an abatement in the purchase price. She is not asking for rescission or resisting specific performance, and the case is, therefore, one of abatement simply. The house and five lots were sold to the defendant for $6,000. The relative values of the house and lots were not precisely shewn, but a plan and price list of the subdivision in question is in evidence. The whole five lots and the house in question are put in the price list at $6,000, and the rest of the subdivision is priced according to lots. Lot 53 is a corner. The corner opposite, on the east, lots 30 and 31, of equal size with defendant's lots 52 and 53, are priced at $1,200 for the two, and the corner on the other side of 52 and 53, to the west, lots 54 and 55, at $1,250 for the two. The inside lots adjoining are priced at $450 and $500 respectively. It can, therefore, be taken, and there is no evidence to the contrary, that lot 53, at the highest, would be priced at $750. The learned judge accepted the said Harry Goddard's evidence, and the evidence of some other witnesses given on behalf of the defendant, in which they estimate the value of lot 53 at $100 per front foot. This was said to be the value in 1910, a year after the sale, and when property was at its highest in that locality on an inflated market. It seems to me that this method of arriving at the compensation for

Judgment

deficiency is radically wrong. The true basis is the value at the time of the sale.

I therefore think the sum allowed, namely, $300, by the learned judge for deficiency in area should be reduced in the proportion of 23 to 100. The deficiency was a little less than three feet, but the fraction is slight, and I would therefore allow $69 in abatement of the purchase price on this head.

The defendant, being in possession, erected a small frame office building which projected beyond the true line of said lot 53, and also planted some trees beyond the same line, but within what would have been the limits of the lot had it been 33 feet wide, as represented, and she claims, and was allowed $200 for anticipated cost of moving back the building and the trees and building a new fence.

I am unable to see upon what principle the plaintiff can be made liable in respect of the building and trees. The alleged misrepresentation as to the width of the lot was clearly not fraudulent. The defendant voluntarily, and without ascertaining the true boundary as it was shewn on the registered plan, and by the stakes on the ground, chose to incur the expense for which she is now claiming. I can find no authority for allowing that on the principle upon which abatement is allowed on purchase price for deficiency, nor can I find authority for awarding damages.

There is some evidence that the moving back of the line of lot 53 will destroy the dilapidated fence which was there at the date of defendant's purchase. This, I think, is proper to be taken into consideration as an element in the difference in value between the lot with the fence on it as represented and the lot as it actually is. As far as I can make out from the evidence, which is very vague, this loss is trivial, and I think if I allow $31, making the total amount of abatement $100, I shall be doing ample justice to the defendant.

Judgment

The appeal should, therefore, be allowed, and the judgment on the counterclaim reduced from $1,400 to $100. The appellant should have the costs of the appeal, and the respondent's costs of the counterclaim should be confined to the issue respecting the deficiency in area, and the plaintiff should be given the

COURT OF APPEAL

1915

May 14.

HAYES v. GODDARD

costs of the counterclaim on the other issue, namely, that relating to the tank and drains.

Appeal allowed.

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

LAMPMAN, CO. J.

1914

Dec. 18.

COURT OF APPEAL

1915

June 7.

MOWAT v. GOODALL

MOWAT AND MOWAT v. GOODALL BROTHERS.

Fire insurance—Unpaid premium—Right of agent to sue—Relationship of principal and agent must be established.

As a rule an agent for a fire-insurance company cannot personally recover premiums from the insured, but where the insured is aware that the agent was paying his premiums to the insurers with his assent and at his request, either express or implied, the agent looking to the insured to be recompensed, the relationship of principal and agent is established between them and the agent may maintain an action to recover the premium so paid.

APPEAL by plaintiffs from the decision of LAMPMAN, Co. J. in an action to recover the earned portion of the premium on an insurance policy, tried by him at Victoria on the 28th of September, 1914. The plaintiffs are the general agents of the Hudson's Bay Insurance Company on Vancouver Island, and the defendants are their sub-agents at Colwood, B.C. The plaintiffs had issued a policy in the Hudson's Bay Insurance Company in favour of the defendants for $2,500 on their stock and furniture, that expired on the 6th of October, 1913. A few days before the expiration of this policy one of the plaintiffs asked the defendant Charles Goodall whether he wanted to renew the policy, to which he replied in the affirmative. The renewal policy was accordingly issued and sent to him. Shortly after the renewal

Statement

policy was sent to Goodall the plaintiffs visited him for the purpose of inquiring as to when he would pay the premium. He admitted the receipt of the policy, and said that owing to a change in the location of some furniture he wanted the policy changed, and that he would pay the premium later. Nothing further took place until the 23rd of January, 1914, when Goodall returned the policy without paying any premium, with a letter in which he stated that he had never applied for a renewal of the old policy.

F. C. Elliott, for plaintiffs.

J. Percival Walls, for defendants.

18th December, 1914.

LAMPMAN, Co. J.: The plaintiffs, who were general agents for the Hudson's Bay Insurance Company, sued for a premium of $35.45 in respect to a policy of fire insurance on defendants' property.

On the facts, I think plaintiffs are entitled to recover, provided they are the proper parties to sue. The plaintiffs shewed that the course of dealing in Victoria amongst insurance agents is that the companies send to their agents the policies in blank and these are filled in and issued to the assured, and on the company being notified of the effecting of the insurance the agent is charged with the premium, which he must send to the company within some such period as one or two months, according to the rule of the particular company. The agent is liable to the company for the premium, and the company never looks to the assured for the premium. None of the many agents called mentioned any case in which the agent had sued and recovered.

In marine insurance in England the general rule is that the broker, and not the assured, is the debtor of the underwriter for premiums. But that rule of law was based on a custom which had existed for more than a hundred years, and the course of the business of insurance as carried on in London and elsewhere in England differs from the business of fire insurance as carried on in Canada: see Arnould on Marine Insurance, p. 140. The broker there is the agent of the assured. The fire-insurance agent here is on a different footing entirely; he is the agent of the company only, unless, of course, there are par-

LAMPMAN, CO. J.

1914

Dec. 18.

COURT OF APPEAL

1915

June 7.

MOWAT v. GOODALL

ticular circumstances making him also the agent of the assured.

An essential characteristic of a usage is notoriety, and I cannot find that the evidence shews that the usage asserted to exist is notorious; all that was shewn is that the agents understand that they are liable to their companies for premiums whether they collect them or not.

The action is dismissed.

The appeal was argued at Vancouver on the 6th of April, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

F. C. Elliott, for appellants: According to the English cases the broker must pay the premium whether he has received it from the insured or not. The broker must look to the insured, and the company to the broker. In marine insurance, see *Power* v. *Butcher* (1829), 10 B. & C. 329. The custom is that the company does not look to the assured for payment, but to the broker: see *Universo Insurance Company of Milan* v. *Merchants Marine Insurance Company* (1897), 2 Q.B. 93 at p. 95. As to the recovery of insurance premiums, see Halsbury's Laws of England, Vol. 17, p. 513, par. 1011. The trial judge was against the defendant on the facts, holding that he authorized the taking of the insurance and that he ordered the policy, but dismissed the action on the ground that the Company was the proper party to bring the action. Even had the action been brought by the Company the plaintiff has the right to recover the premium that he has paid.

Argument

J. Percival Walls, for respondent: We never ordered the policy, and the goods in question not being on the premises, the policy was invalid: Halsbury's Laws of England, p. 534, par. 1064. The law on marine insurance does not apply to fire insurance. On the question of the payment of the premium, see Halsbury's Laws of England, Vol. 17, pp. 354, 526; *Acey* v. *Fernie* (1840), 7 M. & W. 151; *French* v. *Backhouse* (1771), 5 Burr. 2727; Bunyon on Fire Insurance, 5th Ed., 182.

Elliott, in reply.

Cur. adv. vult.

7th June, 1915.

MACDONALD, C.J.A.: I would allow the appeal.

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

The question is, did the defendant ask the plaintiffs to obtain for him a policy under such circumstances as a promise to pay them (the plaintiffs) would be inferred? I think he did when he told the plaintiffs to renew the policy and to send it to him by mail. That conversation took place about the 4th or 5th of October, and the policy was sent to him about the 7th of October, with the following letter:

"We have pleasure in enclosing herewith Policy No. 43733 and would point out to you that the rate has been reduced to $2.25, and we have much pleasure in protecting you in this amount."

He kept it until the 21st of January, when he returned it to the plaintiffs without any explanation.

I think enough has already been said to justify a finding in plaintiffs' behalf, but the plaintiffs' case goes further. They shew that the defendant was a sub-agent of theirs; that he had been instrumental in obtaining policies of insurance, and that he knew that the practice in force between the company and its agents was for the company to allow the agents a 60-day credit, and the agents in turn to allow the same length credit to the assured; that on a previous occasion he had asked the plaintiffs to pay for him; that after he had been handed the policy, and within the 60 days he spoke about having some alterations made in the policy to meet some changes he was to make, and promised that he would pay the premium when those changes were made; that after the expiration of the 60 days he offered to pay the plaintiffs the premium now in question if the plaintiffs would rectify a grievance he had against them in respect of work he had done for them in obtaining one Southwell's insurance. It is difficult to see what plainer acknowledgment of a request by the defendant to keep him protected could be made, and a request of that kind implies a promise to indemnify.

The learned County Court judge said that on the facts he thought the plaintiffs were entitled to recover, provided that they were the proper parties to sue. This finding on the facts

LAMPMAN, CO. J.

1914

Dec. 18.

COURT OF APPEAL

1915

June 7.

MOWAT v. GOODALL

IRVING, J.A.

LAMPMAN, CO. J.

1914

Dec. 18.

disposes of the subterfuges set up by the defendant in his statement of defence and afterwards persisted in in his testimony. I think the plaintiffs' facts are proved by reliable evidence and the defendant's denials are untrue.

COURT OF APPEAL

1915

June 7.

MOWAT v. GOODALL

The cryptic proviso, I understand, is based on the idea that the company, and not the plaintiffs, were the proper parties to bring the action. But the company gave the defendant no credit. He must know, as everybody else does know, that insurance cannot be obtained without paying for it. In his letter to the company he takes the ground that he did not want that policy. "I refused to pay the premium under such a policy," he says, in writing to the company on the 29th of January, 1914, but admits he mentioned the matter of a new policy to the plaintiffs, who, to his knowledge, were issuing policies in the Hudson's Bay Insurance Company.

As to the custom of fire-insurance companies and their agents, I refer to the following extract from the judgment of Meredith,

IRVING, J.A.

C.J.O. in *Antiseptic Bedding Co.* v. *Gurofski* (1915), [33 O.L.R. 319 at p. 333]; 8 O.W.N. 92, an action brought to recover from the defendant (by reason of his neglecting to place insurance on the plaintiff's property):

> "In many cases it is the course of dealing of agents to treat the insured as their debtor for the premium, and themselves as the debtors in respect of it to the insurers whom they represent, and that practice is well known to and recognized and acted on by insurers."

I am unable to see the application of section 21 of the policy to the question before us.

MARTIN, J.A.

MARTIN, J.A.: While I agree with the learned judge below that in general the agent for a fire-insurance company cannot personally recover premiums from the assured, and also that an agent for marine insurance stands on a special footing, yet I agree with my brother GALLIHER that in the special circumstances of this case the plaintiff must be deemed to be the agent of the assured and that he paid the premium at his request. So these facts take this case out of the general rule, founded on *French* v. *Backhouse* (1771), 5 Burr. 2727, that in order to recover premiums paid for insurance the plaintiff must have been employed as an agent for that purpose, either expressly or

by implication. My attention has been directed to the case of *Antiseptic Bedding Co.* v. *Gurofski* (1915), 26 O.W.R. 852, but I am afraid no real assistance can be derived from it, even on principle, because the defendant there was expressly found to be "not an agent for any of the insurance companies (p. 854), but for the insured (pp. 856-7), and employed by them to effect a special and risky insurance (p. 854)."

The appeal, therefore, should be allowed.

LAMPMAN, CO. J.

1914

Dec. 18.

COURT OF APPEAL

1915

June 7.

MOWAT v. GOODALL

GALLIHER, J.A.: The learned trial judge has found the facts in plaintiffs' favour, but dismissed the action on the ground that they were not the parties to sue.

At the trial several insurance agents were called, and all agree that as between themselves and the insurers the custom is that the agents are liable to the insurers for premiums on all policies written by them, and they in turn look to the insured and collect the premiums from them.

My brother IRVING has referred me to a case decided by the Court of Appeal for Ontario—*Antiseptic Bedding Co.* v. *Gurofski* (1915), 8 O.W.N. 92—which deals with the position of insurers, agents and insured, but does not meet the exact point raised in this case. The point to be decided in this case is, was the insured aware that the agents were paying his premiums to the insurers, looking to the insured to be reimbursed, and was this being done with his assent and at his request, express or implied, so as to create the relation of principal and agent between them? In this connection it is worthy of notice that the defendant himself was a sub-agent of the plaintiffs for placing insurance. This, together with the letter of the 14th of August, 1914, is dealt with as follows:

GALLIHER, J.A.

"Now you say on August the 14th, 1914, you sent a letter to the defendant asking for $25.50, what is that for? That was previous business he had written for us.

"For previous business? Collected for us and we wanted him to pay it.

"The Court: That was a premium he had collected when he was a sub-agent for you? Exactly."

Then, in reading the whole evidence, it appears that the plaintiffs had in previous years paid insurance premiums for the defendant, not being reimbursed for several months after the

LAMPMAN, CO. J.
1914
Dec. 18.
COURT OF APPEAL
1915
June 7.
MOWAT v. GOODALL

policy was delivered. The defendant surely did not imagine (being an agent himself) that he was covered by insurance unless his premiums had been paid by the plaintiffs. That might not be sufficient to establish the relationship I think necessary here, but if not, I find further evidence, in which the defendant, in cross-examination, says:

"Anything about a clock? No, I asked them one day when I was in the office—I had an old oak grandfather's clock and I asked him when I was placing the $1,000 on the furniture—my brother died and I removed into the house—this clock I valued at $300 and I asked him if it would cost any extra premium for a clock worth $300—have to be quoted specially; he said, 'Yes, it would'; then I said, 'Let it go in and pay the extra premium.'"

I am quite satisfied that the defendant knew that the plaintiffs were paying his premiums, and that they were doing so with his assent and at his request.

GALLIHER, J.A.

I quite agree with the learned trial judge's remarks regarding the non-application of the law governing marine insurance in England to the case at bar.

The appeal should be allowed for the reasons above stated.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the opinion that the learned trial judge arrived at the right conclusion, and would dismiss the appeal.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellants: *Courtney & Elliott.*
Solicitor for respondents: *J. Percival Walls.*

RAMSAY v. CORPORATION OF THE DISTRICT OF WEST VANCOUVER.

COURT OF APPEAL

1915

May 14.

RAMSAY v. WEST VANCOUVER

Municipal law—By-law for altering roads—Closing highway from traffic—Exclusive use given railway—Compensation to adjoining property owner—Arbitration—Municipal Act, R.S.B.C. 1911, Cap. 170, Secs. 53, Subsecs. (176), (193), (197); and 394.

A municipal corporation passed a by-law granting permission to a railway company to carry its line of railway along a public highway and to close a portion thereof from traffic for its exclusive use, thereby reducing the width of the highway along which vehicles can travel.

Held, that an owner of property abutting upon the strip of the road that was left open is entitled to have compensation for the injury done him determined by arbitration under the Municipal Act.

Per MACDONALD, C.J.A.: Subsection (176) of section 53 of the Municipal Act read in the light of subsection (193) of the same section gives the corporation power to close a strip of highway from traffic.

Order of CLEMENT, J. affirmed.

APPEAL by the Corporation from an order of CLEMENT, J. made at Vancouver on the 2nd of October, 1914, appointing arbitrators to decide the plaintiff's claim against the Corporation for compensation under the Municipal Act. The plaintiff owns property on the north side of the right of way over which the Municipality, by by-law, gave a railway company the right of way to the extent of 46 feet in width, leaving 20 feet on the north side of the street for public use. The question was whether the plaintiff can claim compensation against the Municipality under the Municipal Act, R.S.B.C. 1911, Cap. 170, or against the railway under the British Columbia Railway Act, R.S.B.C. 1911, Cap. 194, Secs. 157-160.

Statement

The appeal was argued at Vancouver on the 6th of January, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

R. M. Macdonald, for appellant: The question is whether the complainant is entitled to proceed against the Corporation for

Argument

COURT OF APPEAL

1915

May 14.

RAMSAY v. WEST VANCOUVER

compensation under the Municipal Act, or against the railway under the Railway Act. He demanded an arbitration against the Municipality and took out an originating summons, an order being made, under the Municipal Act, appointing arbitrators. We contend he must proceed under the Railway Act. The by-law closing the road was passed under the authority of the Railway Act; the whole transaction is in connection with the railway, and if he is entitled to compensation, the railway should pay it: *Moore* v. *Corporation of Esquesing* (1871), 21 U.C.C.P. 277 at p. 285; *The King* v. *The Inhabitants of Milverton* (1836), 6 L.J., M.C. 73.

Argument

Harvey, K.C., for respondent: The by-law deals with two matters: first, with stopping up the street, and second, allowing rails thereon, and the by-law itself states that it is in the public interest: *In re United Buildings Corporation and City of Vancouver* (1913), 18 B.C. 274. The only right we would have against the railway would be where they had taken over the lands, and they have not yet done so. We are deprived of the use of the road by the by-law. The fence excludes the public.

Cur. adv. vult.

14th May, 1915.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appellant, a municipal corporation, entered into an agreement with the Pacific Great Eastern Railway Company giving the company liberty to carry its line of railway along a public highway within the boundaries of the Municipality, together with the exclusive right of possession of a strip of the highway 46 feet wide, which strip the appellant, by by-law, closed to public traffic. This left still open to traffic a strip of 20 feet in width of the original road allowance along the northerly side of the portion which had been so closed. The railway company, on its part, agreed to purchase and dedicate as a highway a strip of land 20 feet wide on the southerly side of the said closed strip, so that the result of the by-law and agreement combined was that highways 20 feet in width were provided for traffic on each side of that portion of the original highway which was stopped up as aforesaid. The appellant also agreed with the railway company to indemnify it

against all actions and demands for damages or compensation by the owners of the abutting lands.

By section 52, subsection (176) of the Municipal Act, power is given to municipal corporations to pass by-laws "for establishing, opening, making, preserving, improving, repairing, widening, altering, diverting, or stopping up" public highways. The owners of land injuriously affected by the exercise of such powers are given the right to compensation for injury to their lands, and to have the amount thereof determined by arbitration: section 394 *et seq.* The respondent's land abuts on the said 20 feet of the original road allowance not closed, and he is endeavouring to proceed to arbitration under the said provisions of the Municipal Act, and in this connection obtain the order for the appointment of arbitrators, which is the subject of this appeal.

The appellant's counsel contended that because the Provincial Railway Act enables the railway company, with the approval of the minister of railways and the consent of the Municipality, to run its line along a public highway, such approval having in this instance been obtained, the effect of the by-law and agreement aforesaid should be held to be merely the consent of the Municipality to the railway company's occupying such strip, but not exclusively. In view of the terms of the by-law and agreement, I think this contention cannot be given effect to. Had the railway company proceeded in accordance with the provisions of the Railway Act alone, the strip of the highway in question could not have been closed to public traffic. It could be closed only, if at all, under the provisions of said subsection (176).

MACDONALD, C.J.A.

The appellant's counsel then took, in the alternative, the position that the by-law and agreement were *ultra vires* of the appellant, basing this contention on the one ground alone, *viz.*: that while it had power to stop up a highway, it had no power to narrow it by stopping up part of its width. I am not concerned with the powers of the Corporation to enter into the agreement in question in all its parts. The appellant may or may not have exceeded its powers in some of the terms of the agreement. In this connection the one above stated is the only one argued before us, and I shall confine myself to it.

COURT OF APPEAL

1915

May 14.

RAMSAY v. WEST VANCOUVER

I think the powers vested in the Corporation by said subsection (176), read in the light of subsection (193) of same section, are sufficient to authorize the closing to traffic of the said strip of the highway. It is true that power is expressly given to widen highways and nothing is said as to narrowing them, but power to close them up altogether or to alter them implies, in my opinion, power to close part of the width.

The appeal should be dismissed.

IRVING, J.A.

IRVING, J.A.: I would dismiss this appeal. *Baskerville* v. *City of Ottawa* (1892), 20 A.R. 108, seems in point.

MARTIN, J.A.

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

GALLIHER, J.A.

GALLIHER, J.A.: While it was necessary for the Municipality to pass a by-law granting permission to the railway company to construct their line along a public highway, the by-law itself went further and stopped up a portion of the highway, thereby limiting the width of the highway along which vehicles could travel, and in that sense bringing the Act authorized within the meaning of the word "altering," in the second line of subsection (176) of section 52, Cap. 170, R.S.B.C. 1911.

This interferes with the right of ingress and egress which the plaintiff had to and from his property, which abutted on the highway, and I think his claim for compensation against the Municipality is properly launched.

I would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This is an appeal from the order of CLEMENT, J. of the 2nd of October, 1914, made upon the hearing of an originating summons, appointing arbitrators, under the provisions of the Municipal Act, to determine compensation for any damages caused by injuriously affecting lands of the claimant owing to the stopping up of a certain highway, known as Bellevue street, the by-law being No. 38, passed on the 14th of October, 1913.

The whole of the street has not been stopped up, but, in my opinion, the statutory authority admits of a portion of the street being stopped up (section 53, subsection (176), Cap. 170, R.S.B.C. 1911).

The Corporation having stopped up a portion of the street it necessarily follows that there may be damages by way of injurious affection of abutting lands, and there is the right to have any such damages assessed by arbitrators (section 394), the compensation being provided for under statutory provisions: *Metropolitan Board of Works* v. *McCarthy* (1874), L.R. 7 H.L. 243; *In re Tate and City of Toronto* (1905), 10 O.L.R. 651.

The Corporation in the present case did not merely confer upon the Pacific Great Eastern Railway Company the right to carry its line along the street in question (section 53, subsection (197)), but in the by-law it is provided that it is to the extent there set forth stopped up and closed [quoting clause 1 of the by-law].

The situation would possibly have been different if there had been in the present case merely the authorization to the railway company to construct the railway along the street. Then it might be that no damages could be assessed against the Corporation (*In re Medler & Arnot and Toronto* (1902), 4 Can. Ry. Cas. 13 and pp. 33-35). The question of damages (if any) in such a case might be assessable only under the provisions of the Railway Act. However, as this is a point not necessary of decision in the present case, I withhold the expression of any positive opinion thereon.

MCPHILLIPS, J.A.

The Arbitration Act, R.S.B.C. 1911, Cap. 11, applies to arbitrations under the Municipal Act, and there is the power in the arbitrators to at any time state a special case for the opinion of the Court upon any question of law arising in the course of the reference, and the Court, or a judge, may so direct in a proper case (sections 10 (*b*) and 22).

It follows that, in my opinion, the order of the learned judge was right, and the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *A. H. MacNeill.*
Solicitor for respondent: *R. P. Stockton.*

CLEMENT, J.

1914

Nov. 24.

COURT OF APPEAL

1915

May 14.

RORAY v. HOWE SOUND MILLS AND LOGGING COMPANY, LIMITED.

Company—Sale of portion of assets—Sale brought about by a director of company—Not entitled to commission.

Directors cannot pay themselves for their services out of the company's assets unless authorized so to do by the instrument which regulates the company or by the shareholders at a properly convened meeting.

In re George Newman & Co. (1895), 1 Ch. 674, followed.

Decision of CLEMENT, J. reversed.

RORAY v. HOWE SOUND MILLS AND LOGGING CO.

Statement

APPEAL from the decision of CLEMENT, J. in an action tried by him at Vancouver on the 23rd and 24th of November, 1914, for the recovery of commission for the sale of a mill. The defence was that the plaintiff was at the time of the sale a director of the Company. It appears that the defendant Company was originally a three-man company, composed of the plaintiff, Lane and Newberry. On the 10th of October, 1913, Lane and Newberry sold out to Taylor, Davis and Shrauger, when Roray abandoned a small portion of his shares, so that the four would have an equal number (Shrauger dividing his shares with one Grandison, who was not a director). At the time of the sale the three new men became directors in lieu of Lewis and Newberry. Plaintiff was managing director until the 9th of October, 1913, during which time the mill was under construction. When the new members came in an arrangement was entered into between Roray and the other directors whereby Roray would have no further interest in the management. Davis then entered into an agreement with the plaintiff, offering a five per cent. commission to plaintiff if he brought about a sale of the mill. Davis admitted the arrangement for a sale but denied the offer of commission. Roray eventually brought about a sale and his commission was refused by the Company on the ground that he was still a director. The trial judge found that the plaintiff was entitled to recover the commission sued for, and, as he was of opinion that there were no difficult questions of law

or fact involved, awarded costs on the County Court scale. Defendant Company appealed.

W. S. Lane, for plaintiff.
Abbott, for defendant.

CLEMENT, J.: I think the plaintiff is entitled to recover. There is no evidence to contradict the evidence of the plaintiff that five per cent. is the customary commission on transactions of this sort. So that, if he is entitled to recover at all, the judgment should be for $1,000.

I find as a fact that plaintiff did bring about this sale. I also find on this evidence that while, perhaps, plaintiff remained legally a director—as to that I express no decided opinion—but assuming he was a director, then practically as between himself and these other three gentlemen, he was not a director. He was allowed no voice whatever in the conduct of the business of this Company, of any description, after that meeting of October. Even if he were a director, I do not think that either clause 85 or clause 102 of the articles would debar him from recovering in the case of an open and avowed contract between himself and the Company. Clause 85, as I have already intimated, refers to work done by a director as a director. As I said a few moments ago I think that where a person in the position of the plaintiff does work in connection with the sale of a company's assets, the burden is very strongly upon him to shew that in acting he was not acting by reason of the fact of his interest. Here I think he has succeeded in meeting that burden. I do not think in connection with this sale he acted in any sense as a director of the Company. I arrive at that result not particularly on plaintiff's own evidence, but from the evidence of Taylor and Davis. No doubt, when the question of a sale to Blackford came up they did not any way treat Roray as a man with whom they should consult about it, as a brother director, but they by their action simply employed him as they would employ any outsider, to try and bring about a sale. Of course, if in point of law plaintiff was not a director, the case I think would be quite clear, but, as before intimated, I do not think it necessary to express a decided opinion on that point. I lean toward the

CLEMENT, J.

CLEMENT, J.

1914

Nov. 24.

COURT OF APPEAL

1915

May 14.

RORAY v. HOWE SOUND MILLS AND LOGGING CO.

view expressed by Mr. Shrauger in the box, that when the Company was changed from practically a three-man company to a four-man company they increased the number of their directors to four. That I think accounts for the rather ambiguous entries that are contained in the minutes of that meeting. However, whether he was or was not a legal director, I do not think that he either acted or was treated by his co-directors as acting in any sense as a director in regard to the sale to Blackford. Therefore, as I have said, clause 85 does not apply. Clause 102 does not apply except in the plaintiff's favour. Clause 102 distinctly provides that a director is not disqualified from entering into a contract with the Company. The subsequent clause, regarding disclosure of any interest a director may have in a contract, has no bearing whatever in this case. It cannot be suggested that if a director has the power to enter into a contract with a company he is not entitled to receive the consideration for his services in connection with that contract, whatever that might be under the contract.

There is one question of fact upon which perhaps I should express an opinion. Upon this evidence I think it appears that there was an arrangement with Davis, to this extent: that Davis gave Roray to understand that there would be a commission in the matter for him, if the sale went through. I am rather inclined to think that no express amount was mentioned. However, it is perhaps unnecessary, in the view I have taken, to come to any decided view upon the point; but I give credence to the plaintiff's evidence, to the extent of finding that the matter was talked over between himself and Davis; whether any definite arrangement was made or not I am not prepared to say. In that respect the plaintiff is corroborated by the witness Bundy, though Bundy's evidence does not carry it far enough to enable any definite amount to be fixed. In fact, a subsequent letter (which of course is not evidence against the defendant) would indicate that the matter was really at large, and he advised Roray to get some definite understanding about the matter. For that reason, I will have to treat it as a case of *quantum meruit*, and I think that the acts of Davis and the others amounted to the employment of the plaintiff Roray to bring about this sale;

CLEMENT, J.

that he did bring about the sale, and that he is entitled to remuneration for his services, and on the evidence that amount will be fixed at $1,000.

I cannot see that the case has involved any particularly difficult question of law and fact, and for that reason the recovery will be upon the County Court scale, as far as costs are concerned.

The appeal was argued at Victoria on the 14th of January, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Mayers, for appellant: This was originally a three-man company, all directors, the plaintiff being manager. On the 10th of October, 1913, the two other directors sold out to three men. They all met together and after the transfers, the three new men were made directors and the plaintiff transferred a portion of his shares so that they each held one-quarter of the shares. The plaintiff then dropped out as manager and took no further active part in the Company's affairs, but he did not resign as a director; he still continued in that capacity up to the time of the sale. No doubt he was employed by one of the directors (Davis) to effect a sale of the mill, but he was at the time of the sale a director and therefore not entitled to commission: see *In re Haycraft Gold Reduction and Mining Company* (1900), 2 Ch. 230 at p. 235; *In re George Newman & Co.* (1895), 1 Ch. 674 at p. 686. Argument

Abbott, for respondent: The presumption is against his being a director and the burden lies on the defendant. He was a director until the 10th of October, 1913, when he ceased to have an interest in the Company through an arrangement at the meeting of shareholders on that date.

Mayers, in reply: There is no distinction between an acting and a non-acting director. Roray knew he was a director on the books of the Company until the 14th of September, 1914: see *Transvaal Lands Company* v. *New Belgium (Transvaal) Land and Development Company* (1914), 2 Ch. 488 at p. 502.

Cur. adv. vult.

CLEMENT, J.

1914

Nov. 24.

COURT OF APPEAL

1915

May 14.

RORAY v. HOWE SOUND MILLS AND LOGGING CO.

14th May, 1915.

MACDONALD, C.J.A.: I would allow the appeal.

IRVING, J.A.: The services rendered by Roray were such as might fairly be regarded as incidental to his office as director, which office he held, and to have been undertaken by him in virtue of his office.

For such services a director has no right to look for payment unless authority is to be found in the articles or given by the shareholders. Proof of such authorization is not forthcoming. I would allow the appeal.

MARTIN, J.A.: I would allow the appeal.

GALLIHER, J.A.: Assuming that Davis, one of the directors, agreed to pay the plaintiff a commission on the sale of the mill that alone could not bind the Company, nor do I find anything in the acts of the other directors or of the president, Taylor, that would in any way aid the plaintiff.

GALLIHER, J.A.

They claim they knew nothing of any commission to be paid, and when suggested to them by the plaintiff they repudiated same.

On the whole I think there was no contract for commission either express or implied.

MCPHILLIPS, J.A.: In my opinion this appeal is entitled to succeed. The plaintiff was, upon the facts, a director in the defendant Company, and I do not understand that the learned trial judge has held otherwise, but I cannot, with all respect, agree with the learned judge in the language used by him in the course of his judgment, *i.e.*:

MCPHILLIPS, J.A.

"I also find on this evidence that while, perhaps, plaintiff remained legally a director—as to that I express no decided opinion—but assuming he was a director, then practically as between himself and these other three gentlemen, he was not a director. He was allowed no voice whatever in the conduct of the business of this Company, of any description, after that meeting of October."

The plaintiff being a director must be held accountable as such and cannot escape from the discharge of his duty and liability, or not be deemed a director, because of the action of his fellow directors in excluding him from their councils.

It is idle contention to advance any such argument. Therefore the case must be approached with the premise that the plaintiff, then being a director of the defendant Company, brings about the sale of a certain shingle-mill plant and appurtenances the property of the Company, the sale price being $20,000, and claims to be entitled to a 5 per cent. commission thereon, and the learned trial judge has held that the plaintiff is entitled to recover, and the appeal is from the judgment allowing the plaintiff this sum, *viz.*: $1,000.

It is well settled that unless the articles admit of directors entering into contracts with the company of which they are directors, practically no contractual relationship is admitted save as to taking up shares, subscribe for debentures, etc. There can be no conflict of duty and all secret benefits by way of commission or otherwise are matters that call for accounting to the Company: *Bray* v. *Ford* (1895), 65 L.J., Q.B. 213.

It is also well settled that directors are not *prima facie* entitled to remuneration for their services, but as a matter of fact the articles as a rule do make provision for remuneration and it is a matter of internal management: *Burland* v. *Earle* (1902), A.C. 83.

The contention is that there was an agreement upon the part of the directors, or an agreement by one of them, R. L. Davis, that the plaintiff was to receive 5 per cent. commission upon the sale if effected by the plaintiff, and it was effected. It is to be noticed, though, that quite apart from whether this would be in any way legally binding upon the Company, Davis positively denies making any such agreement. It is true, Davis wrote the following letter to the plaintiff, but apart from this letter it cannot be said that there is any evidence upon which any agreement to pay commission may be founded: [quoting the letter.]

Even if it had been the case of $21,000 being asked and the sale going through at that price the plaintiff would have had to account to the Company for the $21,000, and would not have been permitted to retain the $1,000 as commission unless it were that the Company could be said to be legally liable therefor.

To determine whether upon the facts of the present case there can be any liability upon the part of the Company to the

CLEMENT, J.

1914

Nov. 24.

COURT OF APPEAL

1915

May 14.

RORAY v. HOWE SOUND MILLS AND LOGGING CO.

MCPHILLIPS, J.A.

plaintiff it becomes necessary to examine the articles of association. Clauses 85 and 102 of the articles appear to me to be the only clauses in this regard that need be referred to, and they are in the following terms:

"85. The directors shall be paid all their travelling and other expenses properly and necessarily expended by them in connection with the company, and they shall also be entitled to receive out of the funds of the company by way of remuneration for their services such sum as the company in general meeting may, from time to time, determine.

"102. Any director may, notwithstanding any rule of law or equity to the contrary, be appointed to any office under the directors, with or without remuneration; but he shall not vote upon any question connected with the appointment or remuneration of such office. No director shall be disqualified by his office from contracting with the company either as vendor, purchaser, or otherwise, nor shall any such contract, or any contract or arrangement entered into by or on behalf of the company in which any director shall be in any way interested be voided, nor shall any director so contracting or being so interested be liable to account to the company for any profit realized by any such contract or arrangement by reason of such director holding that office of or the fiduciary relation thereby established, but it is declared that the nature of his interest must be disclosed by him at the meeting of the directors at which the contract or arrangement is determined on, if his interest then exists, or in any other case at the first meeting of the directors after the acquisition of his interest, and that no director shall as a director vote in respect of any contract or arrangement in which he is so interested as aforesaid; and if he do so vote his vote shall not be counted, but this prohibition shall not apply to any contract by or on behalf of the company to give to the directors, or any of them, any security by way of indemnity, and it may at any time or times be suspended or released to any extent by a general meeting."

Construing these two clauses of the articles, it is apparent upon the facts that the plaintiff does not make out a case entitling him to recover this commission. No remuneration by way of commission upon the sale was determined at any general meeting of the Company nor was there any agreement come to at any meeting of the directors to pay him any such commission nor was there any disclosure made at any meeting that he was to receive any such commission nor was there at any later time any such disclosure or notification of any agreement which the plaintiff can invoke to in any way substantiate the claim made: see *Liquidators of Imperial Mercantile Credit Association* v. *Coleman* (1873), L.R. 6 H.L. 189.

It is attempted to establish a liability upon the special facts

of the present case that there was individual assent of the directors, this though I do not consider was proved and, even if proved, in my opinion, would be ineffective to fix liability upon the Company. Directors cannot pay themselves or one of themselves for services rendered unless authorized so to do by the articles governing them and then only in conformity therewith, not acting individually but in a directors' meeting or authority therefor is given at a duly-convened shareholders' meeting, and see *per* Lindley, L.J. in *In re George Newman & Co.* (1895), 1 Ch. 674 at p. 686.

Also see *Young* v. *Naval and Military, &c., Co-operative Society of South Africa* (1905), 74 L.J., K.B. 302; and *Transvaal Lands Company* v. *New Belgium (Transvaal) Land and Development Company* (1914), 2 Ch. 488 at p. 502.

It therefore follows that, in my opinion, upon the facts of the present case, the plaintiff cannot be admitted to have made out such a case as would warrant the Company—the defendant—being held liable to pay the claimed commission. The conditions precedent to the creation of liability upon the Company have not been proved, *i.e.*, the procedure as authorized by the Company's articles were not followed, in fact there is an entire absence of all that which was requisite and imperatively necessary to waive the rules and settled law upon the subject.

I would allow the appeal, the action to be dismissed, the appellant to have the costs here and in the Court below.

Appeal allowed.

Solicitors for appellant: *Bodwell, Lawson & Lane.*

Solicitors for respondent: *Abbott, Hart-McHarg, Duncan & Rennie.*

MURPHY, J.

1914

Sept. 14.

COURT OF APPEAL

1915

May 14.

WILSON v. B.C. REFINING CO.

WILSON v. THE BRITISH COLUMBIA REFINING COMPANY, LIMITED.

Company law—Retention of dividend for debt due—Shares—Pledge of "in trust"—Registration—Articles of association—Estoppel—Companies Act, R.S.B.C. 1911, Cap. 39, Secs. 35 and 40.

M., a shareholder in the defendant Company, owed money to the bank of which the plaintiff was the manager, and he also owed money on a note to the defendant Company. He pledged his shares in the defendant Company to the plaintiff as collateral security for the debt to the bank, and a certificate was issued for the shares by the defendant Company to the plaintiff "in trust." Upon the dividend being declared the defendant Company, in accordance with its articles of association, set off the debt due them by M. against the amount of dividend due on said shares. It was held by the trial judge that the entry of shares on the share register "in trust" contravenes section 35 of the Companies Act and that the defendant Company was entitled to make the set-off under section 75 of Table A of the Companies Act, 1897, which is included in its articles.

Held, on appeal, reversing the decision of MURPHY, J., that the plaintiff is entitled to the dividends declared on the shares as against the Company, as section 75 of Table A of the Companies Act, 1897, can only apply to a person whose name is on the books of the Company as a member.

Held, further, that section 53 of the Companies Act, 1897, has no application to a case where a transfer of shares is made. It can only apply where the shares appear to have been pledged as collateral security and the real owner's name remains on the books of the Company.

APPEAL by plaintiff from the decision of MURPHY, J. in an action tried by him at Vancouver on the 8th of September, 1914, for the recovery by the plaintiff of the amount due upon certain shares held by him in the capital stock of the defendant Company on a dividend duly declared. The facts are that one Malekov had transferred to the plaintiff, who was the manager of the Vancouver branch of the Royal Bank of Canada, the shares in question as collateral security for an advance from the bank, the shares having been duly registered in the plaintiff's name "in trust," he holding them as trustee for the bank. Malekov at this time owed money to the defendant Company

Statement

on a promissory note, and upon the dividend referred to being declared the Company in accordance with its articles of association, which provided that the directors might deduct from the dividends payable to any member all such sums of money as might be due from him to the Company on account of calls or otherwise, retained the dividend in payment of Malekov's debt.

Sir C. H. Tupper, K.C. (*Head,* with him), for plaintiff.
Ritchie, K.C. (*W. C. Brown,* with him), for defendant.

14th September, 1914.

MURPHY, J.: It is not controverted that plaintiff holds the shares merely as a trustee for the Royal Bank of Canada, of which he is manager in Vancouver. Again, it is not disputed that the Royal Bank holds them as collateral security to Malekov's account. Malekov is the true owner and has pledged the shares. He owed money to the Company at the time the dividend claimed herein was declared and the Company contend that under its articles it is entitled to retain so much of the dividend money as is necessary to liquidate this debt. It was not shewn that this debt represents unpaid calls on the shares, the dividends on which are in question herein. In fact, I think all evidence given as to what this debt was for must be rejected as hearsay, Mr. Cunningham having no knowledge of its origin except information gleaned from the books or given him by others connected with the Company. Its existence as alleged is, however, proven. The questions are: Can the true facts be proven, Wilson being the registered holder "in trust" and having in his possession certificates issued to him "in trust"? If they can be, is the Company's action justified by the Companies Act and its articles? In the first place it is to be observed that the entry of these shares on the share register in trust contravenes section 41 of Cap. 44, R.S.B.C. 1897, and section 35 of Cap. 39, R.S.B.C. 1911, one or other of which Acts applies to the Company. The transfers sent in by plaintiff were executed to him "in trust." His covering letter requested that the new certificate be issued to him "in trust," and it was, in fact, so issued. Section 53 of Cap. 44, R.S.B.C. 1897, and

MURPHY, J.

1914

Sept. 14.

COURT OF APPEAL

1915

May 14.

WILSON v. B.C. REFINING CO.

section 40 of Cap. 39, R.S.B.C. 1911, are identical and are as follows:

"No person holding shares, stock, or other interest as collateral security, shall be personally subject to liability as a shareholder; but the person pledging such shares, stock, or other interest as such collateral security shall be considered as holding the same, and shall be liable as a shareholder in respect thereof."

Section 75 of Table A of the 1897 Act, which is included in the articles of the Company, reads:

"The directors may deduct from the dividends payable to any member all such sums of money as may be due from him to the company on account of calls or otherwise."

It is worth noting that this provision has been exercised in Table A of the Act of 1911.

"Member" in Table A of 1897 clearly, I think, means "shareholder" as that term is used in the Act. If then the true facts can be shewn, it appears to me the Company's contention is correct. The section above quoted not only exempts the pledgee from liability but goes on to expressly declare that the pledgor "shall be considered as holding the same," and shall be liable "as a shareholder in respect thereof."

Table A of 1897, which in so far as the points involved herein are concerned, applies to this Company, fixes on the shareholder liabilities, or, at any rate, confers on the Company rights against the shareholder, in addition to the matter of calls. By section

MURPHY, J.

10 thereof the Company may decline to register any transfer of shares made by a member who is indebted to them. By section 75, above quoted, they may retain out of the dividends payable to him any amount due for calls or otherwise. The language of both the Act and the articles is clear and effect must, I think, be given to its obvious meaning. But it is said the true facts cannot be shewn. *In limine,* it is to be observed that everyone dealing with a Company is supposed to be conversant with its memorandum and articles: Hamilton & Parker's Company Law, 3rd Ed., p. 107, and authorities there cited. Mr. Wilson and the Royal Bank must therefore be taken to have been aware, if my view of the meaning of the Act and articles is correct, that if the true facts were known the Company had a right to retain any dividend declared to the extent necessary to cover any indebtedness to it by Malekov. Mr. Wilson, by the form of

transfers sent in and by his covering letter requesting the issue of the shares to himself "in trust," expressly calls the Company's attention to the fact that the transaction is not an ordinary transfer of shares to him in his own right. Strong and Henry, JJ., in *Page* v. *Austin* (1882), 10 S.C.R. 132, held the true facts could be shewn even when the transfer registration and share certificates were absolute in form. Gwynne, J. in the same case, refused to go so far, but said they might be in the case of mortgagees or trustees appearing upon the books so to be. Whilst the full transaction is not set out on the books, and it is recognition of trusts in the Act, the register does shew it in part. As stated above, however, plaintiff must be taken to have had knowledge of the Company's rights in the premises. How can it be said then that the Company is estopped? True, if the claim was for calls on these particular shares, then, probably, they would be by virtue of the statement and receipt on the share certificate that they are fully paid up. But how can registration to Wilson "in trust" be held to be any statement or representation that Malekov owed them nothing? The essentials of an estoppel *in pais* are clearly stated by Strong, J. in *Page* v. *Austin, supra,* at p. 164, and, if I may be permitted to adopt his language in this case, the very foundation upon which such a mode of concluding the rights of parties rests is wanting. I think then the Company is entitled to succeed on this issue.

MURPHY, J.

There remains the question of costs. The circumstances accompanying the payment of the dividend to plaintiff on the small lot of shares held by him is, I think, an admission of liability by the defendant. In all the circumstances I think I should certify that there was sufficient reason for bringing the action even as to this amount in this Court. The order will therefore be that the plaintiff recover the general costs of the action up to the date of the payment of this amount to the bank, and that the defendant recover the costs of the issue on which it succeeds up to that date. Subsequently to that date the defendant to have the costs. Set-off *pro tanto* to be allowed.

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

MURPHY, J.

1914

Sept. 14.

COURT OF APPEAL

1915

May 14.

WILSON v. B.C. REFINING CO.

Argument

Sir C. H. Tupper, K.C., for appellant: The law is that where a shareholder transfers his stock and the transfer is registered, that stock will not be liable for any indebtedness of the transferor. Twenty-one thousand nine hundred and five shares were transferred to Wilson and we say evidence as to the capacity in which we held the stock was inadmissible. The fact is we have the stock certificate and we are entitled to the dividend. The learned trial judge said Malekov is the true owner of the shares; this is erroneous. There is no evidence of the debt from Malekov to the Company and even if there were it is not defined, and the note the Company held from Malekov was not received. On the question of the certificate being issued to Wilson "in trust" the words "in trust" are entirely innocuous and have no legal effect: see *London and Canadian Loan and Agency Company* v. *Duggan* (1893), A.C. 506; *Re Winnipeg Hedge and Wire Fence Company, Limited* (1912), 1 D.L.R. 316 at p. 323; *In re T. H. Saunders & Co., Limited* (1908), 1 Ch. 415 at p. 423. Sections 38, 39 and 40 of the Companies Act are not in the English Act, but in paying dividends the registered holders only are recognized: see *Paul's Trustee* v. *Thomas Justice & Sons, Limited* (1912), S.C. 1303; Halsbury's Laws of England, Vol. 5, par. 311; Hamilton's Company Law, 3rd Ed., pp. 177-9; *In re Perkins. Ex parte Mexican Santa Barbara Mining Company* (1890), 24 Q.B.D. 613 at p. 616. On the question of the definition of "shareholder," section 2 of the Companies Act, R.S.B.C. 1911, is the same as section 1 of the Act of 1897: see Halsbury's Laws of England, Vol. 5, pp. 170, 172, 195. *Societe Generale de Paris* v. *Tramways Union Co.* (1884), 14 Q.B.D. 424 at pp. 451-2 deals with registered holders in regard to payment of dividends even when acting as trustees for others. See also Halsbury's Laws of England, Vol. 5, pp. 150, 162, and 197, note (*c*); *Bradford Banking Company* v. *Briggs* (1886), 12 App. Cas. 29; *In re W. Key & Son, Limited* (1902), 1 Ch. 467 at pp. 474-5. In the case of *Page* v. *Austin* (1882), 10 S.C.R. 132, the trial judge's references were merely *obiter dicta* and in the case of *Re Standard Fire Ins. Co.* (1885), 12 A.R. 486, Burton, J. deals with *Page* v. *Austin, supra.*

Ritchie, K.C., for respondent: We must take issue on the meaning of the words "in trust." "In trust" means "in trust for the bank as collateral security." If the Company have notice from the bank that they hold the shares as security the Company cannot then incur further liability and retain priority. The statute governs the rights of the parties. Counsel for the appellant quoted English cases that do not apply here owing to our statute. What Strong and Henry, JJ. said in *Page* v. *Austin* (1882), 10 S.C.R. 132, is not *obiter dicta*: see also the judgment of Cameron, J. in the Court below (1882), 7 A.R. 1 at p. 10. Galt, J. was the only judge in that case against us: see (1879), 30 U.C.C. P. 108. On the question of the note not being renewed see *In re The London, &c., Banking Co. (Limited)*, (1865), 34 Beav. 332. The plaintiff has a certificate which is *prima facie* evidence of title, but it is proved the transfer never became effectual, as it had to be passed by the directors (four being a quorum) and it was passed at a meeting at which four were present, but two of these were not qualified to act as directors, so that the transfer was illegally passed: see Lindley on Companies, 6th Ed., pp. 61 to 65; *Chida Mines (Limited)* v. *Anderson* (1905), 22 T.L.R. 27. There is no evidence of the sanction of the transfer by the board. Argument

Tupper, in reply: On the question of internal management the trial judge held in our favour and they did not cross-appeal. See on this point *McKay's Case* (1896), 2 Ch. 757; *Burkinshaw* v. *Nicolls* (1878), 3 App. Cas. 1004 at p. 1017-27; *Biggerstaff* v. *Rowatt's Wharf, Limited* (1896), 2 Ch. 93 at pp. 102-4; *In re Taurine Company* (1883), 25 Ch. D. 118.

Cur. adv. vult.

14th May, 1915.

IRVING, J.A.: Plaintiff sues for a half dividend payable in respect of 22,655 shares registered in his name, which dividend was declared on the 21st of December, payable as to one half on the 1st of February. IRVING. J.A.

The writ was issued on the 17th of March, 1914, the other half dividend being payable on the 1st of May, 1914.

MURPHY, J.

1914

Sept. 14.

COURT OF APPEAL

1915

May 14.

WILSON v. B.C. REFINING CO.

The Company was incorporated on the 2nd of September, 1908, under the British Columbia statutes then in force.

We had in the case of *Rose* v. *B. C. Refining Co.* (1911), 16 B.C. 215, some experience of this Company.

By two letters dated respectively the 12th of November, 1913, and the 9th of December, 1913, the Company was invited to transfer from Malekov, who was then the registered holder of these 22,655 shares, to "Maurice W. Wilson, in trust," that is as to 21,905 shares: as to the 750 shares the words "in trust" were not used. From the letters it is quite apparent that the request was being made by the Royal Bank of Canada. The transfer was at once made and on the 13th of November, 1913, a certificate certifying that 21,905 shares were vested in "Maurice W. Wilson in trust" was delivered to the bearer, presumably a messenger from the bank, and later a certificate for 750 shares was also sent to the plaintiff. On the 13th of December the defendant declared a dividend, the first half of which would amount to $1,132.75. On the 3rd of February the defendant sent to the plaintiff a cheque for $37.50, being half of the dividend on the 750 shares, and in the course of time claimed to retain the balance of the dividend for a debt which they alleged to be due to them from Malekov. They, as a matter of fact it may be stated, held a note made by Malekov for $1,576.90, which note was dated the 4th of November, 1913, payable 60 days after date, and therefore not due at the time the shares were transferred to the bank on the 13th of November, 1913.

IRVING, J.A.

The defence claimed, *inter alia,* that the plaintiff was not the registered holder of these 21,905 shares; that the Company claimed a lien on them as Malekov owed them the sum of $1,576.90; that the plaintiff held them in trust for the Royal Bank of Canada, which in turn held them as collateral security for a debt due to the bank from Malekov, who was the real owner. Further the transfer to the plaintiff of the 13th of November was a mistake; that the secretary was under the impression that the words "in trust" meant in trust for Malekov, and had he known that it was in trust for the Royal Bank of Canada, the transfer would not have been allowed to go through.

The defendant counterclaimed to have this mistake set right, but the counterclaim was dismissed and no appeal has been taken on that point.

The learned trial judge held that it had been established that the plaintiff was the holder of the certificates issued: on that point I agree with him. He also held that Malekov was indebted to the Company in the sum of $1,576.90; upon that point I agree with him, but Malekov was not indebted to them, in my opinion, until after the transfer made for the reason that I have already indicated in the dates above given. The learned judge directed judgment to be entered for the defendant. From this decision the plaintiff appeals and argues first, that it was not proved by satisfactory evidence that Malekov was indebted to the Company. I think, on reading the evidence, that Malekov was indebted to the Company. I think, on reading the proceedings at the trial, that that point was there conceded, and it is not now open to the plaintiff to bring forward that argument.

The second point was that assuming that the first one be given against the plaintiff, and that the debt amounts to $1,576.90, it is said that the Company had no right to deduct the amount of Malekov's debt to the Company from a dividend which was payable in respect of shares held by the plaintiff, and it is on that point that the argument chiefly turned.

By the Company's articles, Table A of the Act of 1897 applies so far as the points involved in this case are concerned. Article 8 provides that the instrument of transfer shall be executed by both parties, and until the name of the transferee is entered in the register book the transferor shall be deemed to remain the holder of such shares. Article 10: "The Company may decline to register any transfer of shares made by a member who is indebted to them." Article 75 provides that "the directors may deduct from the dividends payable to any member all such sums of money as may be due from him to the Company on account of calls or otherwise."

Section 41 of the Act provides that no notice of any trust shall be entered on the register. Section 43 of the Act provides that a certificate under the common seal of the Company shall

MURPHY, J.

1914

Sept. 14.

COURT OF APPEAL

1915

May 14.

WILSON v. B.C. REFINING CO.

be *prima facie* evidence of the title of the member to the shares specified.

These articles and sections are taken from the English Companies Act (25 & 26 Vict., c. 89), Secs. 30 and 31. The Act also contains the following sections which have been copied from the Ontario statutes:

"52. No person holding shares, stock, or other interest in the company as executor, administrator, guardian or trustee, shall be personally subject to liability as a shareholder; but the estates and funds in the hands of such person shall be liable in like manner and to the same extent as the testator or intestate or the minor, ward, or person interested in the trust fund, would be if living and competent to act and holding such shares, stock, or other interest in his own name.

"53. No person holding shares, stock, or other interest as collateral security, shall be personally subject to liability as a shareholder; but the person pledging such shares, stock, or other interest as such collateral security shall be considered as holding the same, and shall be liable as a shareholder in respect thereof."

This 53rd section seems to me inconsistent with the general policy of the English Act, particularly when read with section 52. It is unfortunate that sections from the Ontario statutes are so often grafted on to English statutes complete in themselves when they are reproduced in this Province. The result often is a misfit. These unnecessary insertions give rise to a great deal of litigation by reason of their not falling in with the scheme of the English Act.

IRVING, J.A.

Assuming the following facts are not in dispute (1) that Malekov was indebted to the Company; (2) that prior to the declaration of the dividend the shares had been transferred to the plaintiff "in trust"; (3) that the plaintiff who was the manager of the Royal Bank of Canada holds them as trustee for the bank; and that (4) the bank received them as collateral security for a debt due the bank from Malekov, the learned judge, reading article 75 authorizing the directors to make the deduction, in connection with the Ontario section 53, just set out, came to the conclusion that the Company was entitled to make the deduction.

With deference to his opinion I have arrived at a different conclusion. In my opinion section 53 can have no reference to the case where a transfer of shares is made. On its face it can

only apply where the shares appear to have been pledged as collateral security and the real owner's name remains on the books of the Company.

The 75th article can only apply to the person whose name is on the books of the Company as a member: see on this section Lindley on Company Law, 6th Ed., p. 610.

Having regard to the provisions of the 53rd section a person making a loan and taking as security shares of a Company, and who must be guided by the form of the Company's memorandum and articles and certificate tendered to him by the borrower as security, would have two courses open to him in preparing his security. In the case of a share certificate where the shares are not fully paid up, he would take a charge and give notice to the Company and so have the advantage of section 53. In the case of fully paid up shares he would take a transfer and rely on the general policy of the Companies Act which is plainly expressed in *In re Perkins. Ex parte Mexican Santa Barbara Mining Company* (1890), 24 Q.B.D. 613 at p. 616 by Lord Coleridge, C.J. who says:

". . . . Companies have nothing whatever to do with the relations between trustees and their *cestuis que trust* in respect of the shares of the company. If a trustee is on the company's register as the holder of shares, the relations which he may have with some other person in respect of the shares are matters with which the company have nothing whatever to do; they can look only to the man whose name is upon the register. It seems to me that, if we were to throw any doubt upon that rule, we should make the carrying on of their business by joint-stock companies extremely difficult, and might involve those companies in very serious questions, and the ultimate result would be anything but beneficial to the holders of shares in such companies themselves."

IRVING, J.A.

The Company in the event of the transfer being applied for where the shares are not fully paid up, or where the transferor is indebted to the Company, might decline to register a transfer under article 10, but where the transfer is actually made the Company would, I think, be bound to look to the registered member. He in turn would if compelled to pay expect to be indemnified by his *cestui que trust*. In the absence of express words the Company has no lien on a member's shares for debts owing by him. The Company's remedy is to refuse to transfer.

Although the statute, section 41, directs that no notice of

MURPHY, J.

1914

Sept. 14.

COURT OF APPEAL

1915

May 14.

WILSON v. B.C. REFINING CO.

trust shall be entered on the register, nevertheless the practice in British Columbia of using the words "in trust" seems to be a common one.

In this case, as in the case of *London and Canadian Loan and Agency Company* v. *Duggan* (1893), A.C. 506, the words "in trust" must, having regard to the letter covering the application, have informed the secretary of the defendant Company that the plaintiff was applying for registration in trust in respect of the bank of which he was manager, and there was nothing to suggest that he was acting as a trustee for Malekov.

The object of the section is to free not only the Company but also the creditors from inquiring from those other persons for whom the shares are held: *Chapman and Barker's Case* (1867), L.R. 3 Eq. 361 at p. 366. The entry "in trust" if made would be for the benefit of the beneficiaries and not of the trustees

IRVING, J.A.

or of the Company: see *Muir* v. *City of Glasgow Bank* (1879), 4 App. Cas. 337 at p. 360, a Scotch case where the practice is to insert a memorandum shewing that the shares are held in trust.

I would allow the appeal.

MARTIN, J.A.

MARTIN, J.A.: I would allow the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal, in my opinion, should be allowed.

Section 40 of Cap. 39, R.S.B.C. 1911 (identical with section 53 of Cap. 44, R.S.B.C. 1897), declares that a person holding shares as collateral security shall not be personally subject to liability as a shareholder, but the person pledging the shares shall be so liable. The enactment was no doubt framed to enable the pledgee of the shares or the mortgagee thereof to escape the liability which would otherwise fall upon any such pledgee or mortgagee if he should become the registered holder of shares upon which any liability existed or could subsequently be imposed. It is settled law that the registered holder of shares is liable in respect of anything unpaid on the shares and it matters not whether the registered holder is beneficial owner thereof or a mere trustee, and even where a trustee to the know-

ledge of the Company: *Chapman and Barker's Case* (1867), L.R. 3 Eq. 361.

In the present case the plaintiff has been registered as the holder of the shares in question "in trust," and the evidence is that the plaintiff holds the shares for the Royal Bank. In placing the plaintiff upon the register as the holder of the shares "in trust," the Company acted in contravention of section 35 of the Companies Act, R.S.B.C. 1911, Cap. 39 (identical with section 41 of Cap. 44, R.S.B.C. 1897), and in my opinion this entry is to be ignored and is without any legal effect.

The attempt here is not to charge the *cestui que trust*—the Royal Bank—with any liability as a shareholder—in any case any such attempt would be fruitless: see *East of England Banking Company. Ex parte Bugg* (1865), 2 Dr. & Sm. 452; 143 R.R. 229; *Cree* v. *Somervail* (1879), 4 App. Cas. 648; but it is attempted to retain dividends payable upon the shares under article 75 of Table A of the Companies Act (Cap. 44, R.S.B.C. 1897) which reads as follows:

"75. The directors may deduct from the dividends payable to any member all such sums of money as may be due from him to the company on account of calls or otherwise."

The shares standing in the plaintiff's name issued as fully paid and were transferred as such and the plaintiff was registered as the holder thereof as and being fully paid shares.

It cannot be said that the amount claimed to be due to the Company by Malekov, the transferor of the shares, is at all well defined and whether for calls or in what way the same is due and payable to the Company. However, the claim is that there is the right to deduct any indebtedness and the amount due and owing is represented by a promissory note of Malekov, overdue and unpaid, of $1,576.90 with interest at 7 per cent., dated the 4th of November, 1913, payable 60 days after date to the order of the Company. This is to be noted though, that no proof of calls being in arrear or unpaid was given. The manager of the Company, upon cross-examination for discovery, was asked the following questions:

"In paragraph 8 of your defence, you say that on the 9th of December—that would be the date when you were requested to transfer the 750 shares to Mr. Wilson? Yes.

MURPHY, J.

1914

Sept. 14.

COURT OF APPEAL

1915

May 14.

"You say at that date Mr. Malekov was indebted to the defendant Company. Now, what was the indebtedness of Mr. Malekov at that time? One thousand five hundred and seventy-six dollars, covered by note.

"One thousand five hundred and seventy-six dollars, with interest at 7 per cent. What was that indebtedness for? It was for purchase of stock, part of which was the stock that was transferred in trust to Mr. Wilson.

"Now, was the 4th of November, 1913, the first time that Mr. Malekov became a shareholder in your Company? Oh no; he has been a shareholder since the inception of the Company."

WILSON v. B.C. REFINING CO.

The Company apparently took the promissory note in connection with a purchase of stock and the closest statement we have is "part of which was the stock that was transferred in trust to Mr. Wilson." Now the question is, can the Company notwithstanding that it has registered the plaintiff as the holder of fully-paid shares successfully contend that they are not fully paid? In *McKay's Case* (1896), 2 Ch. 757, it was held that where the secretary certified to the instrument transferring the fully-paid shares the Company was estopped, and in the present case the secretary so certified. Were this a case where it was proved that the secretary had unauthorizedly certified, then according to the decision in the House of Lords in *George Whitechurch, Limited* v. *Cavanagh* (1902), A.C. 117, there would be no estoppel. The plaintiff being placed upon the register as the holder of the shares became a member of the Company. Fry, L.J. in *Nicol's Case* (1885), 29 Ch. D. 421, said at p. 447, that the section, referring to the 23rd section of the Act (1862), (section 32 of the Companies Act, R.S.B.C. 1911, Cap. 39), "makes the placing of the name of a shareholder on the register a condition precedent to the membership."

MCPHILLIPS, J.A.

The plaintiff, having acquired membership in the Company, must be looked upon as the member holding the shares, and the dividends in question in this action must be dividends due and payable to him and there is no proof whatever that he is indebted to the Company. With all respect and deference to the learned trial judge, I am quite unable to agree with the view that in article 75 of Table A "member" must be read as meaning shareholder.

Now it is unquestionably admitted law—unless it be otherwise provided—that once the transferee is upon the register then

the transferee becomes liable to pay all moneys subsequently becoming payable. However, according to the Companies Act in British Columbia we have seen that shares held by way of collateral security are specially dealt with and in such cases the pledgor or mortgagor remains liable as a shareholder, the pledgee or mortgagee being exempted from such liability. It is plain if there was to be liability—say on non-fully paid up shares, the shares would be incapable in most cases of being utilized in obtaining any advances thereon, so provision was made against any such liability falling upon the transferee. To construe article 75 of Table A as contended for would by another method be destroying the value of the shares as security to perhaps even a greater degree, in that indebtedness of the transferor to the Company at the time of the transfer or subsequently thereto would be chargeable against any dividends. The spirit, intention and meaning of the statute law in my opinion can be gleaned and the proper construction to be placed on same is, that whilst even after registration in the transferee, when shares are held by way of collateral security, there is no liability upon the transferee as a shareholder, yet as the member of the Company in whose name the shares are registered he is entitled to the dividends, save any deduction to be made therefrom for calls payable by him, or any sum he is otherwise liable for as such member (Companies Act, 1897, Cap. 44, R.S.B.C. 1897). Under article 10 of Table A the Company may decline to register any transfer of shares made by a member who is indebted to them in the present case, although the Company makes the claim that Malekov the transferor was indebted to them at the time of the transfer, nevertheless assents to the transfer and registers the plaintiff as the member entitled to the shares and further as entitled to fully-paid shares.

Now there is no evidence whatever that the plaintiff is indebted to the Company nor is it so contended, but the right of deduction made is based upon the fact that Malekov—the transferor is indebted to the Company—in my opinion by approving of the transfer of the shares to the plaintiff and registering him as the member entitled to the shares, coupled

MURPHY, J.

1914

Sept. 14.

COURT OF APPEAL

1915

May 14.

WILSON v. B.C. REFINING CO.

with the fact that the shares are fully-paid shares, no lien can be said to now exist as against the shares registered in the name of the plaintiff. This in my opinion constitutes a clear waiver of any lien: *Bank of Africa* v. *Salisbury Gold Mining Co.* (1892), 61 L.J., P.C. 34; *Higgs* v. *Assam Tea Co.* (1869), L.R. 4 Ex. 387; *In re Northern Assam Tea Company* (1870), L.R. 10 Eq. 458; *In re M'Murdo; Penfold* v. *M'Murdo* (1892), 8 T.L.R. 507.

Section 40 of Cap. 39, R.S.B.C. 1911 (and the identical section 53, Cap. 44, R.S.B.C. 1897), may be construed in another way, *i.e.*, until registration the transferee incurs no liability in respect to any calls or is otherwise liable in respect thereof. Undoubtedly, pending registration, the transferee is possessed only of an equitable right to the shares, the legal ownership is only effectuated when the transferee is entered on the register, and the Legislature intended to protect the person who had shares by way of collateral security transferred to him and who was equitably entitled thereto from the payment of calls in respect thereof. It might be said why legislate as to that which is admitted law? But when the history of the legislation is looked at, bearing in mind that the law some years ago was not so well settled, the legislation does not seem so singular. Section 40 above referred to may be followed back in the legislation of this Province to chapter 5, section 35, of the statutes of 1878, and appears in somewhat similar language as section 33 of the Companies Act, Cap. 21, C.S.B.C. 1888.

MCPHILLIPS, J.A.

To even yet indicate uncertainty as to liability, it is only necessary to refer to Palmer's Company Law, 9th Ed., p. 132:

> "It is not clear that the registration of the transfer divests the liability of the transferor for calls in arrear (*In re Hoylake Railway Co.* [(1874)], 9 Chy. App. 257); but where the transfer is in the usual form it seems that the company may sue the transferee for the calls in arrear (*Herbert Gold, Limited* v. *Haycraft* (C.A.), 27th March, 1901), and it is clear that the transferee takes the shares on the footing that the call has not been paid, and cannot vote in respect thereof if the articles provide that no member shall be entitled to vote at all if any calls or other sums of money shall be due and payable to the company in respect of the shares of such members. *Randt Gold Mining Co.* v. *Wainwright* (1901), 1 Ch. 184."

If this view were adopted then the plaintiff after registration

would be liable to the Company in respect of any calls in arrear, but none have been proved and further how contradictory for the Company to contend that there are moneys due in respect of calls in arrear where the shares are stated to be fully paid? In my opinion no liability can be imposed upon the plaintiff even adopting this view.

MURPHY, J.

1914

Sept. 14.

COURT OF APPEAL

1915

May 14.

WILSON v. B.C. REFINING CO.

Then proceeding to the further consideration of article 75 of Table A, the deduction may be made "for the dividends payable to any member." Now upon the declaration of a dividend each shareholder is entitled to claim his proportion thereof. In the present case, unquestionably the plaintiff is the person entitled and he was entitled to sue therefor, but the contention is that nothing is due to him because of the indebtedness of Malekov to the Company, and article 75 is invoked. The dividend, though, is not payable to Malekov but to the plaintiff, and to deduct the indebtedness of Malekov to the Company offends against section 40 of the Act which enacts that "No person holding shares . . . . as collateral security shall be personally subject to liability as a shareholder" and a liability as set forth in article 75 "on account of calls or otherwise" is undoubtedly a liability as "a shareholder," a liability which is upon Malekov, a liability the plaintiff is by statute exempted from, and not being liable therefor, it is, in my opinion, impossible to make any such deduction. To admit of the Company taking the dividend would be to admit of the Company taking the money of the plaintiff to pay a liability imposed by statute upon the transferor—Malekov alone—a liability which the plaintiff is expressly and by statute relieved against although he is the registered transferee of the shares. To take the moneys of the plaintiff to pay the calls or moneys otherwise payable by Malekov as a shareholder assuredly would be imposing a personal liability upon the plaintiff. No calls were even proved to be due or in arrear or other indebtedness as a shareholder by Malekov, the most that was proved was that part of the consideration for the $1,576.90 promissory note had relation to some of the shares transferred by Malekov to the plaintiff. In my opinion this was even on the basis of liability upon the plaintiff, insufficient evidence. I may further add that, in

MCPHILLIPS, J.A.

MURPHY, J.

1914

Sept. 14.

COURT OF APPEAL

1915

May 14.

WILSON v. B.C. REFINING CO.

my opinion, at most all that could be deducted would be moneys payable in respect of calls or otherwise payable in respect of the shares as a shareholder, not debts otherwise contracted. In the present case, in my opinion, the facts entitle it to be held that the plaintiff is the transferee of fully-paid shares and that the shares were properly issued as fully paid, but that even if improperly issued, the Company by issuing same as fully paid and approving of the transfer thereof as such and registering the plaintiff as the transferee thereof is estopped from now setting up as against the plaintiff that there is any sum due in respect of calls or otherwise for which the plaintiff can be in any way held liable. The Company has its recourse against the transferor Malekov as provided by statute, but no recourse against the plaintiff. In *Page* v. *Austin* (1884), 10 S.C.R. 132 at p. 154, Strong, J. said:

> "When, however, shares improperly issued as paid up have come into the hands of a subsequent transferee as a *bona fide* purchaser for value, who has taken them upon the representation of the proper officers of the company made to him directly, either in answer to enquiries or otherwise, or upon the faith of a written representation appearing on the certificates, that the shares are paid up, it is well established that no liability, either at law or in equity, attaches to the shares in the hands of such an innocent purchaser. Numerous cases, both in England and the United States, warrant the decision of this Court in *McCracken* v. *McIntyre* [(1877), 1 S.C.R. 479], to the effect just mentioned, and it is manifest that were it not for such a rule the transfer of property in shares would be so affected as greatly to impair its value."

MCPHILLIPS, J.A.

Also see *Burkinshaw* v. *Nicolls* (1878), 3 App. Cas. 1004; *Rowland's Case* (1880), W.N. 80; *Markham and Darter's Case* (1899), 1 Ch. 414; and *Bloomenthal* v. *Ford* (1897), A.C. 156 at p. 162.

The two certificates that issued to the plaintiff covering the shares issued respectively, the 13th of November, 1913, for 21,905 shares and the 15th of December, 1913, for 750 shares, and not until the 23rd of June, 1914, by way of counterclaim in this action does the Company claim rectification of the register of members. This delay in itself is a formidable objection to giving any effect to the contention made that the transfer of the shares and the certificates were without the authority of the directors and not binding upon the Company, and in my opinion is inadmissible.

Lord Blackburn in *Bradford Banking Co.* v. *Briggs* (1886), 56 L.J., Ch. 364 at p. 368, said:

"The Legislature are competent to enact that a trading company of this sort should have the right to disregard the ordinary rules of justice, and charge what they knew was one man's property with another man's debt, if only that property consisted of shares in the company; but I do not think it possible to construe section 30 [section 35, Cap. 39, R.S.B.C. 1911] as an enactment to that effect. The Earl of Selborne in *The Societe Generale de Paris* v. *Walker* (1885), 55 L.J., Q.B. 169; 11 App. Cas. 20, said, 'I think that according to the true and proper construction of the Companies Act, 1862, and of the articles of this company, there was no obligation upon this company to accept, or preserve any record of, notices of equitable interests or trusts if actually given or tendered to them; and that any such notice, if given, would be absolutely inoperative to affect the company with any trust.' I do not think it necessary to express any opinion as to this, for I do not think that the appellants in this case seek to affect the respondents with a trust; they seek no more than to affect them in their capacity of traders, with knowledge of their (the appellants') interest."

In the present case the shares are the property of the plaintiff, the dividends are the moneys of the plaintiff, and in construing the statute law here required to be construed I cannot arrive at the conclusion that the property and moneys of the plaintiff are chargeable with "another man's debt," that is the debt of Malekov, which was the decision of the learned trial judge, with which, with the greatest respect, I cannot agree.

It therefore follows, in my opinion, that the plaintiff is entitled to the shares registered in his name freed of any lien thereon in favour of the Company. Firstly, holding the shares as collateral security the liability as a shareholder rests alone upon the transferor, Malekov. Secondly, if I should be in error in this, then the Company in approving when it might have disapproved of the transfer of the shares and registering the plaintiff as the transferee thereof, the shares being certified as fully paid, is estopped from saying that they are not fully-paid shares and waived any lien or right to deduct moneys due for calls or otherwise by the transferor Malekov. Thirdly, the Company being aware of the fact that Malekov had transferred his shares, and that they were held by the plaintiff in trust for the Royal Bank of Canada, and that he had ceased to be the

MURPHY, J.

1914

Sept. 14.

COURT OF APPEAL

1915

May 14.

WILSON v. B.C. REFINING CO.

owner of the shares, is disentitled to deduct moneys due by way of dividends upon shares of which he is no longer the owner. I would therefore allow the appeal, the plaintiff to have the costs here and in the Court below.

Appeal allowed.

Solicitors for appellant: *Tupper, Kitto & Wightman.*
Solicitors for respondent: *Ellis & Brown.*

MORRISON, J.

1915

May 22.

JEFFARES v. WOLFENDEN

JEFFARES v. WOLFENDEN AND MILLINGTON.

Negligence—Highway—Motor-bus—Negligence of driver—Damages.

The plaintiff, on his way south to the C.P.R. wharf in Victoria, at about six o'clock on a misty evening in February, started across Government Street (upon which is a double street-car line with a 15-foot fairway on each side) from the east side at a point a few feet north of Humboldt Street. He had reached the tram-track when he was struck by the defendant's motor-bus coming from the north, and received the injuries complained of. The bus was coming down a slight incline on rubber tires that made little noise, the right wheel being on the inside tram-track. The street was well lighted and there were no intervening objects to obstruct the driver's view or to prevent his driving on the left fairway. There was conflict of evidence as to whether the driver sounded his horn.

Held, that even assuming the driver sounded his horn, the plaintiff having reached the tram-track, he may reasonably have felt the security thus afforded, and it being the duty of vehicular traffic to keep in the fairway it may reasonably be inferred that the driver could, by taking ordinary care, have avoided the accident.

Statement

ACTION tried by MORRISON, J. at Victoria on the 20th of May, 1915, for damages for injuries sustained by the plaintiff through being struck and knocked down by the defendants' motor-bus owing to the driver's negligence. The facts are set out in the head-note and reasons for judgment.

Fell, K.C., for plaintiff.
Moresby, for defendants.

22nd May, 1915.

MORRISON, J.: On the evening of the 3rd of February, 1914, about six o'clock, the plaintiff, in the act of crossing Government Street to a point opposite the public lavatories on the way to the C.P.R. steamboat landing, had reached the first tram-track in the middle of the street, about 15 or 20 feet from Humboldt Street crossing. The distance across from curb to curb is some 49 feet. There is a double track of rails in the centre. The south-bound traffic is supposed to keep in the fairway to the left of these tracks, which is 15 feet wide. There are no buildings on either side of the street at this particular point. The time was six o'clock in the evening and the weather was misty. One witness, a chauffeur who was at his cab stand at the time, said it was such an evening as no one would be abroad who was not obliged to be. There was no one on the east sidewalk, from which the plaintiff had come. The street was well lighted. Unless there were intervening objects or other circumstances or conditions, the driver of the defendants' motor-bus, who was proceeding south on his way to the C.P.R. steamboat landing, had a clear field of vision. The bus was coasting down the incline, and having rubber tires, there would be little or no noise. The plaintiff says he looked up the street and did not see or hear anything approaching, nor did he hear any sounding of a horn. He was walking across with his left hand in his overcoat pocket, his elbow projecting beyond his body. The bus approached with its right wheels on the inside rails, and the plaintiff's elbow was struck either by the forward mudguard of the bus or by the edge of another contrivance fixed to the side of the bus and projecting as far out, if not a little farther, than the mudguard, knocking him down and causing the injuries complained of. There is a conflict of evidence as to whether the driver sounded his horn when approaching Humboldt Street. But assuming he did, and that the plaintiff had seen the bus and had heard the horn, yet, having reached the tram-track, which, if the vehicular traffic keeps to the respective sides allotted it, he may reasonably

Judgment

MORRISON, J.

1915

May 22.

JEFFARES v. WOLFENDEN

have felt the security afforded by a "safety island." The driver had his wind-shield up. There was mist, or as one witness put it, sleet. Krumpholdz, who sat alongside the driver, told him to stop before he struck the plaintiff. There was ample room for him to have passed near the sidewalk. The plaintiff was walking away from the driver's fairway, leaving some fifteen feet, plus a sidewalk twelve feet wide, in which to swerve his car, over which I will assume he had control. Parenthetically I may say that the witness Nuttal, who was called on behalf of the plaintiff, came very near being considered an adverse witness. I do not mean at all to reflect on his honesty, but he gave his evidence reluctantly, which was manifest from the manner in which he gave it. The witness Brier, who said the horn was sounded a second time, and who detailed a statement alleged to have been made by the plaintiff admitting his own negligence, has not impressed me sufficiently to justify my accepting his evidence. He struck me as being in the class of what I may call inexplicable witnesses who seem to see and hear more than really happens. His evidence may be creditable to his imagination, but it does not appeal to my reason.

Judgment

The plaintiff has, in my opinion, established circumstances from which it may be fairly inferred that there is reasonable probability that the accident resulted from the absence of some precautions on the driver's part. I think he could, by taking ordinary care, have avoided the collision with the plaintiff, even assuming the plaintiff, for the sake of argument, were negligent in being where he was.

The plaintiff received rather severe injuries, from the effects of which he is still suffering. The medical testimony is that he will be within a year as well as ever.

There will be judgment for the plaintiff for the amount of the expenses incurred, as shewn by the bills produced, and $1,500 damages otherwise, with costs.

Judgment for plaintiff.

BARNSWELL v. NATIONAL AMUSEMENT COMPANY, LIMITED.

LAMPMAN, CO. J.

1914

Dec. 8.

COURT OF APPEAL

1915

June 7.

BARNSWELL v. NATIONAL AMUSEMENT CO.

Contract—Breach of—Sale of ticket for admission to theatre—Entrance obtained to lobby—Admission to body of theatre refused—Damages—Measure of.

The purchaser of a ticket for admission to a theatre who is allowed entrance to the lobby but is refused admission to the auditorium, may recover damages for breach of contract (McPHILLIPS, J.A. dissenting). *Hurst* v. *Picture Theatres, Limited* (1915), 1 K.B. 1, followed.

APPEAL from the decision of LAMPMAN, Co. J. in an action for damages for breach of contract and for assault, tried by him at Victoria on the 26th of September, 1914.

The plaintiff, who is a coloured man, and a resident for many years in Victoria, bought an admission ticket (for which he paid ten cents) from the girl at the wicket outside the Empress Theatre, and on his presenting the ticket the doorkeeper refused him admission. It appears that there was a rule of the house that coloured people should not be admitted. The plaintiff protested and then called a policeman, who accompanied him to the door. Some talk was indulged in and the manager asked the policeman to take plaintiff away as there were many people coming in, and the policeman put his hand on plaintiff's shoulder, told him to go away, and he went. The learned trial judge held that the defendant Company was liable for breach of contract and awarded $50 damages. The defendant Company appealed.

Statement

Aikman, for plaintiff.
Long, for defendant.

8th December, 1914.

LAMPMAN, Co. J. (after stating the facts as set out in statement): Counsel for the plaintiff relies on *Hurst* v. *Picture Theatres, Limited* (1913-14), 30 T.L.R. 98 and 642, in which the Court of Appeal in England held that *Wood* v. *Leadbitter*

LAMPMAN, CO. J.

LAMPMAN, CO. J.

1914

Dec. 8.

COURT OF APPEAL

1915

June 7.

BARNSWELL v. NATIONAL AMUSEMENT CO.

(1845), 13 M. & W. 838, was not now good law. In the latter case it was held that the purchase of a ticket for a place in the grand-stand of a racecourse only conferred on the purchaser a licence to go upon the stand, which licence might be revoked at any time. In the former case the Court of Appeal held that the grant of a right to enter upon premises and see a spectacle included a contract not to revoke till the performance was ended and that the plaintiff was entitled to damages.

In the case at bar the plaintiff did not get inside the theatre —in the *Hurst* case the plaintiff did occupy his seat for some time—but he did proceed through the lobby to the door and was there turned back. It was suggested that his damages were only the amount paid for the ticket, but the defendant broke its contract, and I have no doubt the plaintiff was humiliated.

LAMPMAN, CO. J.

I fix the damages at $50, and the plaintiff will have judgment for that amount.

The appeal was argued at Vancouver on the 8th of April, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

F. J. McDougal, for appellant: The learned trial judge was in error in finding that the plaintiff purchased a ticket; the evidence shews he obtained it in a roundabout way. There is a distinction from the case of *Hurst* v. *Picture Theatres, Limited* (1915), 1 K.B. 1, as here the plaintiff had not obtained entrance to the theatre. The obtaining of a ticket is only a licence, which we have a right to revoke: see *Wood* v. *Leadbitter* (1845), 13 M. & W. 838.

Argument

O'Brian, for respondent: Upon his obtaining the ticket he may exercise the right the licence gives him, first, the right to go on the premises; second, the right to enjoy the spectacle. In this case, having obtained entrance to the lobby he was in the theatre.

McDougal, in reply: As to the amount of damages, see *Hadley* v. *Baxendale* (1854), 9 Ex. 341.

Cur. adv. vult.

7th June, 1915.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal.

IRVING, J.A.: It appears that the plaintiff had entered the building as a spectator who had duly paid his money to see the entertainment. He was, therefore, entitled to remain.

Wood v. *Leadbitter* (1845), 13 M. & W. 838; 14 L.J., Ex. 161, was decided on the ground that the plaintiff had not obtained an instrument under seal granting him the privilege he claimed. But the Judicature Act has changed all that. The Court now gives effect to equitable considerations and will protect a right in equity which, but for the absence of an instrument under seal, would be a right at law: *Hurst* v. *Picture Theatres, Limited* (1914), 83 L.J., K.B. 1837; (1915), 1 K.B. 1.

The damages are not excessive.

I would dismiss the appeal.

MARTIN, J.A.: This case cannot be distinguished on the facts from the decision in *Hurst* v. *Picture Theatres, Limited* (1915), 1 K.B. 1. The judge found, rightly, that the plaintiff had purchased his ticket, and the evidence shews clearly that the plaintiff had entered the building, the constable, Barnes, testifying that he went up the steps and got "through the first door and tried to get through the second door, which was a few feet away, ... into the theatre," meaning the auditorium. So here we have the exercise of a licence—his "right to go upon the premises . . . . something granted to him for the purpose of enabling him to have that which had been granted him, namely, the right to see," as Buckley, L.J. puts it at p. 7.

MARTIN, J.A.

As regards damages, the amount awarded, $50, would not justify our interference, because, while those for breach of contract would be inappreciable, yet the learned judge has obviously considered that the plaintiff was entitled to something appreciable for the assault.

The appeal, therefore, should be dismissed.

GALLIHER, J.A.: I would dismiss the appeal.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I would allow this appeal. The case may be differentiated from that of *Hurst* v. *Picture Theatres, Limited* (1914), 30 T.L.R. 642. The learned trial judge has

MCPHILLIPS, J.A.

LAMPMAN, CO. J.
1914
Dec. 8.
COURT OF APPEAL
1915
June 7.
BARNSWELL v. NATIONAL AMUSEMENT CO.
MCPHILLIPS, J.A.

found in the present case that "the plaintiff did not get inside the theatre." In the *Hurst* case the plaintiff in that action had occupied his seat for some time. I do not consider that the effect of the *Hurst* case is to overrule *Wood* v. *Leadbitter* (1845), 13 M. & W. 838; 67 R.R. 831. When this case was referred to by Sir Frederick Pollock in the preface to Vol. 67, he said:

> "*Wood* v. *Leadbitter*, p. 831, is still, in principle, a decision of first-rate authority on the nature of a licence as distinguished from a grant, though modern judges may be readier than their predecessors to find a grant or demise in transactions of ambiguous form."

It is true, since the decision of the Court of Appeal in the *Hurst* case Sir Frederick Pollock, in Vol. 31 of the Law Quarterly Review at p. 9, further deals with *Wood* v. *Leadbitter,* and the case is referred to in the Contents as follows: "The Passing of *Wood* v. *Leadbitter.*" With all deference to the learned editor of the Law Quarterly Review, I very much doubt if the Court of Appeal really intended to go the length of holding that *Wood* v. *Leadbitter* is no longer in principle good law, and in the absence of the determination of the House of Lords or their Lordships of the Privy Council (whose decision, of course, would be binding upon this Court) that *Wood* v. *Leadbitter* is not still good law, I propose, with the greatest of respect for the eminent and distinguished judges who constituted the majority of the Court of Appeal in the *Hurst* case, to still consider it good law, and it is in the public interest and in the interest of society that there should be law which will admit of the management of places of public entertainment having complete control over those who are permitted to attend all such entertainments. I entirely agree with Phillimore, L.J. in his dissenting judgment in the *Hurst* case. In addition to the cases referred to by Phillimore, L.J., I would refer to the following cases, decided since the Judicature Act, and *Wood* v. *Leadbitter* is referred to therein: *Wells* v. *Kingston-upon-Hull* (1875), L.R. 10 C.P. 402 at p. 409; 44 L.J., C.P. 257; *Butler* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (1888), 21 Q.B.D. 207 at p. 211; 57 L.J., Q.B. 564. With respect to *Jones & Sons* v. *Tankerville (Earl)* (1909), 78 L.J., Ch. 674, in my opinion, Parker, J. (now Lord Parker) did not in any

way indicate that it was his view that *Wood* v. *Leadbitter* was no longer good law; on the contrary, quite the reverse. What did he say? At p. 676 we find him saying:

"But it seems clear that, unless the agreement conferred an irrevocable licence, the plaintiff was entitled to succeed both in trespass and trover, though the defendant might have had a counterclaim for damages for breach of contract, and if the licence were irrevocable, it could, on the principles laid down in *Wood* v. *Leadbitter*, only have been because the contract conferred on the defendant an interest at law in the timber comprised in it."

In the present case there is no interest in property or land. It is not even established that the plaintiff was entitled to any particular seat, nor was he seated, or in possession of a seat, as in the *Hurst* case. I would also refer at this point to what Phillimore, L.J. said at p. 643 in the *Hurst* case:

"This case was distinguishable from *Walsh* v. *Lonsdale* ([1882] 21 Ch. D. 9), which was relied on by the plaintiff, because there was here no interest in land."

It is to be remarked that the action in the *Hurst* case was one for assault and false imprisonment, not for breach of contract, although apparently the learned trial judge, Channell, J., submitted both questions to the jury, *i.e.*, breach of contract and assault, the verdict though was in respect of the assault only. Unquestionably the assault was proved in the *Hurst* case. In the present case no assault was proved. The learned trial judge states in his judgment that the plaintiff called for the policeman, and the learned judge would appear to have proceeded solely in his judgment upon breach of contract. Now, should it be that I am wrong in my view of the law that *Wood* v. *Leadbitter, supra,* is a decisive authority against the plaintiff, then it is apparent that the damages as and for breach of contract, upon the facts of the present case, are excessive—at most the damages could only be nominal. In the *Hurst* case at p. 99 in 30 T.L.R., being the report of the trial, the following is stated:

"His Lordship [Channell, J.] asked the jury to find whether the plaintiff did or did not pay for his seat. If the jury thought that he did they were to give him damages for the breach of the contract for some such sum as sixpence, and the damages for the assault, if there was one, must be reasonable, but such a sum as would shew their opinion of what had occurred."

The jury returned a verdict for the plaintiff and assessed the

LAMPMAN, CO. J.
1914
Dec. 8.

COURT OF APPEAL
1915
June 7.

BARNSWELL v. NATIONAL AMUSEMENT CO.

damages at £150, and intimated that if they had to find a verdict on the contract "they would find a verdict for sixpence." It would follow that if *Wood* v. *Leadbitter, supra,* is no longer good law, the plaintiff is not entitled to have judgment for $50 as damages for breach of contract. Adopting the language of Channell, J. in part, the learned trial judge was only entitled to "give him damages for the breach of the contract for some such sum as" ten cents, being the price of the ticket, or at most, say $5, being nominal damages, as really no damages were proved to have been sustained. However, being of the opinion that the principles as laid down in *Wood* v. *Leadbitter* are still good law upon the special facts of this case, I feel constrained to come to the conclusion that the appeal should be allowed.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *McDougal, Long & McIntyre.*
Solicitors for respondent: *Aikman & Austin.*

DEISLER v. THE SPRUCE CREEK POWER COMPANY, LIMITED, *ET AL.*

MACDONALD, J.

1914

April 30.

COURT OF APPEAL

1915

April 30.

DEISLER v. SPRUCE CREEK POWER CO.

Mines and minerals—Location posts—Presumption of validity of—Lease of mining claim—Error in description—Amendment of lease—Effect of on placer claim staked prior to the amendment—Occupation—Placer Mining Act, R.S.B.C. 1897, Cap. 136.

A free miner, locating a placer claim that does not conflict with the boundaries of a prior lease, is not deprived of his claim, legally obtained by his location and record, when a rectification is afterwards made of the boundaries described in the lease under the authority of an order in council, apart from the fact that the order in council contained a clause saving the rights of free miners (MCPHILLIPS, J.A. dissenting).

Per IRVING, J.A.: The marking out of the ground by an applicant for a mining lease under the Placer Mining Act is merely a preliminary to the application for a lease; it does not constitute occupation, and is subject to the modifications which the gold commissioner may make and to the boundaries which he may fix.

Per MARTIN and MCPHILLIPS, JJ.A.: As soon as an applicant for a lease enters upon "any unoccupied or unreserved Crown land" and "marks out" an "area" of mining ground with the intention of applying for a lease, said ground so marked out then and there becomes "land lawfully occupied for placer-mining purposes" within the meaning of section 11 of the Placer Mining Act, and, being land thus segregated from the Crown domain, is not open for location by other free miners until the application has been adjudicated upon by the Lieutenant-Governor in Council under section 96 of the Act.

Observations upon the meaning of "occupation."

APPEAL by the defendant Company from the decision of MACDONALD, J. of the 30th of April, 1914, at Vancouver, in an action for trespass on the plaintiff's placer-mining claim known as the Sunflower in the Atlin District, and for damages. The facts are set out fully in the reasons for judgment of the learned trial judge. Statement

S. S. Taylor, K.C. (*W. P. Grant,* with him), for plaintiff.
Bodwell, K.C., for defendants.

30th April, 1914.

MACDONALD, J.

MACDONALD, J.: Plaintiff on the 13th of July, 1906, by

MACDONALD, J.

1914

April 30.

COURT OF APPEAL

1915

April 30.

DEISLER v. SPRUCE CREEK POWER CO.

purchase from one P. C. Callaghan became the owner of the Sunflower placer claim, situate on Spruce Creek, Atlin District, British Columbia. This claim was located by one Walter Rennison in 1902, and the statutory enactments relating to placer claims have been complied with, so that whatever title Rennison possessed to the ground situate within the limits of the claim became vested in the plaintiff. The working of the claim was interfered with by the defendant Company through its workmen on the 16th of September, 1906, and its co-defendants entered into a "lay" agreement with the Company, at the same time annulling a previous agreement with said Callaghan under which they had been working the claim. Defendant Company claimed that it was entitled to adopt this course, either through being the owner of the property under a placer-mining lease, known as the Vernon lease, granted by the Crown on the 10th of May, 1901, or as being the owner of the Speculator mineral claim, embracing the same area as the Sunflower, the Speculator having been purchased from one R. H. Thomas on the 1st of September, 1906.

MACDONALD, J.

Defendant Company attacked the staking of the Sunflower mineral claim and its location as not being in accordance with the provisions of the Placer Mining Act. Aside from the question of the ground being already occupied by the Vernon lease, the invalidity contended for narrowed itself to two points: First, that the location posts were not of the proper size, and secondly, that, in any event, the location was premature, having taken place before the ground had become open for location. As to the staking there was considerable contradictory evidence. William C. Hall, manager of the defendant Company, stated that he had measured the stakes and produced a memorandum alleged to be made at the time. The difficulty in giving effect to his evidence, arises from the fact that Edward S. Wilkinson, P.L.S., called to corroborate him, and who would, on this point, have been of great assistance as being an independent witness present at the time, did not make or keep a memorandum of such measurement. There were some very emphatic statements made as to the shrinkage that would occur in location stakes exposed to the weather in the Atlin District.

At one time James A. Fraser, gold commissioner for the district, made a measurement of the stakes in question, but the book in which the result was noted was not forthcoming at the trial and could not be found by him. There is no section in the Placer Mining Act similar to subsection (*d*) of section 16 of the Mineral Act, so if legal posts were not used in locating the claim, it is invalid. Strict compliance is required: see *Pellent* v. *Almoure* (1897), 1 M.M.C. 134, and cases therein referred to, decided before the saving clause to the Mineral Act was passed. After due consideration of the evidence pertaining to the size of these stakes, I cannot find that the staking of the Sunflower mineral claim was invalid through legal posts not being used for that purpose. In coming to this conclusion I am impressed with the fact that the stakes were located on ground claimed by the defendant Company and the manager of such Company doubtless knew the necessity of properly staking a placer claim. With his knowledge and means of attack, if certain of his ground, he allowed the plaintiff's predecessor in title to work the claim and dispose of a large quantity of gold extracted therefrom. There is also the presumption in favour of the plaintiff that the staking, especially under the circumstances, was carefully and properly carried out by Rennison. As to the question of whether the claim was a premature location, I am satisfied the claim was located after the period of "lay over" had expired, namely, on the 5th of July, 1901, being the date referred to in a sworn application for record of the claim. The physical location of the Sunflower thus having been found valid, and as far as other placer claims are concerned, to have taken place upon ground which was open for location, disposes of the Speculator mineral claim. It was located on ground then occupied by the Sunflower mineral claim, and, as far as such claim is concerned, is invalid. It would also be invalid if the ground thus sought to be located was within the limits of an existing placer-mining lease. I find that the location of the Speculator was at the instigation and for the benefit of the defendant Company, and that Thomas was simply utilized in the matter. His affidavit stating that the land sought to be located was unoccupied for placer-mining

MACDONALD, J.

1914

April 30.

COURT OF APPEAL

1915

April 30.

DEISLER v. SPRUCE CREEK POWER CO.

purposes does not accord with the position taken by his employer that the Vernon placer-mining lease was then effective for mining purposes.

The more important question then remains to be decided whether the land occupied by the Sunflower placer claim, or any valuable portion thereof, was located on ground then lawfully occupied by the Vernon lease. J. F. Murton made application in May, 1900, pursuant to section 90 of the Placer Mining Act (R.S.B.C. 1897, Cap. 136), *inter alia*, for a lease of bench ground for placer-mining purposes according to a description contained in said application. His application was for a lease of the land, containing an area of twenty acres, for twenty years, and the claim was to be known as the Vernon placer-mining claim. The gold commissioner for the district on the 2nd of June, 1900, pursuant to the statute, recommended such application, with five others, for the favourable consideration of the Lieutenant-Governor in Council, explaining that the ground sought to be obtained could only be worked on a large scale, by reason of the depth of gravel and the cost of obtaining water. He stated that section 92 of the Act had been complied with and recommended that the rentals be fixed at $50 yearly. An order in council was passed on the 15th of June authorizing the issuance of the lease for the ground for the period and at the rental recommended by the gold commissioner. A hydraulic bench lease (number 189), was in due course, dated the 15th of June, 1900, granted to Murton, and contains the usual conditions and stipulations, including proviso for re-entry. This issue was issued before the survey of the land was completed, and, according to a recital contained in a memorandum of the gold commissioner attached to the lease, the metes and bounds referred to in the original description were incorrect and had been derived from assumed, instead of actual measurements, with courses and directions. When the survey subsequently took place, it was found that such survey did not correspond with the description in the lease, or even with the description in the application therefor. It appeared to over-lap and encroach upon placer claims or prior locations. Authority was then obtained for a new survey and an order in council was

passed with a view to rectifying the discrepancies. An amended description to correspond with such new survey, with an accompanying plan, was substituted for the original description in the lease and the original plans were detached therefrom. The defendant Company, as successors in title to Murton, seek to uphold this lease with such amended description and plan. I do not consider that the original boundary of the leased property as marked on the plan made by J. H. Brownlee, P.L.S., was correct. He stated that there was a custom in the district of surveying placer claims in the manner indicated, but, even if there were a local custom to that effect, it would not entitle the owner of land held under lease from the Government to include additional land in the manner indicated. There was also what is termed a first amended boundary of the Vernon lease, arising out of a survey which is referred to in the different plans, but I do not find authority for this survey and consider that the boundaries thus created should be ignored. There remains to consider whether the second amended boundary already referred to in the amendments to the lease, and which was made by E. S. Wilkinson, P.L.S., is the proper boundary of the land comprised within the Vernon lease. The first point to determine is the location of No. 1 post of the Vernon lease. There was considerable evidence adduced and lengthy argument as to whether or not this post was at the point shewn in the plan attached to the lease as amended. Mr. Wilkinson was admitted by both parties at the trial to be an impartial witness and his credibility was not in any way attacked. I accept his evidence, and in referring to the running of the amended boundary he stated he intended to start from the posts as he saw them on the ground—". . . . . I intended to start from the original location posts as I found them." In further reference to the starting point of his survey in cross-examination, he stated as follows:

MACDONALD, J.

"What was the post you started from? That was the Vernon lease post. It had a whole lot of writing referring to the lease.

"Was it the corner post of the lease? Yes.

"Did it seem to be in its original location? As far as I could tell, yes.

"Who pointed it out to you? Probably Mr. Hall I should think."

The suggestion was made that even if the post were at the

MACDONALD, J.

1914

April 30.

COURT OF APPEAL

1915

April 30.

DEISLER v. SPRUCE CREEK POWER CO.

point where it was found by the surveyor, that it had been moved to that point preparatory to his making the survey. I find no evidence to support such a fraudulent act, and I assume that the post was at the point of its original location, so that whatever course was taken in the survey was from the proper starting point. If the ground to be obtained under a lease is governed by the location of the posts placed at each corner of the claim and not by the description in the lease subsequently granted, the Company became entitled to the ground within the limits of the second survey made by Wilkinson. This shews, according to exhibit 32, a substantial portion of the Sunflower placer claim within the boundaries of the land occupied by the Vernon lease. It is contended, however, that the amendment to the Vernon lease, which was authorized by order in council, dated the 22nd of September, 1904, was subject to the proviso that such description as amended did not conflict with rights of any free miner. The effect of this proviso requires to be considered. Does it limit the relief, so that the lessee from the Crown only obtained the land included within such limits, subject to the rights that might have been acquired by any free miner who had located mineral or placer claims in the meantime? Some weight is given to this contention by the fact that the order in council provides that the leases are to be re-executed and should be considered as only effective from the time of such execution. It is contended on the contrary that the fact that re-execution is provided for instead of a new lease implies that the old lease stands and the description is simply to be rectified and that its operation relates back to its date. The lease was not as a matter of fact re-executed, but no point was taken on this ground at the trial, and the Crown received rent and recognized the defendant Company as its tenant. This direction in the order in council thus only becomes important in determining the construction to be given to the authority under which the gold commissioner acted in amending the description. The plaintiff submitted that it was intended that the rights of free miners, which had arisen in the meantime, should, by this proviso, be preserved, and that they should not suffer through rectification of an error with respect to the description, either in the

MACDONALD, J.

application or in the original lease. It was also contended that the location of the Sunflower was a re-location of a placer claim, which had expired, and that the ground had thus become open for re-location. No evidence was adduced as to the extent of the prior placer claim. As advantage was taken in locating the Sunflower of the law that had just been changed, extending the area that could be located, the ground thus previously occupied may not have been within the limits of the Vernon lease as indicated upon the ground by its four corner posts. The form of lease in use by the department of mines provided that the land demised to Murton was subject to the reservation of "all such mining claims (if any), situate in whole or in part within the tract hereby secured as are legally held and represented by free miners on the day of the date of these presents," so that within the limits of the large area thus leased by the Crown there might exist a valid placer-mining claim which would not be affected by the lease. This is important in considering whether the lease was to become effective from the time of its amendment or was to relate back to the date of his execution in June, 1900. With this reservation in the lease why was the proviso in the order in council also inserted? Was it to place beyond doubt the intention of the Crown that such mistake was not to be rectified to the prejudice of any free miner who had located a placer claim within the limits of the land which would thus be included within the amended description? It must be borne in mind that this order in council was apparently passed at the instigation of the defendant Company after the location of the Sunflower claim, and without the owner of such claim having an opportunity of being heard. Beyond question such order obtained some interest in the land and it would be contrary to justice that he should be deprived of his rights in this manner. Consequently the more reasonable interpretation would be that it was not intended to affect the position of the Sunflower or any other claim.

The contention of the defendant Company is that the Crown was simply rectifying an error that had taken place and that the plaintiff was not in a position to obtain any advantage from the mistake. This position would be tenable if the land com-

MACDONALD, J.
1914
April 30.
COURT OF APPEAL
1915
April 30.
DEISLER v. SPRUCE CREEK POWER CO.

prised within the limits of the area bounded by the corner posts became, simply by the location of such posts, alienated from the Crown and leased to Murton. Shortly, I take the contention of the Company to be that, after proper staking, it then complied with all the other provisions of the Act entitling it to a lease of the ground within the area thus sought to be obtained, but that in the description in the application, and more especially in the lease, there was a serious mistake—that such description did not correctly describe the land thus applied for and the Crown as the landlord was simply performing an act of justice in correcting the error. I do not think the staking alone conferred any rights upon Murton. It was only an initial step and would not even have enabled him to redress an act of trespass. He did not obtain any such interest as the locator of a mineral claim acquires between time of location and recording his claim. Until his application for a lease was sanctioned and the lease executed Murton had no right to the land.

MACDONALD. J.

In my opinion, if, through faulty description, he did not become lessee of the land intended, then a subsequent *bona-fide* locator of a placer claim is not affected by the fact that the greater portion of his claim may be within the boundaries of an area created by four corner posts, but for which no lease has been granted. This was the position with respect to the Sunflower placer claim, and I do not think the validity of the claim was destroyed by any subsequent amendment of the description in the lease to Murton. Plaintiff is entitled to all the land lying within the boundaries of the Sunflower claim and defendants are liable in damages for tresspass and removal of gold therefrom. I do not consider that there is sufficient evidence before me to fix the amount of damages, so there will be a reference to the registrar, and any evidence already taken may be used in addition to further evidence. Counsel may speak to the form of the reference. Plaintiff is entitled to the costs of action and the costs of reference are reserved.

The appeal was argued at Vancouver on the 10th and 11th of December, 1914, before MACDONALD, C.J.A., IRVING, MARTIN and MCPHILLIPS, JJ.A.

MACDONALD, J.

1914

April 30.

COURT OF APPEAL

1915

April 30.

DEISLER v. SPRUCE CREEK POWER CO.

Bodwell, K.C., for appellant: The plaintiff claims the defendant Company was trespassing on his placer claim, the Sunflower. The points at issue are: (1) Is the Company lawfully in occupation of the land to which they lay claim under the Vernon lease? (2) Is the Sunflower a validly-located claim? We contend the Sunflower location is invalid because, first, it conflicts with the Vernon lease and, second, the stakes were not the correct size. The Vernon lease was applied for by Murton in May, 1900, and the lease was issued on the 15th of June, 1900, the Sunflower being located on the 5th of July, 1901. The description in the application for the lease was different from the description in the lease. A first survey was ordered and made in October, 1901. In 1904 the lease was amended by order in council, and another survey made. We contend, in any event, that the ground in dispute was included in the lease, both before and after the amendment: see American and English Encyclopædia of Law, Vol. 32, p. 1036; *United States* v. *Detroit Lumber Co.* (1906), 200 U.S. 321 at p. 334; *Joseph Chew Lumber and Shingle Manufacturing Co.* v. *Howe Sound Timber Co.* (1913), 18 B.C. 312. Our location fixed the ground we were entitled to. The plaintiff's claim is invalid, as the location posts were too small. A small post invalidates a location except in the case of shrinkage since location accounting for their being smaller than the size required by the Act.

Argument

S. S. Taylor, K.C., for respondent: If defendant Company has no title it has no right to discuss our posts, as this is a common-law action, and not one under the Mineral Act. As to the size of the location posts, Hall was the only witness as to this, and his evidence was given after a long interval had elapsed since location, and is uncertain and unsatisfactory. The question is wholly centred in the lease and the effect of the amendment. The damage was all done before the amendment was made: see *Grasett* v. *Carter* (1883), 10 S.C.R. 105 at p. 114. The *Joseph Chew Lumber Co.* case is entirely different. Here there is a statutory power given an officer to do certain things. If he makes a mistake he cannot correct it.

Bodwell, in reply: The trial judge did not discredit Hall's evidence as to the location posts.

Cur. adv. vult.

MACDONALD, J.

1914

April 30.

COURT OF APPEAL

1915

April 30.

DEISLER v. SPRUCE CREEK POWER CO.

MACDONALD, C.J.A.

30th April, 1915.

MACDONALD, C.J.A.: The attack on the validity of the plaintiff's placer claim, the Sunflower, was not sustained by the learned judge. The evidence was conflicting upon both questions involved, namely, the date of staking and the size of the posts. The decision of these questions was eminently one for the trial judge, who saw and heard the witnesses, and I find nothing to convince me that the conclusion arrived at by him is erroneous.

The contest then turns on the alleged conflict in boundaries between the Sunflower and the Vernon lease, the instrument of title under which the defendant Company claims the ground in dispute. That lease is dated the 15th of June, 1900. In May of that year the lessee staked the ground and applied for the lease, giving a description of the area applied for and attaching to the application a plan of the ground. That description and plan shewed the ground to be a rectangular parallelogram, the sides being 1,500 and 1,800 feet respectively in length. The lease, as issued, contained a similar description, except that it does not in words state that the piece of ground is rectangular. The plan which was attached to the lease was in terms made part of the description. That plan was detached at a subsequent time when a rectification was made in the description, and is not in evidence. That description, including the plan, continued to be the description of the boundaries of the Vernon until long after the location and record of the Sunflower.

Now, the validity of the Sunflower having been established, the burden rests upon the defendant Company to establish the alleged overlapping of the Sunflower upon the Vernon claim. The effect of the lease was to withdraw from the category of lands open to location by free miners the area in the lease. The free miner locating a placer claim in the neighbourhood would be entitled to regard the boundaries of the Vernon as properly described in the lease, and if he located his claim outside those boundaries, no rectification afterwards made of those boundaries could take away what he had obtained by his location and record. The real question therefore, in my opinion, is, what were the boundaries of the Vernon as described originally in

the lease? That is the issue, the burden of which the defendants must satisfy, and that, I think, they have not satisfied. If the verbal description contained in the lease originally be accepted for the respective length of the four sides of the claim, and it must be, and it be assumed that the plan shewed the angles to be right angles, and a survey be made from the starting point in that description, namely, the south-east corner of the Durban No. 2, which, while not an apt description of that corner, must mean the one near the bank of the creek, and running in a direction, however, slightly north of east, it will be found that the boundaries of such a rectangular plot will not conflict with the Sunflower. It may be said, why assume that the lost plan would shew right angles? That would be a most pertinent query if the onus of proof were on the plaintiff, but not when the defendants come into Court with a partial description only of the area embraced by the lease. No survey has been made from the description contained in the lease. On the contrary, all surveys made were made for the very purpose of establishing other boundaries.

It is conceded by counsel for the defendants that the original description in the lease was erroneous. An order in council was passed in 1904, at the instigation of the lessee, authorizing an amendment of the description and the rectification of the boundaries, but there was a clause therein saving the rights of free miners, and this saving clause is the basis of the learned judge's decision in the Court below. I am not sure that I should go so far as the learned judge has gone in his construction of this saving clause. I think it meant that the boundaries were not to be enlarged so as to encroach on existing placer claims, and that is enough for the purposes of my decision in this case. Had the Sunflower, or any portion of it, been within what the defendants could prove to be the boundaries as originally described, I should have thought the saving clause would not help the plaintiff, but that is immaterial now, in view of my conclusion that the defendants have failed to prove that any portion of the Sunflower is within the boundaries of the Vernon as originally described in the lease.

MACDONALD, C.J.A.

The appeal should, therefore, be dismissed.

MACDONALD, J.

1914

April 30.

COURT OF APPEAL

1915

April 30.

DEISLER v. SPRUCE CREEK POWER CO.

IRVING, J.A.

IRVING, J.A.: Plaintiff, as owner of the Sunflower mineral claim, sues for trespass committed by servants (laymen) of the defendant Company. The defence raised two points: (1) Was the Sunflower placer claim properly staked? That is, I think, correctly answered by the judge's findings of fact. It was staked on the 5th of July, 1901, with legal stakes. (2) Was the lease known as the Vernon lease, applied for by Murton (R.S.B.C. 1897, Cap. 136, Sec. 90, Placer Mining Act) in May, 1900, a bar to the plaintiff's right to stake the Sunflower? Mr. *Bodwell* relies on the granting of the lease in 1900, and claims that the defendants were in possession of the land applied for and comprised in the lease from and after the order in council of the 15th of June, 1900, and that the defendants' title relates back to the marking out of the land in April, 1900, or at any rate, to the 15th of June, 1900.

The defect in Mr. *Bodwell's* contention, in my opinion, is that he assumes the substantial part of the steps to be taken to obtain a lease is the original marking out of the ground by the applicant. That marking out, in my view, is merely a preliminary to the application for a lease. It does not constitute occupation. It is to shew what ground the application is intended to include, but as the gold commissioner may refuse or modify the terms of the application as he shall think fit (section 95), it is plain that it is the gold commissioner, and not the Lieutenant-Governor who fixes the terms and boundaries of the lease. The gold commissioner may not grant a lease in any locality marked out without the sanction of the Lieutenant-Governor in council. The sanction does not confer a title on the lessee to any land, but once that sanction is granted the matter devolves on the gold commissioner, whose duty it is to see that land actually occupied by free miners, or land available for agricultural purposes, is not included within the lease, and generally to make such modifications of the terms of the application as he thinks fit.

The right of the free miner to "enter on any land not lawfully occupied for placer mining purposes" would be exercisable, I think, after the applicant had marked out the locality he intended to apply for, and until the survey of the lease was

completed. The clause in the lease itself, "except and always reserved out of this demise all such mining claims situate in whole or in part within the tract hereby secured as are legally held and represented by free miners," would include claims taken up after the preliminary marking out. A marking out by an applicant under section 90 is not a "location" of the claim. It is designed to let the free mining public know that there is a proposal that the marked out area should be withdrawn from the reach of the individual miners, so that they can make a protest to the Lieutenant-Governor in council. The recitals shewing why it is expedient that this area should be leased indicate the reasons for permitting so large an area to be taken up as a lease.

The strongest evidence that could be put before the Lieutenant-Governor in council that the area ought not to be withdrawn from the operation of the individual free miner would be the fact that, after the marking out by the applicant, a large portion of the area had been covered by the individual applications.

The fact that the applicant is given 30 days within which he is to make his application in writing is not, having regard to the absence of express words, closing the area to location by free miners, proof that the area is so closed. That provision as to time may very well have been inserted for the sake of regularity of procedure, and to prevent stale claims being put forward.

IRVING, J.A.

I think Mr. *Bodwell's* contention, based on the acceptance by the Government of certain surveys, is not supported by anything in the statute.

The Government is not concerned with the surveys. When the sanction is given, the gold commissioner notifies the applicants, and it is for them to locate the lands to be comprised within their lease and have them surveyed. This survey and location is generally done at one and the same time. If the applicant is negligent in this respect, it is his own fault if he suffers damage. In *Joseph Chew Lumber and Shingle Manufacturing Co.* v. *Howe Sound Timber Co.* (1913), 18 B.C. 312, a case under the Land Act, the limits had been located, and the surveys accepted after notice. The trespassers were never misled.

MACDONALD, J.

1914

April 30.

COURT OF APPEAL

1915

April 30.

DEISLER v. SPRUCE CREEK POWER CO.

The defendant Company here made their preliminary marking out in April, 1900, and applied in May for an identified area of 1,500 feet by 3,200 feet. The Lieutenant-Governor in council gave sanction for 1,500 feet by 1,800 feet, but did not identify the part which had been rejected. The notification from the gold commissioner, dated the 7th of July, 1900, prescribed the conditions under which the lease was to issue as of the 15th of June, 1900, *viz.*:

"The ground mentioned in the said application was to be surveyed by a duly-qualified Provincial land surveyor, who would furnish this office with plans and also a certificate to the effect that the said ground does not conflict with other leases or placer claims."

Mr. Brownlee made a survey of the location to be included in the lease, and a plan of that survey was attached to the lease which was then drawn up and executed. What that plan shewed we do not know, as it was removed from the document when it was discovered (later) that the survey and, therefore, the location of the leasehold also were wrong. After the lease had been executed, with this faulty plan attached, the Sunflower claim was located (in July, 1901).

On the 19th of August, 1904, an order in council was passed, reciting that a mistake had been made in the survey of the Vernon, and authorizing the gold commissioner to amend the plans and descriptions so as to correct the leases, "provided the amendment did not conflict with the rights of any free miner." The order in council also provided that the amended lease was to be re-executed.

IRVING, J.A.

The defendant Company, through their manager, was, in 1906, a party to the Sunflower being jumped, and the Company, having bought out the jumpers, granted a lay to some men who worked the ground. This seems to me cogent evidence for believing the Sunflower was not within the original boundaries.

In the summer of 1908 another surveyor, Wilkinson, was called in and made a new survey of the lease. Station No. 23, which was the identification mark referred to in the application, was not then in existence. The land at first located by Wilkinson shewed the Sunflower outside of the lease. This location was ignored, no doubt because it did not include the Sunflower. Then another location and survey was made which did include

within its boundaries a portion, at least, of the Sunflower; thereupon an undated deed poll, giving a new description of the leasehold, was executed by the gold commissioner and attached to the lease on the 11th of March, 1908.

In my opinion the defendants' lease could only become effective after the amendment was made and the new lease executed (if it was ever executed). It might then relate back to the date of the location and survey which was adopted by the gold commissioner, but I think the true date is the execution of the lease (section 92).

I agree with the learned judge that the validity of the plaintiff's claim, made in 1901, could not be destroyed by an amendment of the defendants' lease based on a location and survey made years later.

I would dismiss the appeal.

MARTIN, J.A.: This is a contest between the owner (the plaintiff) of the Sunflower hill placer claim, located on Spruce Creek, in the Atlin Mining Division, on the 5th of July, 1901, and recorded the same day, and the holders of the Vernon hydraulic bench lease claim on said creek granted by the gold commissioner on the 15th of June, 1900, under Part VII. of the Placer Mining Act, R.S.B.C. 1897, Cap. 136, Secs. 90-103.

The validity of the location of the Sunflower claim was attacked before us only on the ground that the posts were not "legal posts" as defined by section 2, but, during the course of the argument, we intimated that we saw no reason to interfere with the finding of the learned trial judge that the statute had been complied with. I have only to add to the case cited by the learned judge—*Pellent* v. *Almoure* (1897), 1 M.M.C. 134 and notes thereto—those of *Clark* v. *Haney and Dunlop* (1899), 8 B.C. 130; 1 M.M.C. 281; *Manley* v. *Collom* (1901), 8 B.C. 153; 1 M.M.C. 487; (1902), 32 S.C.R. 371 (with note on p. 504); and *Rutherford* v. *Morgan* (1904), 2 M.M.C. 214, wherein the subject is considered in the charge to the jury at pp. 217, 219, 221-2, under the corresponding section 2 of the Mineral Act, R.S.B.C. 1897, Cap. 135, giving the same definition of "legal post."

MARTIN, J.A.

MACDONALD, J.

1914

April 30.

COURT OF APPEAL

1915

April 30.

DEISLER v. SPRUCE CREEK POWER CO.

I pause here to say that it was submitted that the defendant leaseholder had no status to attack the validity of the Sunflower location, but the recent decision in this Court of *Farrell* v. *Fitch and Hazlewood* (1911), 17 B.C. 507, is to the contrary. There, as here, the defendant Company denied the validity of the plaintiff's location and set up title in itself: *cf. Canadian Company* v. *Grouse Creek Flume Co.* (1867), 1 M.M.C. 3 at p. 8; *Hartley* v. *Matson* (1902), 32 S.C.R. 644; 2 M.M.C. 23; and *St. Laurent* v. *Mercier* (1903), 33 S.C.R. 314; 2 M.M.C. 46, and note at p. 50. The plaintiff herein does not question, even if he were in a position to do so, the validity of the defendants' lease (which, it should be noted, can only be declared forfeit by the gold commissioner, under section 99), but says that as a matter of fact it does not conflict with his own, as his claim is outside of its boundaries. And I note here that this is not a dispute, as was suggested, between two "placer claims" in the special sense that term is used in section 22, as distinguished from the general definition in section 2, because only one of the properties is a claim in the true mining sense of that word, and "located" and recorded as such under the name of "location" pursuant to sections 20, 21, etc., and forms A and B in the Schedule, all under the heading "Locating, Recording, Re-recording, Working, and Lay-overs," which terms are not applicable to the peculiar procedure prescribed for leases under Part VII. "Placer claims" are divided into five classes of diggings (creek, bar, dry, bench and hill) in the interpretation section 2, and the term is used in that sense in section 22.

MARTIN, J.A.

The Sunflower claim was not located till the 5th of July, 1901, more than a year after the Vernon lease was granted on the 15th of June, 1900, so, on the face of the record, it would be an invalid location if it were on Vernon ground, because that would be "land lawfully occupied for placer-mining purposes" under section 11, and, therefore, not open to location. But a difficulty arises from the fact that the description in this lease, and others, was found to be erroneous, and to remedy that defect a new survey was authorized by order in council to be made, and the gold commissioner was likewise authorized by order in council, dated the 22nd of September, 1904, to "amend the plans

and descriptions of the ground covered by said leases so as to correspond with the surveys, and thereupon to have re-executed said leases to the lessees mentioned in said leases or to their assigns, providing such amendment to the description of the ground does not conflict with the rights of any free miners"; and this was accordingly done. Unfortunately, the plan originally attached to the lease has disappeared. It is now contended that the leaseholder is entitled to fall back upon his original application and hold his lease according to the original location of the posts upon the ground, even though this located ground does not correspond either with the amended or the original description in the lease. This, I am of opinion, cannot be done if any other valid locations have been made since the time the lease was granted to and accepted by the applicant and before it was amended. No doubt the Crown and the lessee could agree to amend the description, but that could not be done to the prejudice of intervening locators, quite apart from the special reservation in the said order in council, whatever it may be held to mean. If the applicant accepts a lease from the Crown of a certain area, in response to his application, he is bound by the definition of that area in the lease, and can only assert his rights against other claim owners to the extent of that area, and his rights cannot be expanded to their detriment by order in council or otherwise. The provision in section 97, requiring the lease to be filed in the office of the mining recorder, is obviously for the purpose of informing and protecting other miners, as well as the leaseholder, and as regards them, ground not covered by the lease is ground not "lawfully occupied for placer-mining purposes" under section 11, and, therefore, open to location. It would lead to great confusion, hardship and injustice upon innocent free miners, who would be seriously misled, and almost invite fraud, to encourage any laxity in such cases, wherein the maxims *vigilantibus non dormientibus* and *prior tempore,* etc., specially apply. It must be remembered that there is no more obligation upon the Lieutenant-Governor in council to grant the lease in regard to the extent of the area applied for than there is as to rent, period, time of commencement, or any other of the "terms and conditions" thereof mentioned in section 95. It

MARTIN, J.A.

MACDONALD, J.

1914

April 30.

COURT OF APPEAL

1915

April 30.

DEISLER v. SPRUCE CREEK POWER CO.

may, for example, be refused as to the whole area for several reasons: either because it was part of an Indian Reserve (section 11) or because, under section 94, it was, in the opinion of the gold commissioner, "available for agricultural purposes," or because it was all "actually occupied by free miners." And it is to be noted that in the present case the area that was granted by the lease is much less than what was originally applied for, *viz.*: 1,500 x 1,800 feet instead of 1,500 x 2,300 feet. My view of section 90 *et seq.* is that as soon as the applicant for a lease accepts the invitation of the Crown held out thereby, and enters upon "any unoccupied or unreserved Crown land" and "marks out," as the Act directs, an "area" of mining ground of the size authorized by section 93, with the intention of proceeding, and does proceed in due course with his application for a lease, said ground so marked out then and there becomes "land lawfully occupied for placer-mining purposes" within the meaning of section 11, and is, therefore, not open to other location until the application has been adjudicated upon by the Lieutenant-Governor in council under section 96. If it is refused, then the ground is no longer "occupied for placer-mining purposes," but if it is granted it continues to preserve its original state of lawful provisional occupation, and the applicant's original rights are continued and preserved by the lease which eventually issues, on such "terms and conditions" as may receive the "sanction" of the Lieutenant-Governor in council (sections 90, 95, 96) if, of course, the applicant decides to accept them.

MARTIN, J.A.

That the whole proceeding, from the "marking out of such ground," *i.e.*, segregating it temporarily, at least, from the public domain, till the adjudication, must be regarded as one continuous act is, I think, beyond question from a careful perusal of the statute, which appears particularly from section 92, providing for the return to the applicant of his deposit if his application is refused, and also covering the case of default by the applicant by declaring that "in case the applicant fails to perform his part in accordance with his application, then the twenty dollars deposited shall be forfeited to the Government and his application shall be void." To accept the submission

that the applicant acquires no rights, inchoate or otherwise, in the ground he has "marked out" until he actually receives a signed lease under section 97, or at least obtains the sanction of the Lieutenant-Governor in council under section 96, leads to the startling result that even though an applicant has properly "marked out" his "area" of "unoccupied and unreserved Crown land" (as it is styled in section 93), under sections 90 and 92, and subsequently and properly made the application within 30 days, and deposited the plan and $20 required by sections 91 and 92, yet, nevertheless, immediately after such marking, and during all the time necessarily occupied in conforming with the statutory proceedings leading up to the execution of the lease, even if his application is accepted in exactly the terms of his offer, it has been open to any number of other free miners to locate, either wholly or in part, upon "such marked out ground" of the applicant any one of the five kinds of placer claims set out in section 16, and the unfortunate applicant, though duly observing the law, would find himself in possession of a lease nominally, but a piece of waste paper actually, because all his ground had, in the meantime, become "land lawfully occupied for placer-mining purposes" under section 11. Indeed, he would not be entitled to obtain a lease at all in such circumstances, despite all his toil, expense and delay, if the fact of such subsequent adverse location became known to the gold commissioner even at the eleventh hour, because section 94 provides that:

MARTIN, J.A.

> "A lease shall not be granted for any mining ground any portion of which is actually occupied by free miners, unless with the consent of such occupiers,"

and due and practical effect could not be given to this section on the assumption that pending adjudication the entire area of the applicant is liable first, last, and all the time, to be "jumped" by other free miners. The duty of this Court is to endeavour to construe the sections of the Act in such a way as not to frustrate its obvious intentions, and to harmonize and not antagonize the rights of the various classes of miners, and little, if any, difficulty exists in so doing if the subject is understood and properly approached. Just as in this case the rights of the applicant for lease are preserved by treating his posting, *i.e.*, "marking out,"

MACDONALD, J.

1914

April 30.

COURT OF APPEAL

1915

April 30.

DEISLER v. SPRUCE CREEK POWER CO.

as a lawful occupation for the time being, whatever the result may be when it ultimately comes before the Lieutenant-Governor in council, which, in this vast country, with slow communication from many parts of it, may take several months, so in like manner are the rights of the ordinary placer-mine locator guarded by the corresponding section 23, whereby he is given a specified number of days to record his claim after location, which may in remote districts amount to a considerable time (*cf. Dumas Gold Mines, Limited* v. *Boultbee* (1904), 10 B.C. 511; 2 M.M.C. 137), but though in the course of his journey to the mining recorder's office the locator may be delayed and fail to record his claim within the statutory period, or even ultimately decide, for whatever reason, not to do so, nevertheless, till that period has expired, his claim continues to be "lawfully occupied" and "represented" under section 8, and cannot be validly located by another though no work is being done on it and no one living on it—applying the principles laid down in *Woodbury* v. *Hudnut* (1884), 1 B.C. (Pt. 2), 39; 1 M.M.C. 31; and *Wheeldon* v. *Cranston* (1905), 12 B.C. 489; 2 M.C.C. 314. In the submission of a contrary view too much stress has, I think, been placed upon the word "occupation," and it has been treated as though it meant from the earliest stages of location, or marking out (*i.e.*, posting), actual continuous occupation, when it has long been decided, and never, to my knowledge, questioned, that such is not the case. This was recognized and expressed in *Waterhouse* v. *Liftchild* (1897), 6 B.C. 424; 1 M.M.C. 153, decided by the late Mr. Justice MCCOLL (afterwards Chief Justice), than whom we have no higher authority on our mining laws, wherein he said that "ordinarily occupation may be found to consist of a valid location and record under the Act," and he goes on to say that a location in substantial compliance with the provisions of the Act is "a real occupation," and be it remembered that he was then speaking of a mineral claim, only the straight location line of which is marked by its three posts, without corner posts, whereas both the ordinary placer claim, and the lease area under the Placer Act, are marked by four corner posts, thus actually enclosing the ground. See also *Victor* v. *Butler* (1900), 8 B.C. 100 at

MARTIN, J.A.

p. 107; 1 M.M.C. 438 at p. 445. There is no difference in principle, but merely in detail, in the manner of locating claims and marking out lease areas under the Act, and the degree of occupation and segregation from the public domain is in both cases identical at that stage; also in both cases there is, or may be, the bare constructive occupation for a certain period; in the one case before recording under section 23, and in the other before written application under section 91. After that has been done in the case of the placer claim, it must be represented and worked as directed by section 38, but there is no such provision as regards the lease area, which must necessarily await the adjudication of the Lieutenant-Governor in council as to "the terms and conditions of such application" under section 95. But pending that adjudication, the provisional period of constructive occupation is, in my opinion, extended, and the ordinary placer miner can no more lawfully invade the marked-out area of the applicant for a lease than the latter can invade the location of the former pending the due recording thereof, even if it is actually unoccupied. The principle of preservation of rights, even if only inchoate, validly founded and properly pursued, is the same in the one case as in the other, and not altered by the fact that in one case the mining recorder is a "creature of the statute" (*Mott* v. *Lockhart* (1883), 8 App. Cas. 568; 52 L.J., P.C. 61), and may be compelled by *mandamus* to issue the record (*Hartley* v. *Matson, supra,* at p. 25, and *cf. Regina* v. *Gold Commissioner of Victoria District* (1886), 1 B.C. (Pt. 2) 260), and in the other the final tribunal is the Lieutenant-Governor in council, who has full discretionary powers and may grant or refuse the application. *Mott* v. *Lockhart* decided that as between rival applicants for leases and licences for the same mining area in Nova Scotia, he who has the prior pending application and has been let into occupation after payment of the proper fees, though leases have not been issued owing to pressure of business in the Crown office, is regarded as the "lessee in substance and in right, though not in form." Otherwise the case has no application to this, because it is on a very different statute, and is not a contest between different classes of miners. The title of the

MARTIN, J.A.

MACDONALD, J.

1914

April 30.

COURT OF APPEAL

1915

April 30.

DEISLER v. SPRUCE CREEK POWER CO.

free miner to his location is complete upon the recording thereof, and the production of the record and his free miner's certificate is ordinarily *prima-facie* proof of title, though more is required in the special adverse proceedings under the Mineral Act: *Schomberg* v. *Holden* (1899), 6 B.C. 419; 1 M.M.C. 290.

It will be seen that the foregoing views tend to support the construction of the Act submitted by the appellant Company, and were it not for the question of fact regarding the boundaries, I should decide in its favour. But being of the opinion that as against the respondent the appellant is bound by the original description in the lease, which it accepted, and is not entitled to resort to the area defined by the posts (whatever that may have been), I can only come to the conclusion that such description is so indefinite that it is impossible to say what ground it covers or whether the Sunflower claim encroaches thereupon: in other words, the overlapping of the valid Sunflower location has not been established, and the defendant has failed to prove what were the boundaries of its grounds in accordance with the lease thereof. It is a mere matter of speculation, which the Court will not enter upon (*Ryan* v. *McQuillan* (1899), 6 B.C. 431; 1 M.M.C. 289), as to whether the area was rectangular or not. It is not necessary that it should be under section 90, though ordinary placer claims are required to be "as nearly as possible rectangular" by section 20, therefore a free miner would, in

MARTIN, J.A.

locating his claim nearby, be very apt to conclude that the leased area was rectangular, and if so, then it would not conflict with the Sunflower. The only thing we are certain of respecting said description is that it was "erroneous," as is stated in the order in council of the 19th of August, 1904, *supra,* purporting to amend the same, as recited in the amendment indorsed upon the lease, which refers to the two surveys undertaken to correct the errors. The necessity of having proper measurements of boundaries in mining cases has frequently been pointed out: *vide, e.g., Bleekir* v. *Chisholm* (1896), 8 B.C. 148; 1 M.M.C. 112; *Waterhouse* v. *Liftchild, supra*; *Ryan* v. *McQuillan, supra*; *Dunlop* v. *Haney* (1889), 7 B.C. 1, 305; 1 M.M.C. 369; *Tanghe* v. *Morgan* (1904), 11 B.C. 76; 2 M.M.C. 188; *Last Chance Mining Co.* v. *American Boy Mining*

Co. (1904), 2 M.M.C. 150; and *Lamb* v. *Kincaid* (1907), 38 S.C.R. 516; 2 M.M.C. 449.

MACDONALD, J.

1914

April 30.

COURT OF APPEAL

1915

April 30.

DEISLER v. SPRUCE CREEK POWER CO.

I note, to shew that I have not overlooked it, that section 97 requires that "every lease of mining ground shall be in writing signed by the gold commissioner and the lessee," and though the original lease was signed by the lessee, the amended one was not signed by him after it was "re-executed" pursuant to said order in council. But it is not necessary, in the view I have taken, to consider what effect this might have had, though such an incomplete document on file in the recorder's office is not what section 97 contemplates. How is another free miner to know if the lessee has accepted the amended description?

In my opinion, for the reasons given, the appeal should be dismissed.

McPHILLIPS, J.A.: The defendant, The Spruce Creek Power Company, Limited, appeals from the judgment of MACDONALD, J., who held that the defendant had been guilty of acts of trespass upon placer-mining ground of the plaintiff, the respondent in the appeal.

The learned trial judge, in his reasons for judgment, said:

"If the ground to be obtained under a lease is governed by the location of the posts placed at each corner of the claim and not by the description in the lease subsequently granted, the Company became entitled to the ground within the limits of the second survey made by Wilkinson. This shews, according to exhibit 32, a substantial portion of the Sunflower placer claim within the boundaries of the land occupied by the Vernon lease."

MCPHILLIPS, J.A.

The appellant holds the placer ground covered by the Vernon lease, and the respondent holds the placer ground covered by the Sunflower placer claim. The action would seem to have proceeded and to have been determined upon the footing that if the appellant should be held to be entitled to all the placer ground covered by the amended description and plan attached to the original Vernon lease then no acts of trespass had been committed and that the action should stand dismissed. I so read the evidence.

The matter for determination upon this appeal is, therefore, resolved into small compass.

MACDONALD, J.

1914

April 30.

COURT OF APPEAL

1915

April 30.

DEISLER v. SPRUCE CREEK POWER CO.

The learned judge has held that the original staking entitled Mr. Wilkinson, the surveyor, to survey and describe the ground as covered by the amended description, and if that ground was, by the act of staking and the application made, therefor reserved from all other entry by other free miners, then it follows that the respondent could not, from the time of staking, enter upon any of the ground so staked and stake out a placer claim, that is, that the error of description, afterwards corrected, was a right available to the appellant, and, being corrected by the Crown, no exception thereto is possible of being taken by the respondent, and to the extent that the Sunflower placer claim encroaches upon the true description of the placer ground as staked and applied for and intended to be covered by the Vernon lease, there is no title in the respondent. Should this be the true position in law, it follows that no acts of trespass were committed.

The application for the Vernon lease was in the following terms: [His Lordship quoted the Vernon lease and continued.]

The application as made was duly recommended to be granted by the gold commissioner of the district, amongst others, as contained in the recommendation of date the 2nd of June, 1900. Following the recommendation an order in council was duly passed and approved by His Honour the Lieutenant-Governor, on the 15th of June, 1900. It is to be noted that the order in council reads that the gold commissioner "be authorized to issue to the applicants a lease each of the ground applied for, for a period of 20 years."

MCPHILLIPS, J.A.

On the 7th of July, 1900, J. F. Murton, the predecessor in title of the appellant was advised of the determination of the Lieutenant-Governor in council by letter, and in due course a mining lease issued in pursuance of the application made, but later all proper amendments authorized by order in council were made as to description, and plan and notations thereof duly made on the lease.

The learned counsel for the respondent strongly urged that the concluding words of the order in council of the 19th of August, 1904, admitting of the amendment of the plan and description of the ground covered by the Vernon lease, pre-

served the position of the Sunflower placer claim, the words being, "provided such amendment to the description of the ground does not conflict with the rights of any free miners," and that the Sunflower placer claim, as applied for on the 5th of July, 1901, and duly re-recorded, has precedence to the Vernon lease as amended.

MACDONALD, J.

1914

April 30.

COURT OF APPEAL

1915

April 30.

DEISLER v. SPRUCE CREEK POWER CO.

The governing statute with respect to the location of placer claims, and the title thereto, at the time of the granting of the Vernon lease and the recording of the Sunflower placer claim was the Placer Mining Act (R.S.B.C. 1897, Cap. 136, and amendments thereto; the Placer Mining Act at present in force is Cap. 165, R.S.B.C. 1911).

It is provided in the Placer Mining Act, section 22, as follows:

"22. In case of any dispute as to the title of a placer claim, the title to the claim shall be recognized according to the priority of such location, subject to any question as to the validity of the record itself, and subject further to the free miner having complied with all the terms and conditions of this Act."

Now, unquestionably the appellant had the priority of location, the location date being the 22nd of April, 1900, whilst that of the respondent's predecessor in title was on the 5th of July, 1901. The authority for the granting of the lease which issued to the appellant's predecessor in title is to be found in Part VII. of the Placer Mining Act, and the power to grant the lease extended over "any unoccupied and unreserved Crown lands for placer-mining purposes, and section 95 provides that the gold commissioner may, with the sanction of the Lieutenant-Governor in council, grant or refuse any application, or modify the terms and conditions of the application.

MCPHILLIPS, J.A.

It would appear, upon the facts, that the gold commissioner in the present case granted the application as made, and that his decision was duly sanctioned by the Lieutenant-Governor in council. It is to be noted that the application was granted, no modification thereof being imposed.

It would appear that the Vernon lease was granted before a survey thereof was made, and when a survey was made it was found that as made it overlapped and encroached upon certain placer claims.

MACDONALD, J.

1914

April 30.

COURT OF APPEAL

1915

April 30.

DEISLER v. SPRUCE CREEK POWER CO.

Then it was decided, by order in council, to have a new survey, and the new survey would appear to have been carried out in complete accord with the original staking and application—that is, it was not the survey of any new or different ground in any particular, but it was the defining, upon the ground, by a surveyor, of the actual placer ground originally staked, and that was the area of land out of the then unoccupied and unreserved Crown land the appellant's predecessor was entitled to, applied for, and was granted, or intended to be granted: see *Boehner* v. *Hirtle* (1912), 46 N.S.R. 231; (1913), 50 S.C.R. 264; *Horne* v. *Struben* (1902), 71 L.J., P.C. 88.

Turning to section 128 of the Act, subsection (*f*), it will be seen that power is conferred upon the gold commissioner, in case of disputed boundaries or measurements, to employ a surveyor to mark and define the same, and the survey would appear to have been made with his authority as well as by order in council.

At the time of the location of the Sunflower placer claim the Placer Mining Act Amendment Act, 1901, was in force, same having come into force on the 1st of July, 1901, the location being made on the 5th of July, 1901. The application for the record of a placer claim had to be under oath and in the form set out in the Schedule to the Act (see section 23 as enacted by Cap. 38, 1901, and Form H., as set forth in section 37 thereof). Paragraph 3 of Form H. reads as follows:

MCPHILLIPS, J.A.

"That the said land is at present unoccupied for placer-mining purposes."

Turning to the application as made by the respondent's predecessor in title for the record of the Sunflower placer claim, it is seen that this paragraph 3 is in the affidavit as sworn to and called for by the Act. Now, as a matter of fact, it is clear upon the evidence that to the extent that the Sunflower placer claim encroaches upon the placer ground covered by the Vernon lease, that land was not unoccupied for placer-mining purposes, but in occupation for placer-mining purposes, and was not unoccupied and unreserved Crown land capable of being entered upon and staked as required by section 20 of the Placer Mining Act (as amended by section 10, Cap. 38, 1901). Therefore, the staking and the subsequent application for the record of the

Sunflower placer claim was in part over occupied land already duly staked and covered, or intended to be covered by a then existing lease, the Vernon mining lease, and the respondent's predecessor in title could not obtain any title thereto, and the priority in title is in the appellants (section 22, Placer Mining Act).

Further, in my opinion, upon the evidence, the appellant being in possession and holding under a lease from the Crown, the respondent failed in establishing title as against the appellant.

The land in dispute being staked by the predecessor in title of the appellant, from that time it was not unoccupied and unreserved Crown land, and was not open to any other entry unless the free miner so staking the land fails to proceed and make an application therefor, or if, making application, same be refused, then and then only could the land be said to be unoccupied and unreserved Crown land. Section 91 of the Placer Mining Act provides that the free miner shall, after staking the ground and posting the requisite notices, within 30 days make application in writing to the gold commissioner. This well indicates the intention of the Legislature. The land staked is, upon the staking, segregated from all other unoccupied and unreserved Crown land, and, in my opinion, the Crown is from that time onward entitled to deal with the applicant, or his successor in title, to the denial of all other claimed interests, save only as to those of prior right arising by priority of location, and provision is made in the terms of the lease under which the appellant holds, the wording being "all such mining claims (if any) situate in whole or in part within the tract hereby secured as are legally held and represented by free miners on the day of the date of these presents," and the provision in the order in council does not in its language carry the exception or reservation any further—that is, that the Sunflower placer claim cannot be looked at as being a claim which is entitled to recognition, not being legally held and being after the staking and issuance of the lease.

With respect to re-execution of the lease, this, in my opinion, was wholly unnecessary, and in any case would be a matter of

MACDONALD, J.

1914

April 30.

COURT OF APPEAL

1915

April 30.

DEISLER v. SPRUCE CREEK POWER CO.

form. There was full and ample authority in the gold commissioner to amend the lease, and what was done, in my opinion, was amply sufficient in the way of formality, and the lease, in the form in which it was proved in evidence in the action, must be taken as a Crown lease of the land therein described. The powers of the gold commissioner are most extensive, and besides all those powers specifically detailed in section 128 of the Act, there is to be found this very comprehensive section:

"130. The gold commissioner shall have power to do all things necessary or expedient for the carrying out of the provisions of this Act."

In my opinion there always was, from the time of the staking, the granting of the application, and the issuance of the lease, power in the Crown to effectually vest in the free miner the land staked, applied for, or intended to be applied for following upon the staking—the initial act—and that which was done was mere rectification, which surely was within the power of the Crown, and, in my opinion, nothing more was needed than the passing of the order in council and what was done by the gold commissioner.

In the way of analogy, what does the Court do when a deed is ordered to be rectified? The order itself is sufficient without re-execution or a new conveyance; sometimes the judge initials the alteration; this is, however, unnecessary. The more customary way of proceeding is to have the decree of the Court indorsed on the instrument: see *White* v. *White* (1872), L.R. 15 Eq. 247; *Hanley* v. *Pearson* (1879), 13 Ch. D. 545; *Beale* v. *Kyte* (1907), 1 Ch. 564 at p. 566; *Stock* v. *Vining* (1858), 25 Beav. 235; *Johnson* v. *Bragge* (1901), 1 Ch. 28 at p. 37; *Lord Gifford* v. *Lord Fitzhardinge* (1899), 2 Ch. 32. The lease, therefore, in my opinion, must be looked at as a good and effective demise of the land according to the description and plan attached, and its effectiveness is from the day of its date, not only from the time of the amendment or rectification, and the possession of the appellant is good as against the respondent: *Glenwood Lumber Co.* v. *Phillips* (1904), 73 L.J., P.C. 62.

MCPHILLIPS, J.A.

The predecessor in title of the appellant, being the first applicant for the land in question, was entitled to the land as staked, and became and was entitled to a lease thereof. The respondent's

predecessor in title was an applicant after the staking and application of the appellant's predecessor in title, and could obtain no title thereto. In *Mott* v. *Lockhart* (1883), 52 L.J., P.C. 61 —a Nova Scotia case—Sir Arthur Hobhouse said at pp. 62 and 63:

MACDONALD, J.

1914

April 30.

COURT OF APPEAL

1915

April 30.

DEISLER v. SPRUCE CREEK POWER CO.

"On the 2nd of September, 1880, the appellants applied to the Commissioner for prospecting licences over six blocks of land in a district not proclaimed as a gold district. No prior application had been recorded for any part of these blocks. The applications of the appellants were received and recorded, and the statutory payments were made by them. No licences were issued, but on the 6th of September the appellants, acting as though they were licenced, began to work the ground. . . . . In the month of November they applied to the Commissioner for leases of three of the blocks. Again their applications were received and recorded, and their money taken, but no lease was actually issued . . . . It appears from the evidence . . . . that the non-issue of licences was a common thing. As to the non-issue of leases, that . . . . was due to the pressure of business in the office. On the 9th of September, 1880, the respondents went to make application for a lease of a block of land covering portions of the appellants' block."

It would appear that all that took place was verbal and a question arose as to conflict of application with the previous application, and the respondents did nothing further until the 31st of March, when written applications were made. These applications were refused, as conflicting with the Mott application. See the judgment of Sir Arthur Hobhouse at p. 64.

MCPHILLIPS, J.A.

The above case affords some very considerable assistance, in my opinion, in arriving at a decision in the present case, although, of course, care must be always exercised in applying cases based upon differing statute law. Still, there is great similarity in the statute law as considered by their Lordships of the Privy Council and the Placer Mining Act.

Upon the whole, my opinion is that the lease as amended or rectified—and in that amendment and rectification it is only the carrying out on the part of the Crown of the application which had been received and approved—is effective as against any title in the respondent—a title subsequently acquired, and unavailing as against the previous application and demise following thereon. The title which the appellant is entitled to insist upon, and which, in my opinion, must be given effect to, is that the appellant is not only in possession, but, in my opinion,

MACDONALD, J.

1914

April 30.

COURT OF APPEAL

1915

April 30.

DEISLER v. SPRUCE CREEK POWER CO.

is entitled to the land in dispute under the demise, being a previous demise to that under which the respondent claims: see the judgment of Lord Mersey in *City of Vancouver* v. *Vancouver Lumber Company* (1911), A.C. 711, at pp. 720-22.

Upon the facts of the present case, and applying the law thereto, in my opinion there can be but the one result, and that is, that the judgment of the Court below be reversed, the action dismissed, with costs, the appeal being allowed, with costs here and in the Court below to the appellant.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Bodwell & Lawson.*
Solicitors for respondent: *MacGill & Grant.*

MURPHY, J.

1914

Oct. 17.

COURT OF APPEAL

1915

April 6.

STANOSZEK v. CANADIAN COLLIERIES (DUNSMUIR) LIMITED

STANOSZEK v. CANADIAN COLLIERIES (DUNSMUIR), LIMITED.

Master and servant—Damages—Judgment based on part of the report of the accident made to the Government—Not put in evidence—New trial—Coal-mines Regulation Act, R.S.B.C. 1911, Cap. 160, Sec. 91, r. 12.

In an action for an injury sustained in a mine through alleged breach of statutory rules, a charge of powder having been left unexploded in a hole in the face of a tunnel in defiance of the Coal-mines Regulation Act, it is a ground for a new trial when the trial judge gave credence to extracts from the report of the mining Company to the Government although the report itself was not put in evidence, the plaintiff (who referred to certain extracts in the report on the cross-examination of a witness) not wishing to be bound by all the statements therein contained, and the defendant Company contending that the entire report must go in or none of it.

Statement

APPEAL from the decision of MURPHY, J. in an action tried by him without a jury at Vancouver on the 17th of October,

1914, for damages for injuries sustained by the plaintiff while in the employ of the defendant Company.

On the 15th of June, 1914, the plaintiff was engaged in boring a hole in the face of a tunnel in the defendant's coal mine near Cumberland when an explosion took place, causing the injuries complained of. It appeared, from the evidence, that on Friday, the 12th of June, four holes were driven in the face of the coal (from three to six feet in depth, according to the angle at which they are driven) and were loaded. One of these missed fire and was allowed to remain loaded. The plaintiff contended that the explosion was due to his pick striking the old shot that had missed fire. The evidence shewed that from six to eight feet of the face of the tunnel had been taken away between the time of the boring of the hole that mis-fired on Friday the 12th and when the explosion took place on the following Monday, and the defendant contended that the charge in the mis-fired hole must have fallen away, and it could not, therefore, have been that charge that exploded, but that the plaintiff must have allowed a cap to fall on the floor of the tunnel, that exploded either through his striking it with his pick or by his stepping on it. The trial judge found for the plaintiff in the sum of $1,000. The defendant Company appealed.

Statement

Leighton, for plaintiff.
V. B. Harrison, for defendant.

MURPHY, J.: I believe the plaintiff's story in this action. I think he is entitled to recover under our law, either under the Employers' Liability Act or common law. In the view I take, it is not necessary to determine which branch. I believe plaintiff's evidence, and would say, for the benefit of any higher Court, that I entirely discredit the man Pickup, and I rather think he is the man entirely responsible for this matter. I come to the conclusion I should believe the plaintiff the more readily because of the report that was sent into the Government, in view of the fact the man who made that report, and whose duty it was to make every inquiry, is still in the employ of the Company, and was not brought into Court.

MURPHY, J.

MURPHY, J.

1914

Oct. 17.

COURT OF APPEAL

1915

April 6.

There remains, then, the question of damages. I would much prefer there had been a jury for that. Fortunately, this man was not hurt as much as he might have been, but it is equally plain he has been injured, and that injury is permanent. It is a permanent injury to his eyes, and good sight is of consequence, although he is a coal miner.

I think possibly I will be meeting the ends of justice in this case if I give him judgment for $1,000, and I do so.

STANOSZEK v. CANADIAN COLLIERIES (DUNSMUIR) LIMITED

The appeal was argued at Victoria on the 25th of January, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

V. B. Harrison, for appellant: There is no evidence to support the judgment. The plaintiff's theory that the charge in the hole that mis-fired was struck by his pick cannot be true, as the hole was less than six feet deep, and between six and eight feet of the face had been taken away in the meantime, so that this charge must have fallen away before the explosion. The plaintiff carried caps, and he must have allowed one to fall near the face of the tunnel, where it was stepped on or struck by a pick.

Argument

Leighton, for respondent: There were three shots left that were not fired on Friday the 12th, and it is a fair inference to draw that it was one of these loaded holes that caused the accident. The loading of more than one hole at a time is a breach of the Coal-mines Regulation Act.

Harrison, in reply.

Cur. adv. vult.

6th April, 1915.

MACDONALD, C.J.A.

MACDONALD, C.J.A. agreed with the reasons for judgment of IRVING, J.A.

IRVING, J.A.

IRVING, J.A.: The accident in respect of which this action was brought took place on Monday morning, shortly before 11 o'clock. The negligence charged is a breach of the duty imposed by rule 12, which rule forbids a second hole being loaded before the adjoining hole has been fired. The plaintiff's case was that

on Friday night four holes had been drilled in the face of the coal, and that they had all been loaded, in defiance of rule 12, that of these four holes one had exploded, the next had missed fire, and of the other two, one was allowed to remain loaded from 11 o'clock on Friday night, when the mis-fire took place, until Monday morning, when the accident occurred by which the plaintiff was injured.

The mis-fire incident took place on the 3-11 p.m. shift on Friday, when Schultz and Povitch were working, Sutherland being the fire-boss. They were succeeded on the 11 p.m. Friday to 7 a.m. Saturday shift by the plaintiff and Savonick, Pickup being the fire-boss on that shift. The 7 a.m. to 3 p.m. Saturday shift was taken by Schultz and Povitch, with Sutherland as fire-boss, and after 3 p.m. Saturday no work was done in the mine, except an inspection, which was conducted by Pickup. On the Monday morning the plaintiff and Savonick went on at 7 a.m., where they found a straight place with three cars of fallen stuff, which they shovelled out. The plaintiff drilled four holes, which were duly exploded. He then says he began the fifth hole about 10.30, when the accident occurred as he was making a hole in the face for his drill.

The defence was that all the holes put in on Friday had been exploded, and, further, that all the coal in the four holes loaded on the Friday night had been worked out between 11 o'clock Friday night and 3 o'clock Saturday morning, so that the face had been advanced to such an extent that it was impossible for any part of the loaded holes to remain. Further, the defence undertook the task of shewing that the accident was due to the explosion of a cap on the floor, and not from a hole in the face. There was much evidence given on both sides, and, in ordinary cases, the finding of the learned trial judge would prevail: *Lodge Holes Colliery Company, Limited* v. *Wednesbury Corporation* (1908), A.C. 323 at p. 326; *Khoo Sit Hoh* v. *Lim Thean Tong* (1912), A.C. 323 at p. 325.

IRVING, J.A.

In this case there occurred something which I think makes the rule laid down in those cases inapplicable. The first witness for the defence was Clinton, the superintendent for the defendant Company. On his cross-examination the following occurred:

MURPHY, J.

1914

Oct. 17.

COURT OF APPEAL

1915

April 6.

STANOSZEK v. CANADIAN COLLIERIES (DUNSMUIR) LIMITED

IRVING, J.A.

"You have to make a report to the Government as to the cause of these accidents? We do.

"And you always make a pretty full inquiry? We try to. We cannot always get a full account, but we have to make that within 24 hours, and sometimes a report is made out and afterwards we find out some other information that it might have been caused otherwise.

"You know that there was a missed shot there? I know they had a missed shot, but I also know that shot was cut out, and the place was driven eight or nine feet farther on, between the date of this missed shot, and the date of the accident, far beyond where the accident could have been.

"Did you know, when you made the report to the Government, that it was reported that it was an old missed shot? Peacock made that report; he was manager at the mine at No. 8.

"And he signed the report? He signed the report, or at least I expect he did. I could tell if I saw his signature, probably.

"This is a copy furnished me by your solicitor? Yes, there is no doubt he signed it.

"Mr. *Leighton*: I want to put in part of that. It is partly in the form of question and answer. I do not want to be bound by all the answer.

"Mr. *Harrison*: I submit the whole of it should go in.

"This is correct, is it: 'There was an old missed shot, powder never shot in Joe Stanoszek's place and as he was in the act of mining the place must have struck the piece of explosive with the point of his pick, causing the injury'? That is absolutely wrong but I believe he made that report at the time, believing he was right.

"Court: That is the report you say was sent to the Government?

Mr. *Leighton*: Yes, my Lord.

"Mr. *Harrison*: But he said further that he struck this with his pick. I submit that the whole document should go in, or nothing. It is what he reported from start to finish, or nothing at all; he cannot take a few words here and there.

"Court: Are you going to call Peacock?

"Mr. *Harrison*: No, he is not here.

"Court: If you put the report in, you will have to put it all in.

"Mr. *Leighton*: I have asked if that is a correct statement in the report that was made, and he says it is.

"Witness: We afterwards found that that statement was not so.

"Mr. *Leighton*: But that is the report he made at the time? That is the report that went into the Government.

"Where is Mr. Peacock now? He is at Cumberland."

As I understand the ruling of the learned judge, the superintendent's report was not to go in unless the whole of it went in, and the Court further said that "you cannot put in part, and not the other." But whether this is right or not, the judge looked at the report—either the whole of it, or the part of it read to the witness—and in weighing the testimony of Pickup,

the man who was present immediately after the mis-fire took place on Friday, and who made the inspection of the face on the Sunday, whose evidence, if believed, strongly supported the defendant's case, came to the conclusion that he (Pickup) was unworthy of belief, and that he (Pickup) was entirely responsible for the accident. He proceeded to say that he believed the plaintiff the more readily because of the report that was made to the Government. As this report is not in the appeal book we must, I think, infer that the conclusion was reached by the learned judge acting on the extracts of the report read by the counsel. In my opinion, that was a wrong way to deal with the report, for three reasons. The first is that the report was not in; the second is that you cannot seize on a portion of a report and decide a case on that without reference to the other statements in the report; and the third is that Clinton had no authority to make an admission that the part read to him by counsel for the defence was the cause of the accident.

IRVING, J.A.

As a matter of fact, he made no such admission. He asserts that the extract read appeared in the report, and also stated that the report contained this: (the plaintiff) stated he did "not know what had happened, unless he struck a cap with his pick."

The report having been misused in the way I have described, and the probabilities (of which we can judge as well as the learned trial judge) being that the face had been advanced, I think we should order a new trial.

MARTIN, J.A.

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

GALLIHER, J.A.

GALLIHER, J.A.: This is an appeal from the judgment of MURPHY, J., who found in favour of the plaintiff, and assessed the damages at $1,000. We admitted evidence, upon affidavit, of alleged conversations that the plaintiff had with Joe Povitch and Joe Surawik since the trial of the action, and affidavits in reply flatly contradicting the same. This evidence does not impress me at all favourably, and I disregard it, and come to my conclusions solely upon the evidence before the learned trial judge.

The plaintiff is a coal miner, and met with an accident in the

MURPHY, J.

1914

Oct. 17.

COURT OF APPEAL

1915

April 6.

STANOSZEK v. CANADIAN COLLIERIES (DUNSMUIR) LIMITED

mines of the defendant while in its employ and while engaged in mining coal. The accident occurred on the 15th of June, 1914, resulting in injury to the eyes of the plaintiff. Negligence in the operation of its works by the defendant is alleged, and the plaintiff also relies on the provisions of the Coal-mines Regulation Act, R.S.B.C. 1911, Cap. 160.

On the 12th of June, four holes had been drilled and loaded in the face of the coal seam, as appears by the sketch, exhibit 3. The fire-boss exploded the hole marked W and lighted the hole marked M, which failed to explode, and did not attempt to fire the holes which, for convenience, I designate N and O on the sketch, and the accident occurred at the point A, exhibit No. 1, which corresponds to the point at the junction of the top line and the coal face, which I will also designate as A.

The evidence of the plaintiff is directed to shewing that on Monday morning, the 15th of June, while using his pick in the face of the coal to get a proper starting place for his drill, he came in contact with the load in hole O, which blew out, causing the injury. Pickup, a fire-boss called by the defendant, swears that he exploded these left-over holes prior to the accident, but the learned trial judge expressly states that he entirely discredits his evidence and believes that of the plaintiff. If the case rested upon this alone, the appeal must be dismissed, but there is, to my mind, cogent evidence which goes to disprove the theory set up by the plaintiff.

GALLIHER, J.A.

These holes vary from 3 to 6 feet in depth, according to the angle at which they are driven. Into these is put a load of powder, sometimes two and sometimes three sticks, according to the depth of the hole, the cap which explodes being at the inner end of the outside stick, the balance of the hole being tamped with wet clay, through which two pieces of wire, attached to the cap run, and depend from the outside of the hole from 8 to 24 inches, according to the depth of the hole and the size of the load, these wires carrying the current from the electric igniter which is attached, when firing, to the cap, causing the explosion.

Now, between Friday the 12th, when the missed hole M and the loaded holes N and O had been left, and Monday the 15th,

when the accident occurred, there had been two shifts working on this face of coal, and the evidence is that the entire face of the seam, for its full width of 12 feet, had been carried back from 6 to 8 feet. This could only be done, of course, by shooting the coal down, and would have carried the face back beyond where these holes were left.

It was suggested by plaintiff's counsel to explain this away, that as the seam would not be carried back regularly, or the coal break to an even face, there might have been some of the load in hole O which had not been reached by the break, and that when the plaintiff struck with his pick he came in contact with that. But the evidence of Kirkham, a fire-boss, is that when he went down on the afternoon of the 15th specially to examine the *locus in quo* he found that the whole working face clear across had advanced from 6 to 8 feet since the time when the hole had missed fire. See also the evidence of Clinton.

Moreover, when the place was examined shortly after the accident, there were no indications of an exploded hole, such as one would expect to find, in the nature of coal or debris broken down. The defendant's theory is that the plaintiff must have been struck by a loose cap while picking on the floor. Blaylock, the outside foreman for the defendant, says, speaking to the plaintiff just after the accident:

"I said 'Joe, what happened to you,' and he said, 'I don't know myself what happened,' and I said, 'you must have struck a missed shot,' and he said 'No, I only had four shots, and they all went.' I said 'you have struck a cap in the muck pile,' and he said, 'may be, it was just like the floor coming up and hitting me.'"

I have the greatest hesitation in interfering with the findings of the learned trial judge upon the facts, but as the plaintiff's story seems to me extremely improbable in the face of the undisputed evidence as to the condition of the coal face on the 12th and just after the accident on the 15th, and excluding the evidence of Pickup, as I do, it is not so much a conflict of evidence as it is—given proved, undisputed facts shewing that certain conditions existed—is the plaintiff's story a probable one? I cannot bring myself to conclude that it is, or that it is such as entitles him to a verdict, and if this conclusion is right, then the provision of the Coal-mines Regulation Act does not assist him,

MURPHY, J.

1914

Oct. 17.

COURT OF APPEAL

1915

April 6.

STANOSZEK v. CANADIAN COLLIERIES (DUNSMUIR) LIMITED

as the breach of the statutory duty did not contribute to the accident.

I would allow the appeal.

McPHILLIPS, J.A.: I would dismiss the appeal.

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

Solicitor for appellant: *V. B. Harrison.*
Solicitor for respondent: *Arthur Leighton.*

GREGORY, J.

BOSTWICK AND CURRY v. COY.

1915

March 5.

Sale of land—Contract for—Mortgage—Defect of conveyance—Recovery of unpaid instalments of purchase-money—Lis pendens—Slander of title.

BOSTWICK AND CURRY v. COY

The existence of a mortgage on land contracted to be sold does not constitute a defect of title such as to give the purchaser the right to repudiate the contract; nor does it prevent the vendor from recovering instalments of the purchase price which have accrued due prior to the discharge of the mortgage, although the vendor may be required to give security for the ultimate conveyance of the lands contracted to be sold free from encumbrances.

The filing of a *lis pendens* in the land registry office does not *per se* afford a cause of action to a purchaser of the land affected by the *lis pendens*, who has registered his agreement to purchase before the filing of the *lis pendens*.

ACTION tried by GREGORY, J. at Victoria on the 4th and 5th of March, 1915.

Statement

The action was brought to recover an instalment of the purchase price of certain land agreed to be sold. The purchase price was payable under the contract in five instalments, of which three had been paid, leaving two unpaid instalments, one

of which fell due on the 15th of July, 1914, and was the one sought to be recovered in this action, and the last one on the 15th of July, 1915. The contract of purchase was made on the 25th of April, 1912, and contained covenants by the purchaser and vendor respectively, by which the purchaser undertook to pay the instalments of the purchase price as they fell due, and the vendor undertook, when all the purchase price had been paid, to convey, or cause to be conveyed to the purchaser the land in fee simple, free from encumbrances. The defendant, the purchaser, counterclaimed as against the plaintiff Bostwick for rescission of the contract, and in the alternative against the plaintiff Curry for damages.

The land contracted to be sold was owned originally by Angeline Willey, who, on her death, devised it to A. C. Willey for life, and in remainder to the plaintiff Curry. On the 2nd of November, 1911, the plaintiff Curry conveyed all her interest in the land to A. C. Willey. On the 23rd of November, 1911, the plaintiff Curry commenced an action against A. C. Willey to set aside her grant. On the 25th of April, 1912, A. C. Willey contracted to sell the land to the defendant by the agreement already mentioned. On the 5th of May, 1912, A. C. Willey died, leaving the plaintiff Bostwick as his executor. On the 11th of May, 1912, the plaintiff Curry filed a *lis pendens* against the land in the land registry office where the land was registered. On the 1st of June, 1912, the defendant discovered the existence of the *lis pendens*. Later in the same month the defendant received an offer to purchase the land at an advance of $13,000 over the price he had agreed to pay. The intending sub-purchaser was aware of the *lis pendens*, and offered to buy the land subject to the *lis pendens*, on the purchaser agreeing to make a good title at the time for completion of the contract, which was to extend over a period of three years. The purchaser refused to sell on these terms, and the purchaser then refused to pay an instalment of the purchase price which fell due on the 15th of July, 1912, until the *lis pendens* was removed. This was done on the 1st of October, 1912, and the action in which it was filed was discontinued, and the purchaser then paid the overdue instalment. He also paid the instalment

Statement

GREGORY, J.

1915

March 5.

BOSTWICK AND CURRY v. COY

which fell due on the 15th of July, 1913, and subsequently offered, in April, 1914, to pay the instalment which fell due on the 15th of July, 1914, on receiving a certain discount, which offer was refused.

Previously to agreeing to sell to the defendant, A. C. Willey had mortgaged the land to the plaintiff Bostwick for $1,400, on the 1st of March, 1912, and the mortgage deed was registered on the 13th of March, 1912. The defendant swore that he had no knowledge of this mortgage until the present action was brought, but it was proved that the existence of the mortgage was disclosed to the defendant's agent to purchase prior to the execution of the agreement of the 25th of April, 1912. This mortgage was still undischarged at the date of bringing the present action, although it fell due on the 1st of March, 1913. The amount for which the present action was brought was $7,500, and the last instalment, which fell due on the 15th of July, 1915, was also for $7,500.

Statement

The plaintiff Curry sued as assignee, in the name of her assignor, for part of the purchase price, which had been assigned to her.

No attempt to repudiate the contract was made by the defendant until he delivered his defence to this action.

Mayers, for plaintiffs: The vendor under a contract for the sale of land may sell land in which he has no interest at all at the date of the contract, provided he is able to shew a good title at the time fixed for completion. If, however, the purchaser discovers that the vendor has no title at all, he may repudiate even before the time fixed for completion, provided he do so immediately on becoming aware of the lack of title. Such repudiation is, however, only a defence to a suit in equity, and does not relieve the purchaser of the consequences of his contract at law. No such repudiation is, however, permitted, even in equity, when the defect consists in matter of conveyance and not in matter of title: *Boehm* v. *Wood* (1820), 1 J. & W. 419 at p. 421; *In re Bryant and Barningham's Contract* (1890), 44 Ch. D. 218 at p. 223; *In re Head's Trustees and Macdonald* (1890), 45 Ch. D. 310 at p. 315; *Halkett* v. *Dudley (Earl)*

Argument

(1907), 1 Ch. 590 at p. 596. In this case, assuming that the matters complained of constitute a defect of title, the defendant knew of the existence of the *lis pendens* in June, 1912. He will be held to have known of the mortgage at the time he made the contract, by reason of the fact that his agent knew, and also by reason of the provisions of section 72 of the Land Registry Act. There was, however, no defect of title; the *lis pendens* could not affect the title of the vendor till the action was determined, and the mortgage constituted a mere defect of conveyancing: *Esdaile* v. *Stephenson* (1822), 6 Madd. 366; *Hatten* v. *Russell* (1888), 38 Ch. D. 334 at p. 346; *Guthrie* v. *Clark* (1886), 3 Man. L.R. 320. The decision in *Townend* v. *Graham* (1899), 6 B.C. 539, and the Ontario cases in which it rests cannot be supported. *Townend* v. *Graham* is contrary to *Foot* v. *Mason* (1894), 3 B.C. 377, and is opposed to the principle that a plaintiff entitled to a verdict at law cannot have terms imposed upon him: *Deeks* v. *Strutt* (1794), 5 Term Rep. 690 at p. 693.

[GREGORY, J.: You cannot nowadays come into a Court of Law without also coming into a Court of Equity.]

That is true, but it is not the accident of the Court in which one sues, but the quality of the right one seeks to enforce which determines ones right: *Chapman* v. *Michaelson* (1909), 1 Ch. 238. Here the covenants were independent, and the vendor was entitled at law to recover the instalments without shewing any title: *Wilks* v. *Smith* (1842), 10 M. & W. 355. In any event, the Ontario cases only go to the length of holding that the money must be paid into Court, or security given against the encumbrance: *Cameron* v. *Carter* (1885), 9 Ont. 426 at p. 431.

Argument

With respect to the claim for damages, the defendant has shewn no cause of action. In the case of *Ontario Industrial Loan Co.* v. *Lindsey et al.* (1883), 3 Ont. 66, the defendant had filed a document for which no provision had been made by the Land Registry Act of the Province; his act was, therefore, wrongful, whereas here the *lis pendens* was filed in accordance with the Act, and the plaintiff's deed was, therefore, rightful. The only cause of action which the defendant could have would be for slander of title, and to constitute such an action it must be shewn that actual malice or spite was actuating the plaintiff:

GREGORY, J.

1915

March 5.

BOSTWICK AND CURRY v. COY

Halsey v. *Brotherhood* (1881), 19 Ch. D. 386; *Pater* v. *Baker* (1847), 3 C.B. 831. No evidence of such a state of mind has been given here.

W. J. Taylor, K.C., and *F. C. Elliott,* for defendant: The plaintiff's testator had no title at the date of the contract, as the plaintiff Curry had commenced an action to set aside her grant. The fact of there being a mortgage on the land was a defect in the title, which should have been brought to the personal notice of the defendant. In any case, the action is premature, as the defendant is not bound to pay any part of the purchase price till the mortgage has been satisfied. The contract should, therefore, be rescinded: *Townend* v. *Graham* (1899), 6 B.C. 539; *Graves* v. *Mason* (1908), 8 W.L.R. 542. If the defendant is not entitled to rescind the contract, he is entitled to damages against the plaintiff Curry for filing the *lis pendens,* and thereby spoiling his sale. The measure of damages is the difference between the price at which the defendant could have sold and the present market price, which our expert witnesses have shewn to be less than half: *Ontario Industrial Loan Co.* v. *Lindsey et al.* (1883), 3 Ont. 66.

Argument

GREGORY, J.: It seems to me perfectly clear that the plaintiffs are entitled to recover their claim. The covenant to pay is not disputed, the assignment is good, and the action properly constituted as to parties, the assignee suing in the name of her assignor for such part of the instalment as was assigned to her.

With regard to the defence based on the existence of the antecedent mortgage, I agree that this constituted merely a defect of title, and I adopt the plaintiffs' argument as to the legal effect of this circumstance. Moreover, the existence of the mortgage must have been known to the plaintiffs, if for no other reason than the Land Registry Act says so. I find, however, that the existence of the mortgage was perfectly well known to the defendant's agent during the negotiations for the sale. In regard to the *lis pendens,* the fact of this being filed came to the defendant's knowledge in the summer of 1912. Notwithstanding these facts, the defendant made no attempt to repudiate the contract until the commencement of this action in the latter

Judgment

part of 1914. Moreover, the defendant's conduct throughout the years 1912, 1913, and 1914 is not only not consistent with any intention to repudiate, but is also clear proof of his having ratified and confirmed the contract.

As to the counterclaim for damages sustained by reason of the filing of the *lis pendens,* this, if there is any cause of action at all, can only be supported as an action for slander of title, and the cases cited shew clearly that actual malice is a necessary ingredient of such an action. Now, the case as made by the defendant lacks all proof of the absence of good faith. It is suggested, indeed, that the plaintiff Curry acted recklessly, but there is no evidence of this. It is more reasonable to suppose that she thought she was justified in filing a *lis pendens,* and if she thought she had a claim, it was her duty to give notice of it.

As to the existing mortgage, it is not for a large amount, and the defendant is absolutely secured by reason of the fact that the amount of the last instalment of the purchase price exceeds the amount of the mortgage. But I think there is no reason why I should not follow the practice which appears to have been adopted from Ontario, and make the defendant's position doubly secure by directing that, while there should be judgment for the amount claimed, the plaintiff must either pay the amount of the mortgage moneys and interest into Court, or give security by bond that the mortgage will have been discharged when the time for completion arrives.

Judgment

Judgment for plaintiffs.

MACDONALD, J.

1914

Oct. 16.

COURT OF APPEAL

1915

April 6.

DUNPHY v. CARIBOO TRADING CO.

DUNPHY AND ROLPH v. CARIBOO TRADING COMPANY, LIMITED.

Principal and agent—Exclusive right of sale—Lease of a portion of the property in violation of agreement—Purchaser ready, willing and able to buy—Burden of proof.

When a real-estate broker has procured a purchaser, ready, willing and able to carry through a sale upon the terms specified, but the vendor has, during the negotiations, leased a portion of the property, which prevented the sale going through, the broker must shew on a claim for commission that had it not been for the lease, the proposed purchaser was ready, willing and able to carry out the deal on the terms originally agreed upon.

Statement

APPEAL from the decision of MACDONALD, J. in an action tried by him at Vancouver on the 18th and 19th of June and on the 7th and 9th of October, 1914, for commission for obtaining a purchaser for the defendant Company's property at a price arranged with the Company's managing director. The property is in the vicinity of the 150-Mile House in the Cariboo district, and includes a hotel premises. In April, 1913, the plaintiff Rolph was engaged in auditing the defendant Company's books, when he heard the property was for sale, and in the early part of May he telegraphed E. E. Cunliffe, the managing director of the defendant Company, for an exclusive right of sale, which Cunliffe gave. On the 4th of July, Cunliffe wrote Rolph asking him whether there was any prospect of a sale, as he contemplated renting the hotel. On the 12th of July Rolph wrote that one Dunphy, a broker, informed him that a contemplated purchaser was on the way out from England, and he expected to have some satisfactory news by the middle of the month, so that it would be well to wait a few days longer. He did not hear from Rolph again until the 16th of August, when Rolph, by letter, said he had a prospective purchaser at the terms arranged (*i.e.*, $35,000 cash, and the balance of $185,000 to be agreed on), but the purchaser wanted 20 days to examine the property. In answer, Cunliffe wired that it was satisfac-

tory, and that he would hold off everything for 20 days. Cunliffe testified that on the 19th he wrote Rolph, explaining the telegram, in which he stated that by the time they would arrive for inspection of the property, the hotel would be rented at $400 a month. Rolph denied having received this letter until after the negotiations were off. The hotel was rented on the 25th of August to one Champion, for three years, but the property was not examined by the contemplated purchaser within the 20 days extension. Between the 3rd and 6th of September, Cunliffe, Rolph and Dunphy met in Vancouver (there was conflict of evidence as to the exact date of the meeting), and an extension of the option was agreed on for sufficient time to carry through a contemplated sale. On the 25th of September Dunphy and two men representing one Turner (the proposed purchaser) arrived on the property. After looking it over, Cunliffe advised them of the lease of the hotel, and the sale immediately fell through. Dunphy testified that this was the first intimation he had had of the lease of the hotel. The defence raised was that the contemplated purchaser never agreed to purchase at the price arranged, he having made another proposal to give other property (estimated by him as worth $40,000) in lieu of the initial payment of $35,000. Turner, in his evidence, said he was willing to take the property in accordance with the original agreement if he could have got rid of the lessee of the hotel. The learned trial judge found that the plaintiff was entitled to judgment. The defendant Company appealed.

Statement

Ritchie, K.C., for plaintiffs.
Harvey, K.C., and *Robert Smith*, for defendant.

16th October, 1914.

MACDONALD, J.: Plaintiffs seek to recover $9,250, being commission at the rate of 5 per cent. upon the sum of $185,000, the selling price of certain real estate and personal estate of the defendant Company, pursuant to a verbal agreement between the parties; or in the alternative, seek to recover damages for breach of such agreement.

GALLIHER, J.A.

Defendant Company carries on business at 150-Mile House in the district of Cariboo, British Columbia, and Evelyn P.

MACDONALD, J.

1914

Oct. 16.

COURT OF APPEAL

1915

April 6.

DUNPHY v. CARIBOO TRADING CO.

Cunliffe is the general manager and attorney of the Company. I find that during the year 1913 Cunliffe was duly authorized, on behalf of the Company, to sell its real and personal property, consisting of land in the Cariboo district estimated at 3,757 acres, together with the general store, hotel and buildings at 150-Mile House, and general store at Soda Creek, in said district; also the furniture and stock in the hotel and stores, and the cattle and horses on the lands. The price to be obtained was $185,000, payable $35,000 cash, and the balance to extend over 24 months. Plaintiffs allege that Cunliffe employed them to effect a sale of such property at the price mentioned, and that they produced Turner as a purchaser, ready, able and willing to complete the purchase at the price and upon the terms mentioned. There was no dispute as to the employment, which commenced in April, 1913. At the same time, Cunliffe states he delivered a memorandum, being an estimate of the value of the property intended to be sold. It shews a valuation of $174,420.95. Amongst the property, of which an estimated value is given, appear: house, $20,000; goodwill and licences, $5,000 (changed from $10,000); stock on hand in trade, store and bar, $29,000; furniture, hotel and office, $2,800. It was not contended that this property was to be sold at these separate estimated values, but the memorandum was furnished to assist the agents in making a sale. It is important, however, as shewing that it was intended that the purchaser should become the owner and obtain possession of the houses (including the hotel, with its goodwill and licence), and be entitled to the stock on hand in the store and bar in the hotel. Plaintiffs endeavoured to effect a sale, but failed to bring about any result until the month of September. Plaintiff Rolph wired Cunliffe on the 16th of August, stating that the property was sold at the price mentioned, with $35,000 as a cash payment, and asked for 20 days further time for communication and investigation. Cunliffe replied to Rolph by telegram dated the 16th of August, 1913, as follows:

MACDONALD, J.

"Satisfactory—will hold off everything 20 days. Dunphy should conduct party personally."

This telegram is important in view of the fact that on the

4th of July Cunliffe had written to Rolph inquiring whether anything had been done regarding the sale of the property, and giving his reason for writing that he was "thinking of renting the hotel." Rolph replied to this letter on the 12th of July, expressing a desire that Cunliffe should wait a few days more. The telegram is also evidence of the relation in which the parties stood to each other. Rolph had every reason to believe, on receipt of the telegram, that not only would the time mentioned be allowed, but that nothing would transpire to destroy the prospect of a sale being consummated. The letters of July and this telegram also shew that both parties had in mind the importance that would be attached to the renting of the hotel. I am satisfied that all parties had in mind the profit likely to be earned from the only hotel doing business with a licence at 150-Mile House, or within a considerable distance of that point. The construction of the Pacific and Great Eastern Railway through the district, coupled with the additional traffic on the Cariboo Road, would increase the profits of the hotel. Before the time mentioned in the telegram expired Cunliffe came to Vancouver, and, although the parties differed as to the date upon which they met in the Terminal City Club, there is no dispute that such a meeting took place, and that the authority to the plaintiffs to sell the property was renewed, although they were not given an exclusive right of sale. There is an important and serious contradiction, however, between the plaintiffs on one side and Cunliffe on the other as to what further transpired. Plaintiffs state that the matter of renting the hotel was discussed, and that Cunliffe agreed, if the hotel were leased, it would be subject to the right of sale. He, on his part, states there was no mention whatever of the lease. He explains that the reason this important point was not discussed was that he had written a letter on the 19th of August referring to the renting of the hotel, and assumed that the plaintiffs received it in due course and were aware of the situation. Plaintiff Rolph admits having received this letter, but it was some time after the meeting at the Terminal City Club. It is evident from the copy of a letter produced that Cunliffe, after sending the telegram of the 16th of August, feared that Rolph, in view of the circum-

MACDONALD, J.

MACDONALD, J.
1914
Oct. 16.
COURT OF APPEAL
1915
April 6.
DUNPHY v. CARIBOO TRADING CO.

stances, would attach the natural meaning that the "holding off of everything" included the renting of the property. He therefore, explains in his letter of the 19th of August, that he intended to refer only to negotiations for the sale of the property and then adds, "the hotel by then would be rented $400 per month without stable." It appears that Cunliffe had arranged for leasing the hotel to L. T. Champion, and instructed E. J. Avison, solicitor, at Quesnel, to prepare a lease for execution. The lease as prepared contained clauses providing for its termination by three months' notice in the event of sale. Champion refused to sign the lease with this proviso, and it was struck out and marked "cancelled." The lease thus changed purports to have been executed on the 25th of August, 1913. Cunliffe states that, although this proviso was eliminated, the lessee agreed verbally that the lease should not affect any sale that might be made before the expiry of the 20 days then pending. It is contended that it was improbable that Cunliffe would, in the circumstances, have agreed in the manner stated by both plaintiffs. As far as probabilities are concerned his failure to refer to the true position of the matter would not be more improbable than his statement that no reference whatever occurred in the conversation with respect to such an important matter as the leasing of the hotel. His excuse, based on his letter of the 19th of August, does not appear to be a reasonable one. I think the account of the conversation as given by the plaintiffs is the more probable one. I consider obtaining possession of the hotel and thus getting an immediate profit on that portion of the outlay was a prominent feature in the matter. Plaintiffs make a positive statement that a certain agreement was entered into and Cunliffe contradicts it. There is a presumption in favour of the affirmative statement being correct as against the negative one. Baron Parke in *Chowdry Deby Persad* v. *Chowdry Dowlut Sing* (1844), 3 Moo. Ind. App. 347 at p. 357 (18 E.R. 531 at pp. 534-5) says:

MACDONALD, J.

"In estimating the value of evidence, the testimony of a person who swears positively that a certain conversation took place, is of more value than that of one who says that it did not, because the evidence of the

latter may be explained, by supposing that his attention was drawn to the conversation at the time."

The Master of the Rolls in *Lane* v. *Jackson* (1855), 20 Beav. 535 at pp. 539-40 says:

"I have frequently stated, that where the positive fact of a particular conversation is stated to have taken place between two persons of equal credibility, and one states positively that it took place and the other as positively denies it, I believe that the words were said, and that the person who denies their having been said has forgotten the circumstance. By this means I give full credit to both parties."

Assuming that the parties were equally credible, I follow the rule laid down in these authorities and find that the conversation as related by the plaintiffs took place, and that they proceeded to act as agents for the sale of the property, believing, if the hotel should be leased, it would be subject to the right of sale. At the time of the conversation, Cunliffe, in thus agreeing with the plaintiffs, might have expected that some arrangement could even yet be arrived at with Champion in the event of a sale being effected. The amount involved was so large that he could even afford to pay a substantial sum for an abandonment of the lease before Champion actually took possession on the 29th of September. There is one point worthy of mention, as shewing that Cunliffe was not fully disclosing the position of affairs to the plaintiffs, and that is that the lease executed in favour of Champion provided for a sale of all the stock of liquors and cigars in the hotel at cost price. There was no reference made to this in the letter of the 19th of August, and unless he expected to make some arrangement with Champion to assist in putting through a sale he should have disclosed this term of the lease to the plaintiffs so that the memorandum of property intended to be sold might be adjusted. Cunliffe does not even suggest that there was a rearrangement of the price on account of the hotel with its licence and stock in trade not being included in the property intended to be sold. Even if Cunliffe's statements were accepted as to the nature of the conversation, he should, in any event, have informed the plaintiffs as to the terms of the lease and the disposition made of the property so that they might inform intending purchasers. Plaintiffs being thus authorized to obtain a purchaser for the property, the question is, did they obtain an actual purchaser,

MACDONALD, J.

1914

Oct. 16.

COURT OF APPEAL

1915

April 6.

DUNPHY v. CARIBOO TRADING CO.

MACDONALD, J.

MACDONALD, J.

1914

Oct. 16.

COURT OF APPEAL

1915

April 6.

DUNPHY v. CARIBOO TRADING CO.

not one who might become a purchaser, for the property? After some negotiations they interested Turner, who, after consultation with Eldridge, agreed to visit the locality with the view of purchasing. Was Turner a purchaser ready, willing and able to purchase the property upon the terms indicated? In that event plaintiffs will be entitled to their commission, unless the sale is subsequently prevented through no fault or default of the defendant Company: See *Bagshawe* v. *Rowland* (1907), 13 B.C. 262. Shortly, what occurred afterwards was this. Plaintiff Dunphy telegraphed from Vancouver to Cunliffe on the 23rd of September, to meet him and parties at Ashcroft, and Cunliffe, in his reply of the 24th of September, excuses himself from being present through important business and advises them to obtain a motor-car through Blair. Aside from the question of the terms of the lease, this telegram was quite consistent with his account of the conversation at the Terminal City Club. Cunliffe wrote on the 28th of September, to Rolph, and incidentally I quote a portion of his letter as shewing an inconsistency or lack of memory, as follows:

"Last week I was surprised to receive a wire from Mr. Dunphy saying that he was bringing a party up to look at this property. When I was last in Vancouver I was under the impression that all negotiations were off and consequently rented the hotel."

MACDONALD, J.

These statements differ from the admission made by him that the agency was continued and thus his reason for renting the hotel is founded upon a false basis and is not in accordance with the facts. He had already rented the hotel before he was in Vancouver, so that any impressions obtained at the meeting did not influence him in the matter. When plaintiff Dunphy, Turner and Eldridge arrived at 150-Mile House, they inspected the property and the question of the terms of the lease came up for consideration. There was also some question as to the number of cattle and the price per head. An attempt was made at the trial to shew from the discussion between Eldridge and Cunliffe, that this matter had a controlling influence upon the negotiations. Cunliffe stated that while they did not like the lease, still, the question of cattle was another ground of objection. He was confronted with a portion of his examination for

discovery and admitted its correctness. [His Lordship quoted the evidence and continued]:

Efforts were made to arrive at an understanding or agreement of some kind with Champion, but failed. I am satisfied that the sale was not completed through the failure on the part of the defendant Company to provide for a termination of the lease of the hotel in the event of a sale taking place. I find Turner was willing to purchase and the price and terms as mentioned to him by the plaintiffs and repeated by Cunliffe at 150-Mile House were unsatisfactory, *viz.*: $185,000, $35,000 cash, and the balance in five years, straight mortgage. It was contended that, notwithstanding the positive statement of Turner, that these terms were satisfactory, he admitted in cross-examination that his intention was to make the first payment of $35,000 by an exchange of a parcel of real estate. It is apparent Turner had some discussion with Dunphy as to this mode of payment, but it was never communicated to Cunliffe. Was it merely a desire on the part of Turner to thus make the first payment, or did it amount to an intention on his part not to complete unless such exchange could be effected? Evidently the effect of the cross-examination in this connection, as tending to destroy the positive statement of Turner that he was willing to complete on the terms mentioned, was felt by counsel for the plaintiffs. He directed his re-examination on this point and submitted the question to Turner as to whether if they "had not been willing to take the real estate, were you still willing to go on with the transaction if there had been no release?" The answer to this question in the transcript of the notes of evidence is "No." At the commencement of the argument counsel for the plaintiffs submitted that the notes were defective on this and some other points material to his position. He applied to have witnesses recalled to give fresh evidence which, presumably, would contradict or explain the portion of the notes thus objected to. I refused without authority to pursue this course. It was then contended that the answer "No" referred to, could not have been given by the witness in view of the context, especially the fact that counsel for the defendant objected to the question and argued that if the answer

MACDONALD, J.

MACDONALD, J.

1914

Oct. 16.

COURT OF APPEAL

1915

April 6.

DUNPHY v. CARIBOO TRADING CO.

had been given as indicated, such counsel would have been satisfied and raised no objection. In view of the argument which followed, even if the stenographer correctly reported the answer, it is doubtful if Turner knew its effect. At any rate it is clear that the question was not dropped, but pursued. Eventually, Turner states to the same question repeated:

"I was willing. I had another proposition, to give him so much cash and real estate. . . . . The next proposition would have been to give him $5,000 and the real estate. If that was not satisfactory $10,000 and the real estate; then $15,000 and the real estate and then if he refused that, I was going to give him the money for it."

I accept this statement. Whatever may have been in his mind as to endeavouring to obtain an exchange of real estate in lieu of paying cash, this was never communicated to Cunliffe. Turner was thus not a person who might become a purchaser, but one who was ready to enter into a binding contract, so the judgment in *Grogan* v. *Smith* (1890), 7 T.L.R. 132, does not apply. Then as to Turner's ability to purchase. I am satisfied with the correctness of his statement that he felt confident that he could carry out the purchase. If any difficulty arose, Eldridge stated he was able and willing to come to his assistance.

MACDONALD, J.

In the view I have taken, it is not necessary for me to consider, except in passing, the claim for damages set up by the plaintiffs as an alternative, that the defendant Company by its actions deprived the plaintiffs of the probability of earning their commission. Plaintiffs rely upon a portion of the judgment of Wills, J., in *Inchbald* v. *Western Neilgherry Coffee Co.* (1864), 17 C.B. N.S. 733 as referred to and approved in *Burchell* v. *Gowrie and Blockhouse Collieries, Limited* (1910), A.C. 614 at p. 626.

Plaintiffs performed their part of the agreement and are entitled to commission. There will be judgment for the plaintiffs for $9,250 and costs.

The appeal was argued at Victoria on the 12th of January, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Harvey, K.C., for appellant. The plaintiff was advised of

MACDONALD, J.

1914

Oct. 16.

COURT OF APPEAL

1915

April 6.

DUNPHY v. CARIBOO TRADING CO.

the contemplated lease of the hotel and the agreement between Rolph and Cunliffe that was in force when the lease was given, subsequently expired. It was under a later agreement that Turner's offer was made. Turner looked at the ground and then decided not to purchase. The leasing of the hotel had no bearing on his decision. There was never a complete and binding contract: see *Grogan* v. *Smith* (1890), 7 T.L.R. 132; *Re The Sovereign Life Assurance Company (Salters's Claim)* (1891), *ib.* 602. These cases shew what is necessary to produce a purchaser that entitles the agent to a commission. On the question as to when it is held that no offer is made see *Bagshawe* v. *Rowland* (1907), 13 B.C. 262; *Cairns* v. *Buffet* (1912), 3 W.W.R. 352; *Chappell* v. *Peters* (1913), *ib.* 738; *Hyde* v. *Wrench* (1840), 3 Beav. 334; Halsbury's Laws of England, Vol. 7, p. 352.

Ritchie, K.C., for respondent: The findings of fact of the learned trial judge are sufficient to support his legal interpretation of the case. The reason the sale fell through is on account of the lease: see *Hyde* v. *Wrench* (1840), 3 Beav. 334; *Stevenson* v. *McLean* (1880), 5 Q.B.D. 346; *Nichols & Shepard* v. *Cumming* (1914), 6 W.W.R. 1325; *Burchell* v. *Gowrie and Blockhouse Collieries, Limited* (1910), A.C. 614 at p. 620; *Inchbald* v. *Western Neilgherry Coffee Co.* (1864), 17 C.B.N.S. 733; *Cole* v. *Read* (1914), 20 B.C. 365. He contracted with us that he had a property free of a lease, we get a purchaser and then find the principal building on the property is subject to a lease we cannot get rid of. That is a breach of contract, and we are entitled to commission: see Bowstead on Agency, 5th Ed. 205.

Argument

Harvey, in reply.

Cur. adv. vult.

6th April, 1915.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would allow the appeal for the reasons given by GALLIHER, J.A.

IRVING, J.A.

IRVING, J.A.: The plaintiff suses for a commission promised for an act performed by him. The act was to find a purchaser of property on certain terms laid down by the defendant.

MACDONALD, J.

1914

Oct. 16.

Whether the person he found was ready, able and willing to accept is a question of fact.

The learned judge has found this fact in the plaintiff's favour, and I do not think we should interfere with his finding.

COURT OF APPEAL

1915

April 6.

MARTIN, J.A. allowed the appeal for the reasons given by GALLIHER, J.A.

DUNPHY v. CARIBOO TRADING CO.

GALLIHER, J.A.: In my opinion this appeal narrows down to a consideration of whether the plaintiffs procured a purchaser ready, willing and able to carry out the deal upon the terms specified.

As to whether the purchaser was able to carry out the deal, while I might not have come to the same conclusion as the learned judge, I am not prepared to say he was wrong. There is only left for consideration then, whether he was ready and willing.

Accepting the learned judge's view that Cunliffe should not have entered into the lease, and by so doing prevented himself from carrying out the arrangements which he made with the plaintiffs (as the judge finds) that is not a complete answer, the plaintiffs must shew that had it not been for the lease, the proposed purchaser was ready and willing to carry out the deal on the terms set out. The purchaser, Turner, says he was, and if that answer stood alone it would be an end of the matter, but I think we should consider all the evidence and circumstances applicable to this answer.

It is to be noted that when Turner and his agent, Eldridge, were up at the property, they left without giving any intimation that they were desirous of purchasing or making any direct offer of purchase, and while they looked over the land and stock in a general way they did not go into the matter so as to ascertain whether there was approximately the quantity indicated in the memorandum on which the lump sum of $185,000 was based, not feeling desirous of purchasing, as they say, as the lease stood in the way. Nevertheless, one year afterwards, Turner swears he would have purchased but for the lease. I can hardly understand that. I could understand it if he had said that, finding the lease in the way I did not consider the

other features at all, so as to say whether I would or would not have purchased had not, for instance the number of cattle, quantity of hay or stock of goods in the store been below the mark. How could he truthfully say he would have completed the deal but for the lease if he had never placed himself in a position to judge of the amount and values of the chattels which formed a very considerable item in the transaction? A discussion arose on this very point and the evidence of both Turner and Eldridge is clear that they were claiming that they would deduct for any shortage, and Cunliffe refused to agree to this, saying the sale was for a lump sum and he would not in effect guarantee the quantity. Take for instance the item of cattle. There was supposed to be 550 head, and these on the hoof were valued at $85 per head, or a total of $44,750. Cunliffe said, "I think there is that many, more or less, but if not I will not stand for deduction for shortage," and Eldridge, in Turner's presence, claimed that he would deduct $85 per head for every head short, and in like manner regarding the other chattels. If Turner had gone on and satisfied himself that approximately, the goods and chattels were there or was there anything to shew that he had decided to take a chance, or in other words, that there was in his mind then the purpose to close the deal but for the lease, I might take a different view on this branch, but in the light of the evidence and the surrounding circumstances, I feel that I cannot accept the bald statement that he would have purchased but for the lease. Of course I feel the difficulty I am in, as the learned trial judge has accepted this as sufficient, but this is hardly a case of demeanour of witnesses or contradictory evidence, but rather of drawing an inference from circumstances and uncontradicted evidence.

GALLIHER, J.A.

Although not necessary to the decision on this point, I cannot say that the manner in which the plaintiff admits he proposed dickering for the first payment by exchange of Vancouver property impresses me very strongly as to the genuineness of his intention to purchase on the vendor's terms.

I would allow the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I think that this appeal should be dis-

MACDONALD, J.

1914

Oct. 16.

COURT OF APPEAL

1915

April 6.

DUNPHY v. CARIBOO TRADING CO.

missed. The learned judge, in my opinion, arrived at the right conclusion. The evidence is voluminous and the findings of fact thereon occur to me as being in complete accord with what actually did take place, that is the plaintiffs were duly authorized to effect a sale, and the relationship of principal and agent was duly effected and the plaintiffs did produce a purchaser ready, willing and able to complete upon the vendor's terms, and that the authority was a continuing one and was never determined. The sale was not possible of being carried out owing to the act of the vendors, *i.e.*, the principals, in leasing the hotel property, therefore, the plaintiffs having done all that they were called upon to do in law are entitled to recover the commission, being moneys due and payable to them as allowed to them by the learned trial judge.

In *Fuller* v. *Eames* (1892), 8 T.L.R. 278, an action for commission in procuring a loan, the money was available, but through an inaccuracy of statement by the proposed borrowers for whom the plaintiff was acting the proposed lenders refused to advance the money. A. L. Smith, J. at p. 279, said:

"that if he had been construing this agreement without the authorities of the cases cited, he might have held that this commission was only to be recovered if the money was actually paid, but the cases had long since been settled on such a contract as this—that if the person proposing to negotiate a loan brings the principals together, and if nothing remains for him to do, he is entitled to his commission. The plaintiff had done his part in this case."

MCPHILLIPS, J.A.

The present case is one in which the plaintiffs have done their part; they brought the purchaser to the defendants and through no fault of theirs the sale is impossible of being effected through the default of the principals, the defendants.

A somewhat similar point to that which arises in the present case, came up for consideration in the Manitoba Court of Appeal. *Herbert* v. *Vivian* (1913), 23 Man. L.R. 525, the judgment of Metcalfe, J. being affirmed. At p. 529, he said:

"I think the plaintiffs found for the defendant a purchaser ready and willing and able. The purchaser was satisfactory to the defendant. Subsequently, through the fault of the defendant, and through no fault of the plaintiffs, the deal went off."

Therefore being in complete agreement with the learned trial judge upon the facts, and being of the opinion that there is

ample authority to impose liability upon the defendants upon the facts, the judgment of the learned trial judge should, in my opinion, be affirmed and the appeal dismissed.

MACDONALD, J.

1914

Oct. 16.

COURT OF APPEAL

1915

April 6.

DUNPHY v. CARIBOO TRADING CO.

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

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

Solicitors for respondents: *Bowser, Reid & Wallbridge.*

PRATT *ET AL.* v. IDSARDI.

COURT OF APPEAL

1915

June 7.

PRATT v. IDSARDI

Master and servant—Contract—Breach of by servant—Sufficiency of cause —Damages for want of notice—Failure to seek other employment.

The plaintiffs employed for the season with a survey party by the defendant at monthly wages, with board and transportation to and from the place they were to work, refused to continue at a certain period before its completion on the grounds that the food was of an inferior quality, improperly cooked, and that the cook was unclean. In an action for the cost of transportation and one month's salary for damages for dismissal without notice the learned trial judge gave judgment for the plaintiffs.

Held, on appeal, that the complaint as to the food was not borne out by the evidence, that the plaintiffs left the defendant's service of their own accord, and the action should be dismissed.

Per MARTIN, J.A.: In any event the plaintiffs are not entitled to one month's wages in lieu of notice as they failed to comply with the requirements of the law in seeking other employment.

APPEAL from the decision of SCHULTZ, Co. J. in an action tried by him at Vancouver on the 29th of January, 1915. The defendant, a Provincial land surveyor, having been employed by the Provincial Government to superintend a survey party and the survey work in the Shuchartie and Nahwitti districts

Statement

COURT OF APPEAL

1915

June 7.

PRATT v. IDSARDI

Statement

of Vancouver Island for the Summer season of 1914, commencing on the 1st of May and finishing about the middle of October, employed the plaintiffs, amongst others, as members of the survey party. The arrangement was that if they continued at work until the end of the season they were to be paid their transportation to and from the *locus in quo* in addition to board and salary, but if they left their employment before the end of the season their transportation would not be paid. On the 19th of September the plaintiffs quit work, owing, as they allege, to the food being improperly cooked and unfit for human consumption, and that the defendant would not dismiss the cook when they demanded his discharge. The defendant paid their wages to date, but refused to pay the cost of their transportation. The plaintiffs sued the defendant for cost of transportation and one month's salary as damages for forcing them to quit work without due notice to enable them to procure other employment. The learned trial judge gave judgment for the plaintiffs. The defendant appealed.

The appeal was argued at Vancouver on the 6th of April, 1915, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

J. K. Kennedy, for appellant: The plaintiffs were employed for surveyors' work generally until the work was completed. They commenced work on the 1st of May and expected to finish in the middle of October. On the 19th of September they quit work, complaining of the food and the uncleanliness of the cook. They demanded the dismissal of the cook, which was refused. They ask for damages in lieu of one month's wages for dismissal without notice. We say they were not dismissed. They quit work of their own accord. In any event, they do not shew they sought for and failed to obtain other employment: see *Lamberton* v. *Vancouver Temperance Hotel* (1904), 11 B.C. 67; *Andrews* v. *Pacific Coast Coal Mines, Ltd.* (1910), 15 B.C. 56.

J. A. Russell, for respondents: The evidence shews the food was unfit for human consumption and they were justified in

their action. They were wrongfully discharged without notice, and are entitled to one month's wages.

Kennedy, in reply.

Cur. adv. vult.

7th June, 1915.

COURT OF APPEAL

1915

June 7.

PRATT v. IDSARDI

MACDONALD, C.J.A.: The plaintiffs were employed by the defendant as members of a party making surveys for the Provincial Government in a remote part of Vancouver Island. They were engaged for the season commencing on the 1st of May, and it was calculated that the season would end about the middle of October. The terms of employment were their board, the agreed wages per month, and the fares of the men to the place of their labours and return. On the 19th of September the plaintiffs refused to continue their work and voluntarily left the defendant's employment. He offered to pay them their wages up to the time they left work, but refused to pay their return fares. It is conceded by their counsel that if the plaintiffs refused to continue in defendant's employ to the end of the season without just cause for quitting their employment this action cannot be maintained. The plaintiffs afterwards accepted the amount tendered and have obtained judgment in their favour for their return fares and one month's wages for the balance of the season of their employment.

MACDONALD, C.J.A.

The defendant's counsel contended that there was a misjoinder of parties and also that the plaintiffs had neglected to offer evidence that they had sought employment to mitigate their damages, but in view of the conclusion I have come to on the merits, I need not consider these matters.

Plaintiffs left their employment because of the alleged inferior quality of the food supplied them by the defendant and the manner in which it was cooked, and the alleged lack of cleanliness of the cook. On the morning of the 19th, and without previous notice to defendant, they refused to go to work except on the condition that the defendant would discharge the cook and procure another in his place, and as the defendant refused to comply with this demand they left his employment and refused to continue although defendant begged them to do so. In my opinion, the plaintiffs were not justified,

COURT OF APPEAL

1915

June 7.

PRATT v. IDSARDI

even on their own evidence, in the course they took. As a Court of rehearing, we have to consider the appeal both on the facts and on the law. We cannot dismiss it with the observation that the learned judge below was in a better position than we are to judge of the weight of the evidence or the credibility of the witnesses. The rule which should govern a Court of Appeal in this regard is well established: great weight is to be given to the finding of the trial judge upon the facts when that finding may be influenced by the conduct and demeanour of the witnesses, but his findings cannot release us from our duty to rehear the case on the facts.

The evidence of the plaintiffs and their witnesses, will, on analysis, be found to be very unsatisfactory. Indeed, the inference I would draw from that evidence alone is that the plaintiffs were not justified in quitting the employment. Ward, one of the survey party but not a plaintiff, was called to the witness-box by the plaintiffs' counsel, and put forward by him as "an independent witness." On cross-examination he was obliged to admit, "in regard to the quality of the cooking, in the main it was all right, the main kick was one about there not being enough of it." Now, no complaint is made in the pleadings about there not being enough of it, and it was conceded by plaintiffs' counsel, on the argument in this appeal, that the quantity of food was not in issue in this action. This witness further stated: "As far as I am concerned, the porridge and beans sometimes were not cooked up to standard."

MACDONALD, C.J.A.

Now, the cooking of the porridge and beans is one of the plaintiffs' main grievances. Again, the witness said: "Ham, pastries, vegetables, etc., were there up to a fair standard." The bread, butter, coffee, potatoes, bully-beef, dried fruit, and many other articles are admitted by plaintiffs to have been good. With regard to the complaint of uncleanliness of the cook, and of the dishes and cooking utensils, assuming that there was some ground of complaint in this connection, I am of opinion, after reading the evidence of the plaintiffs, and giving it such credence and weight as it deserves in view of its many inconsistencies and manifest exaggerations, that this complaint furnishes no just cause for their quitting the employment.

The conduct of the plaintiffs in raiding the cook tent before leaving, and pushing aside defendant's wife, who happened to be there, causing her to fall, is a circumstance reflecting upon the temper of those participating in it, and does not tend to strengthen belief in their reasonableness.

I would allow the appeal and dismiss the action, with costs here and below.

MARTIN, J.A.: Apart from all other objections, the appeal should, in my opinion, be allowed, because the plaintiffs were not justified in leaving the defendant's service as they did. Assuming that the food and cooking were not up to what the plaintiffs should reasonably have been entitled to in a camp in that remote locality, and in those conditions (which I am very far from assuming on the very unsatisfactory evidence), yet the plaintiffs did not give the defendant reasonable notice and opportunity to remedy complaints, but acted in a hasty, peremptory, and improper manner, and in effect terminated their own service in such a way as to give them no further claim upon their employer. The plaintiff Dickson, for example, admits that the defendant had not been notified of the complaints for at least a month before the 18th of September.

MARTIN, J.A.

Furthermore, and in any event, the judgment could not stand for the full amount, giving them one month's wages in lieu of notice, because the plaintiffs failed to comply with the requirement of our Courts in seeking other employment, as referred to in this Court in *Andrews* v. *Pacific Coast Coal Mines, Ltd.* (1909), 15 B.C. 56 at pp. 63-4, and therefore, in any event, the appeal should be allowed and the judgment reduced to the proper amount. But, as I take the view that the plaintiffs left their employment without just cause, it is unnecessary to pursue this branch, since their whole case fails.

GALLIHER, J.A.: In deference to the finding of the learned trial judge, I have carefully read and considered the evidence in this case.

GALLIHER, J.A.

The quality of food is a relative term. For instance, one cannot expect the same quality of food in a camp in the wilds of Northern Vancouver Island as they would at a point con-

COURT OF APPEAL

1915

June 7.

PRATT v. IDSARDI

GALLIHER, J.A.

tiguous to market, nor the same neatness and cleanliness in such a camp as in one's private house or in a good restaurant. All conditions and circumstances must be taken into consideration, and the evidence of the plaintiffs, when sifted, after all amounts to little more than isolated cases when one item of diet sometimes, and a different one at others, was somewhat off colour. On the whole, and considering all the circumstances, there was not, in my opinion, sufficient to justify the plaintiffs leaving in a body, as I find they did, seriously hampering the work, and in face of the defendant's promise to do what he could to better conditions, a promise which I think the plaintiffs should have given the defendant at least a few days to endeavour to make good.

The appeal should be allowed, with costs, and the action dismissed, with costs.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree with my brother MARTIN—and that the appeal should be allowed.

Appeal allowed.

Solicitor for appellant: *Alan C. Mackintosh.*
Solicitor for respondents: *J. A. Russell.*

THE KING v. THE "DESPATCH."

MARTIN, LO. J.A.

1915

June 18.

THE KING v. THE "DESPATCH"

Admiralty law—Ship—Collision—Damages—Security for costs—Crown action suspended until security given in defendant's action — Actions consolidated—The Admiralty Court Act, 1861 (24 Vict., Cap. 10), Sec. 34—Rules 33 and 34.

Proceedings in an action by the Crown against a ship for damages to a King's ship through collision will be suspended on motion under section 34 of The Admiralty Court Act, 1861, until the Crown has given security to answer a judgment the defendants anticipate recovering in a cross-cause *in personam* against the master of the King's ship for damages arising out of the same collision.

Held, further, that apart from the statute, the matter is one where the two actions should be consolidated under rules 33 and 34.

MOTION under section 34 of The Admiralty Court Act, 1861, by the owners of the defendant ship, to suspend the proceedings in this cause by the Crown against said ship for damages for collision to the Canadian Government tug Point Hope until the Crown has given security to answer a judgment which the defendants hope to recover in a cross-cause *in personam* begun by them against one W. D. McDougal, the master of the said tug Point Hope, and servant of the Crown, for damages alleged to have been caused by said tug, under his command, to the said ship Despatch in the same collision upon which this action is brought, and also that it may be ordered that the two actions shall be tried at the same time and upon the same evidence. Heard by MARTIN, LO. J.A. at Victoria on the 18th of June, 1915. Statement

Mayers, for the ship.
Lowe, for the Crown.

MARTIN, LO. J.A. (after stating the facts as set out in statement): The defendant ship Despatch has been arrested and bailed, but the Point Hope being a King's ship cannot be arrested (*The Comus* (1816), 2 Dod. 464; *The Athol* (1842), 1 W. Rob. 374), nor the Crown sued for damages caused Judgment

MARTIN, LO. J.A.

1915

June 18.

THE KING v. THE "DESPATCH"

thereby, so the officer in charge has been sued *in personam*: Roscoe's Admiralty Practice, 3rd Ed., 178 (note *l*), 302; Williams & Bruce's Admiralty Practice, 3rd Ed., 89, 262; *Hettihewage Siman Appu* v. *The Queen's Advocate* (1884), 9 App. Cas. 571 at p. 586; *H.M.S. Sans Pareil* (1900), P. 267; *H.M.S. King Alfred* (1913), 30 T.L.R. 102; and *H.M.S. Hawke* (1913), 29 T.L.R. 441; (1913), P. 214. I pause to observe that in the case of *The Lord Hobart* (1815), 2 Dod. 100, a packet in the service of H.M. Post Office but belonging to private individuals was arrested, to answer a claim for wages, the post office having no objection to such a course in cases of that kind, and having dispensed with the customary notice, p. 103.

The Crown has refused in this action to give security after demand therefor.

If the Crown were not a party there could be no answer to the application, and indeed, it was only opposed on the point on which I desired further argument and authority, *viz.*: as to whether or no it was proper to stay an action by the Crown and so in effect to compel it to give security in its own Court. Counsel have been unable to direct my attention to any case exactly in point, but have referred me to the following authorities: Admiralty Rules 33 and 34; Howell's Admiralty Practice, 26; Roscoe's Admiralty Practice, 3rd Ed., 178, 324; Williams & Bruce's Admiralty Practice, 3rd Ed., 370-2; *Attorney-General* v. *Brooksbank* (1827), 1 Y. & J. 439; *King of Spain* v. *Hullet* (1833), 1 Cl. & F. 333; *The Cameo* (1862), Lush. 408; *Prioleau* v. *United States, and Andrew Johnson* (1866), L.R. 2 Eq. 659; *The Charkieh* (1873), L.R. 4 A. & E. 120; *Secretary of State for War* v. *Chubb* (1880), 43 L.T.N.S. 83; *Hettihewage Siman Appu* v. *The Queen's Advocate, supra*; *The Newbattle* (1885), 10 P.D. 33; *Regina* v. *Grant* (1896), 17 Pr. 165; and *Carr* v. *Fracis Times & Co.* (1902), A.C. 176 (The Sultan of Muscat's case). I extract from them the general rule, well stated by Osler, J.A. in *Regina* v. *Grant, supra* (where the question was one of dispensing with a jury), that as regards procedure, "the Crown, coming into the High Court, is in the same position as the subject," just as, on the other

Judgment

hand, as Burton, J.A. put it (p. 167), when in that Court "the Queen . . . . cannot be entitled to less rights than those of the meanest of her subjects," and, "I do not think the rights of the defendants are abridged or enlarged by reason of the plaintiff in this case being the Sovereign." Osler, J. further remarked on said p. 169:

"It might have been thought that without the aid of any special enactment, the mode in which the remedy of the Crown would be pursued and the relief sought administered would be in accordance with the course and constitution of the forum selected as between subject and subject, so that the Crown, coming into a forum in which, as between subject and subject, trial by jury had ceased to be the general mode of disposing of issues of fact, except in certain specified cases, would be bound to follow, or would have the right to take advantage of, the prescribed practice in order to obtain a jury or to deprive the defendant of his claim for one."

There is an exception, of course, where the dignity of the Crown might be affected, as in the case of the Attorney-General not being required to make discovery on oath, cited in *Prioleau* v. *United States, and Andrew Johnson, supra,* p. 664. But, in my opinion, no question of that kind arises here, and by analogy I cite this language of their Lordships of the Privy Council in the *Hettihewage* case, *supra,* p. 589:

"The Crown suffers no more indignity or disadvantage by this species of defence than it would suffer by defences of a more direct kind, which yet would be clearly admissible: as, for instance, if a breach of contract sued on by the Crown were excused on the ground that the wrongful action of the Crown itself had led up to that breach."

Judgment

This was held even in a case where it was said, p. 588:

"It is true that the course taken by the Courts below does practically give an effective execution against the Crown to the extent of the Crown's claim against the defendants. But though the Crown is thereby prevented from recovering its debt, it is not exposed to the indignity attendant upon process of execution."

In the case of the *Attorney-General* v. *Brooksbank, supra,* the Courts stayed proceedings on an information filed by the Attorney-General against army agents to account to the Crown for certain moneys until certain documents were produced by the War Office; and in the *Secretary of State for War* v. *Chubb, supra,* the Court refused to grant the plaintiff an injunction unless the Crown gave the usual undertaking in damages, Jessel, M.R. saying, in answer to the objection "that the Crown could not be bound in such an undertaking":

MARTIN, LO. J.A.

1915

June 18.

THE KING v. THE "DESPATCH"

"I can see no reason for making an exception in favour of the Crown in a matter of common and universal practice. If the Crown cannot give the usual undertaking in damages, I cannot grant the interim injunction."

If this case had been one brought by a foreign prince instead of by our own Sovereign, I should not have reserved judgment, because the former, when he comes as a suitor, is only acknowledged as a "private individual"—*Prioleau* v. *United States, and Andrew Johnson, supra*—and as Brett, M.R. said in *The Newbattle, supra,* p. 35:

"It has always, however, been held that if a sovereign prince invokes the jurisdiction of the Court as a plaintiff, the Court can make all proper orders against him. The Court has never hesitated to exercise its powers against a foreign government to this extent."

It was said in *King of Spain* v. *Hullet, supra,* p. 353, that "the practice of the Court is part of the law of the Court," and in *The Cameo, supra,* Dr. Lushington said "the intention of the Act was to put the two contending parties on a fair footing," and this can only be done in the present circumstances by allowing the present application, with costs to the defendant in any event, as the request for security was refused. It is desirable to add that, quite apart from the statute, the matter is obviously one where the two actions should be consolidated under rules 33 and 34, and as a matter of precaution I make an order to that effect, it having been conceded that the cases should be tried together.

Judgment

Order accordingly.

EX PARTE LAMSON.

CLEMENT, J.

1915

June 26.

EX PARTE LAMSON

Tax-sale deed—Registration of title—Land Registry Act, R.S.B.C. 1911, Cap. 127, Secs. 16, 36, 108 and 134.

There being no valid objection to the title, an owner of land under a tax-sale deed is entitled to registration as owner in the absolute fee register. On a subsequent application for an indefeasible title the registrar cannot refuse an indefeasible title on the mere ground that the root of title is a tax-sale.

APPLICATION by way of petition, under section 108 of the Land Registry Act, for a direction to the district registrar of titles to register the owner of an absolute fee derived under a tax-sale deed in the indefeasible fee register, under an application made on Form N, under section 16 of the Land Registry Act. Heard by CLEMENT, J. at New Westminster on the 26th of June, 1915.

Statement

The district registrar of titles refused to register on the ground that the applicant's title being derived from a tax-sale deed, he was not entitled to registration in the indefeasible fee register until he had obtained a declaration of title under the Quieting Titles Act, or a confirmation of his title by the person registered as owner at the time of the tax sale, and that under section 36 of the Land Registry Act the registrar was required to "register the person entitled under such tax sale as owner" only in the absolute fee register.

J. R. Grant, for the applicant.

The District Registrar, in person, *contra.*

CLEMENT, J.

CLEMENT, J.: The true construction of section 36 of the Land Registry Act is that upon service of notice in writing, under the said Act, on all persons interested in the land applied to be registered, requiring them, and each of them, within the time limited by such notice, to contest the claim of the tax purchaser, such persons, in default of a caveat or certificate of *lis*

CLEMENT, J.

1915

June 26.

EX PARTE LAMSON

pendens being filed by them before the registration as owner of the person entitled under such tax sale, and those claiming through or under him, shall be forever estopped and debarred from setting up any claim to, or in respect of the land so sold for taxes, notwithstanding any irregularities in the tax sale, or in any of the proceedings relating thereto, or the regularity of the tax-sale proceedings, or any proceedings prior to or having relation to the assessment of the said land. There being no other valid objections to the title, I am of opinion that as against such persons, the party claiming under such tax-sale deed should be entitled to registration as owner of the said land so sold for taxes in the absolute fee register. On a subsequent application for an indefeasible title, the registrar, having satisfied himself as to the due service of the aforesaid notices, cannot refuse an indefeasible title on the mere ground that the root of title is a tax sale. The district registrar of titles should proceed with his inquiry as to the fact of service of the notices under section 36 on the persons entitled to receive notice thereunder, and serve any notice he may think necessary under section 134 of the Land Registry Act. Subject thereto, the petitioner's prayer is granted.

CLEMENT, J.

Petition granted.

ANDERSON v. FULLER.

MORRISON, J.

1915

March 15.

COURT OF APPEAL

June 11.

ANDERSON v. FULLER

Sale of land—Farm—Misrepresentations as to by vendor's agents—What constitutes fraud—Foreclosure—Estoppel—Damages.

The plaintiff purchased a farm on Lulu Island after negotiations with the defendant's agents and an examination of the property. During negotiations the agents made representations as to the annual hay crop, the quality of the dyking protecting the land and the underdraining. The plaintiff on taking possession paid $13,000 on account of the purchase price of $30,000. Subsequently there being default in the payments due on the purchase price the vendor (defendant) foreclosed, and the plaintiff was obliged to give up possession. The plaintiff then brought action for damages suffered through his having purchased the property relying on the statements of the vendor's agents, alleging that the hay crop was not as represented, that the dyking was defective, having broken while he was in possession, and that the underdraining was not as represented. The trial judge gave judgment for the plaintiff, holding that the proper measure of damages was the amount paid by the plaintiff on account of the purchase price, with interest and a reasonable sum for time, labour, and wages expended on the place.

Held, on appeal, reversing the judgment of MORRISON, J., that although the misrepresentations complained of may have been made, they may have been innocently made and there was nothing in the evidence to disclose anything in the nature of fraud: that is to say *mens rea* or that statements and representations were made so recklessly as to bring the case within what amounts to actual fraud.

APPEAL from the decision of MORRISON, J. in an action tried by him at Vancouver, without a jury, on the 3rd, 4th, 5th and 8th of March, 1915, for the recovery of $13,236 on the grounds of fraud and misrepresentation. The sum claimed was part of $30,000, purchase price of 100 acres of farming land obtained through a firm of real-estate agents. Owing to some apprehensiveness on the part of the agents as to the payment of commission, the agreement of sale was made out in their names as vendors, but the negotiations were carried on by them as agents of the defendant with the plaintiff. The representations made were, shortly, that the land would yield 400 tons of hay to the acre, that it was efficiently dyked and properly underdrained. The dykes broke and the underdraining was

Statement

MORRISON, J.

1915

March 15.

COURT OF APPEAL

June 11.

ANDERSON v. FULLER

Statement

insufficient. Plaintiff complained and defendant indicated that redress would be forthcoming. In the meantime defendant took proceedings to foreclose out the agents under an agreement for purchase and sale between them and him (under which title they assumed to sell to the plaintiff as owners) and he did eventually foreclose them. Defendant, in these proceedings, told the plaintiff not to notice any process served on him, as the action was against the agents and would not affect him. Eventually he was threatened with eviction, and under such threats left the place. He then brought action, the defence to which was estoppel, laches, acquiescence, and that he had not purchased from the defendant. It was held by the trial judge that there had been deceit and misrepresentation, and he gave judgment accordingly. Defendant appealed.

Mowat, for plaintiff.

Sir C. H. Tupper, K.C. (*Head,* with him), for defendant.

15th March, 1915.

MORRISON, J.

MORRISON, J.: The plaintiff is an illiterate, confiding farmer. Having been attracted by a conspicuous advertisement in a newspaper, inserted by a firm of real-estate agents, with whom the property had been listed by the defendant, pointing out to intending purchasers the alluring opportunity opened for acquiring the farm in question, he interviewed the agents, who, as they now say, and as the plaintiff also repeats, confirmed the representations therein made as coming from the defendant. The plaintiff and his wife proceeded to the farm and there met the defendant, from whom they made some prudent, precautionary inquiries. He told them the dykes were efficient, that the land was properly underdrained, and that it would yield a yearly crop of 400 tons of hay. This reiteration by the owner satisfied them on those essential points, and in due course they consummated the purchase. Before so doing there were preliminary negotiations as to price, the amount of deposit to be made, and the commission to be paid the agents. The defendant would not agree with the real-estate agents either to pay the commission or guarantee it, so it was arranged, in order to safeguard them in that respect, that the agreement of pur-

chase should be made out direct to them by the defendant, the area so conveyed to contain some 131 acres odd, and that they in turn should agree to convey to the plaintiff the 100 acres within the dyke. The odd acres were outside the dyke, and for farming purposes really valueless. This outside land was to be held as security for the commission on the sale. At the same time—a part of the same transaction—the necessary transfer of the 100 acres was made to the plaintiff by the agents. He took possession in the fall of 1911. That winter season was a dry, frosty one, and no serious defect in the dykes evinced itself. The succeeding season the land only yielded some 280 tons of hay, and in the fall and winter of 1912-13 high tides occurred and the place became badly flooded. The dykes proved inadequate, and the season of 1913 crop was much less than the previous year. They gave way to such an extent that the services of a dredge were engaged, and altogether the place became unfit practically for hay cultivation. In addition to this, the underdraining, if any, fell very far short of what was represented. The plaintiff made complaints and protests, and the defendant seems to have assured him that remedy in some form would be forthcoming. Ultimately he assured the plaintiff that he was about getting rid of the agents, in which event he would then deal with him exclusively, and by implication, if not by direct assurance, led the plaintiff to consider that as between them he would be protected. In this regard the defendant told the plaintiff that he was about to take legal proceedings against the agents and that he, the plaintiff, would, in consequence, necessarily be served with a "summons," but not to mind that circumstance, as it was merely a bluff to get the agents out of the way. The defendant issued a writ in a foreclosure suit, a copy of which was duly served upon the plaintiff. Very shortly thereafter the defendant saw the plaintiff and asked him if he had been served with the "summons," and, upon being told that such was the case, he again told the plaintiff not to take any notice of it, nor to take any steps in the matter whatever. The plaintiff, relying upon what the defendant thus told him, did nothing. In due course the suit proceeded, without resistance from the agents, of

MORRISON, J.

1915

March 15.

COURT OF APPEAL

June 11.

ANDERSON v. FULLER

course, nor from the present plaintiff, because he was lulled to sleep by the defendant herein, and the usual orders for foreclosure were made. The plaintiff was notified that he must quit possession, and finally, upon threat to put in the sheriff, he did quit possession. There were several interviews between the plaintiff and defendant and also between the plaintiff and defendant's solicitor, who were acting *bona fide* throughout under instructions from the defendant, but I deem those of minor importance, and, in reality, supporting the view that the plaintiff was utterly at the defendant's mercy. He confidently and honestly entered into this transaction. He gallantly, though vainly, strove to make the best of what began to dawn on him was a bad bargain, into which he had put, for him, a very large amount of hard-earned money—in fact, all he had. He was ready, according to his limited understanding, to remain with the place to the last, and did remain until threatened with ejectment.

The outcome has been that the plaintiff has parted with some $13,000, about $11,000 of which the defendant retains, as well as the land. For this state of affairs, brought about substantially as I have baldly recited, there must be some adequate remedy.

The material representations made to the plaintiff by and on behalf of the defendant were that the land would yield 400 tons of hay annually; that the dykes were sufficient to protect the land from the waters without; and that the underdrains were sufficient. A dyke is like a chain in that it is no stronger than its weakest part. That, until it is subjected to the supreme test of the highest reasonably anticipated water, no reasonably careful inspection just before purchase can disclose the fatal defect. As to the underdrains, it seems to me obvious that a purchaser is justified in relying upon the owner's representations respecting them. The plaintiff impressed me from his appearance, and his quiet, respectful, frank demeanour on the witness stand, as being an unsuspicious, susceptible individual, quite unready to cope with enterprising, eager men, such as those with whom he was dealing in this matter.

MORRISON, J.

I think the defendant, within whose province it was to know those particular facts, was under a duty to exercise care in

giving the plaintiff the information which determined his course. "A common form of dishonesty is a false representation fraudulently made, and it was laid down that it was fraudulently made if the defendant made it knowing it to be false, or recklessly, neither knowing nor caring whether it was false or true. That is fraud in its strict sense": *Nocton* v. *Ashburton (Lord)* (1914), 83 L.J., Ch. 784, *per* the Lord Chancellor at p. 794. The defendant kept on deceiving the plaintiff and now attempts, by raising the plea of estoppel, to protect himself from the consequences. From the impression at the trial created by the respective parties, I do not think there is any element of estoppel in the case. I think the proper measure of damages is the amount paid over by the plaintiff in consequence of his dealings with the defendant, with interest, as well as a reasonable sum for time, labour and wages expended on the place.

MORRISON, J.

There will be judgment accordingly, with costs.

The appeal was argued at Victoria on the 10th and 11th of June, 1915, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

Sir C. H. Tupper, K.C., for appellant: The brokers purchased the 134 acres, 100 of which were inside the dykes and 34 outside, for $30,000. They then sold the 100 acres to the plaintiff for $30,000, retaining the 34 acres as their commission. The purchase was made by agreement for sale and the plaintiff examined the ground carefully before purchasing, having had a two weeks' option for that purpose. It is difficult to sustain an action of fraud and deceit where there is no written evidence and the conversations relied on took place a long time before the evidence was given: see *United Shoe Manufacturing Company of Canada* v. *Brunet* (1909), A.C. 330 at p. 339; 78 L.J., P.C. 101 at p. 104. The principle of restitution does not apply to an action of deceit, the only relief is damages: see Spencer Bower on Actionable Misrepresentation. On the question of the assessment of damages see *Beatty* v. *Bauer* (1913), 18 B.C. 161. The matter was disposed of by the foreclosure proceedings to which the plaintiff assented; he

Argument

MORRISON, J. 1915 March 15. COURT OF APPEAL June 11. ANDERSON v. FULLER

is estopped from bringing this action: see Halsbury's Laws of England, Vol. 13, p. 166, Vol. 20, pp. 747-9.

M. A. Macdonald, for respondent: The representations made by the agents as to the crop of hay, the dykes and the underdrains were untrue and an examination of the property by the plaintiff would not disclose these defects. The case resolves itself to the point that the trial judge has found fraud, and the duty of the Court of Appeal is to decide whether there was evidence from which he might reasonably find fraud: see *Derry* v. *Peek* (1889), 14 App. Cas. 337.

MACDONALD, C.J.A.: I would allow the appeal, and it seems to me perfectly plain, that there is no evidence that would sustain the learned trial judge's finding of fraud. It may be that the representations which the plaintiff complains of were made. If I had to consider the fact as to whether they were made or not, I might find myself bound by the finding of the learned trial judge, who apparently believed that these representations were made, but the representations may have been made, and yet may have been innocent misrepresentations.

The difficulty in the plaintiff's way, as I see the case, is to bring home anything in the nature of fraud to the defendant; that is to say, either *mens rea*, or that the statements and representations were made so recklessly as to bring the case within what has been said by judges in a number of cases will amount to actual fraud, although there may be an absence of *mens rea,* which must be present in actual fraud. In other words, where a person makes a statement recklessly without caring whether it be true or false, then that amounts to fraud. Now I find nothing of that sort in this case, and I find no dishonest motive in this case, and therefore, as the case is based entirely on deceit, although I have every sympathy with the plaintiff, I think I must allow the appeal and dismiss his action.

MACDONALD, C.J.A.

GALLIHER, J.A.: I agree with what the Chief Justice has said.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I agree in allowing the appeal. Firstly, I am of opinion that owing to lapse of time, the plaintiff

MCPHILLIPS, J.A.

MORRISON, J.

1915

March 15.

COURT OF APPEAL

June 11.

ANDERSON v. FULLER

being party to an action for specific performance and the Court having held that it was a contract that should be performed, is not now enabled to set up a contention of fraudulent misrepresentation. If I am wrong in that, secondly, I am of opinion that there was no fraudulent representation here of such character as would entitle damages being given. At best all that the plaintiff would have been entitled to get upon the facts as proved in this case, would have been rescission, *i.e.*, that the contract be rescinded. That he did not set up in the action upon the contract, in fact he allowed the decree to go against him, whereby it is *res judicata* as against him, and therefore it is clear that there is no remedy that is now open to him.

Appeal allowed.

Solicitors for appellant: *Tupper, Kitto & Wightman.*
Solicitors for respondent: *Russell, Mowat & Wismer.*

VICTORIA AND SAANICH MOTOR TRANSPORTATION COMPANY v. WOOD MOTOR COMPANY, LIMITED.

COURT OF APPEAL

1915

June 30.

VICTORIA AND SAANICH MOTOR TRANSPORTATION CO. v. WOOD MOTOR CO.

Sale of goods—Breach of warranty—Measure of damages—Excessive repairs—Set-off and counterclaim—Costs—"Event"—Meaning of—Marginal rules 199, 231 and 250—Sale of Goods Act, R.S.B.C. 1911, Cap. 208, Sec. 67 (3).

The true measure of damages for breach of warranty as to the standard of a motor-truck is the difference between the price paid for the truck and its market value at the date of the sale.

In construing the statutory provision that the costs are to follow the event, the word "event" must be read distributively, so as to include where necessary one or more events.

On the construction of Order XIX., r. 3 (marginal rule 199), the words "shall have the same effect as a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim," mean that the cross-claim shall have that

COURT OF APPEAL

1915

June 30.

effect merely for the purpose of enabling the Court to pronounce such final judgment, and the right to set-off in the wide sense of the language of the first part of the rule enables any cross-claim to be pleaded by way of defence, and not necessarily by way of counterclaim, with the result that a defendant may elect whether he will plead his cross-claim as a set-off or by way of counterclaim.

VICTORIA AND SAANICH MOTOR TRANSPORTATION CO. v. WOOD MOTOR CO.

APPEAL from the decision of GREGORY, J. made on the 12th of March, 1915, pursuant to a decision of the Court of Appeal directing a new trial to assess damages on a breach of warranty. The action arose through the purchase by the plaintiff from the defendant of a three-ton Mack motor-truck. After the plaintiff had used the truck for about ten months he discovered that it was only a two-ton truck and complained of the fact to the defendant, but he continued to use it for three weeks longer, when the defendant Company took possession of it, under the terms of the agreement of purchase, for non-payment of a portion of the purchase price, and held it pending payment by the plaintiff of the money due. The plaintiff then brought action for breach of warranty and for fraudulent misrepresentation, claiming that the truck in question was only a two-ton truck; they demanded the return and cancellation of the unpaid notes for the purchase price, repayment of the money paid, payment of the moneys spent in repairs, and damages for loss of business. The defendant counterclaimed for $319.48 on an open account, and $2,018.53, being the balance due on the purchase price of the motor-truck. The learned trial judge dismissed the action and gave judgment for the defendant on the counterclaim. On appeal, the Court of Appeal held that the notes must be paid by the plaintiff, but that the plaintiff was entitled to damages for breach of warranty. The case was referred back for a new trial to assess the amount of damages to which the plaintiff was entitled, for adjustment of the accounts between the parties, and apportionment of the costs. On the re-hearing, the learned trial judge assessed the damages to which plaintiff was entitled as follow: $700, being the difference between the cost of a three-ton Mack truck and the contract price; and $295 as the excessive cost of repairs and maintenance due to overloading, with interest on said sums, the defendant being allowed to set off from said sums the amount due on the unpaid notes and judg-

Statement

ment on the counterclaim. The defendant was allowed the costs of the first trial and the counterclaim, and the counterclaim of the second trial; and the plaintiff the costs of the second trial. The plaintiff appealed on the grounds that the learned trial judge, in assessing the damages, proceeded on a wrong principle, that the amount was inadequate, and that he erred in his decision as to the costs to be borne respectively by the plaintiff and the defendant. The defendant cross-appealed.

The appeal was argued at Vancouver on the 10th of May, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Higgins, for appellant: The damages were assessed on a wrong principle. It has been shewn that the defendant charged $4,800 for a truck that was only worth $3,000. Under the authorities it is not the contract price, but the actual value of the article that must be considered in assessing damages: see *Church* v. *Abell* (1877), 1 S.C.R. 442 at p. 459; *Tomlinson* v. *Morris* (1886), 12 Ont. 311; *Cull* v. *Roberts* (1897), 28 Ont. 591. We are entitled to whatever we are overcharged, and special damages for depreciation, additional cost of repairs and loss of business.

Harold B. Robertson, for respondent: The damages were assessed on the difference between the value of the car to the plaintiff and the value of a car that is up to the warranty. As to cost of repairs, the car was overloaded by the plaintiff, and this accounts for the large cost of repairs. We were allowed a counterclaim, but we contend it was clearly a set-off: see Order XXI., r. 17; *Government of Newfoundland* v. *Newfoundland Railway Co.* (1888), 13 App. Cas. 199; *Bankes* v. *Jarvis* (1903), 1 K.B. 549; *Wallis, Son & Wells* v. *Pratt & Haynes* (1911), A.C. 394.

Argument

Higgins, in reply, referred to *Roper* v. *Johnson* (1873), L.R. 8 C.P. 167; *Michael* v. *Hart & Co.* (1902), 1 K.B. 482; *Wertheim* v. *Chicoutimi Pulp Co.* (1910), 80 L.J., P.C. 91.

Cur. adv. vult.

30th June, 1915.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: This is an appeal from an assessment

COURT OF APPEAL

1915

June 30.

VICTORIA AND SAANICH MOTOR TRANSPORTATION CO. v. WOOD MOTOR CO.

of damages for breach of warranty that a motor-truck sold by defendant to plaintiff was a three-ton truck. The assessment complained of was made pursuant to a judgment of this Court on a previous appeal: (1914), 20 B.C. 537.

The trial judge assessed the damages under two heads: he allowed $700, the difference between the price of a standard Mack three-ton truck and the price plaintiffs agreed to pay for the one in question; and also the sum of $295.25 to cover increased cost of repair of the truck over what he thought would have been the cost of repair had the truck been used as a two-ton truck.

The plaintiff appealed on the ground that the assessment was made on a wrong principle, and the amount was inadequate.

The defendant cross-appealed on the ground that the allowance of $295.25 was not justified by the evidence. Both parties also appealed against the disposition of the costs. I think the said sum of $700 was arrived at on a wrong principle. The true measure of damages is not the difference in price between the truck in question and a standard three-ton Mack, but is the difference between the price paid for the truck in question, namely, $4,800, and the market value of it at the date of the sale.

MACDONALD, C.J.A.

The plaintiff, by its user of the truck for three weeks after it discovered that it was not as represented, thereby elected to keep it and sued upon the warranty. Had plaintiff discovered the truth at the time the truck was delivered, and elected to keep it, it is manifest that all it could have recovered is the difference between the price it agreed to pay, or had paid, and the market price at that time. In my opinion, the use of the truck for several months before discovery of its true capacity, and the election after that discovery, does not change the situation in respect of the question now under consideration. The use of the truck for several months without knowledge of its true capacity may have entailed expense in the way of repairs which would entitle the plaintiff to additional damages. That is covered by the item of $295.25.

Now, the evidence in this case is that the truck was rated at the factory a two-ton truck. The defendant contends that it

was better than the standard truck, that it had been strengthened in certain parts, rendering it capable of carrying a load of three tons. There is no evidence that it was less valuable than the standard two-ton truck. Hence, it is entirely fair to the plaintiff to take the market price of the standard two-ton truck, deduct that from the price it was to pay for this truck, and adopt the result as the measure of damages. Now, the difference is $550, not $700, and the damages should be reduced accordingly.

It is true the defendant has not appealed against the allowance of the $700 item, but as the plaintiff has appealed, the matter is open, and I ought to give the judgment which in my opinion should have been given below.

As to the item of $295.25, I cannot say that the allowance of this sum was wrong. The plaintiff used the truck for several months under the belief that it could safely carry three-ton loads. This mistaken belief, and consequent overloading of the truck, may very well have added to the cost of repairs. The learned judge thought $295.25 a fair and reasonable sum to allow. No sum could be arrived at with any degree of accuracy. It was a matter of inference from the facts in evidence, and I am not disposed to interfere with the conclusion arrived at by the learned trial judge.

On the main question, therefore, there should be a reduction of $150, and an aliquot part of the interest allowed on the $700.

MACDONALD, C.J.A.

As the whole contest in this costly litigation arose out of the defendant's breach of contract, and as it disputed its liability all through the trial and until established by the judgment of this Court, and as apart from that dispute there could be no real contest in respect of the counterclaim for the balance of the purchase price of the truck, it becomes necessary to consider what was the "event" upon which the disposition of the costs must depend. By the order of this Court directing the new trial, the costs of the action were left to be disposed of by the trial judge. That, of course, meant according to law, and not contrary to it. The judgment appealed from purports to award to the plaintiff the costs of the second trial, and to the defendant the costs "of the first trial and counterclaim and of the counter-

COURT OF APPEAL

1915

June 30.

VICTORIA AND SAANICH MOTOR TRANSPORTATION CO. v. WOOD MOTOR CO.

claim on the second trial." The general costs of the action or defence are not mentioned. By statute, costs are to follow the event except in certain cases not in point here, and subject to a power in the Court to deprive a successful party of them for good cause. Where that power is not exercised the costs are not in reality awarded by the Court, but by the statute. Now, it has been decided that "event" must be read distributively, so as to include, where necessary, one or more events, as there can be more than one in the result of a law suit: *V.W. & Y. Ry. Co.* v. *Sam Kee* (1906), 12 B.C. 1; *Myers* v. *Defries* (1880), 5 Ex. D. 180; *Hoyes* v. *Tate* (1907), 1 K.B. 656; and *British Westinghouse Electric and Manufacturing Company* v. *Underground Electric Railway Company of London* (1912), 3 K.B. 128.

The only difficulty which presents itself in this case arises from a doubt as to whether the cross-claim of the defendant is a set-off or, on the contrary, is a counterclaim. If a counterclaim, then there is no difficulty in the application of the statute to the costs of this case: the plaintiff would be entitled to the costs of the action, including both trials, and the defendant to the costs of the counterclaim, including both trials, and the taxing officer would, under the statute, tax them accordingly. But it was contended on this appeal, by defendant's counsel, that the cross-claim of the defendant was a set-off, and not in reality a counterclaim, although so pleaded. Before the Judicature Act the right of a defendant to set up a cross-claim was, apart from agreement, governed by what are commonly called the statutes of set-off, which are no longer in force. A right to a counterclaim in an action was given for the first time under the Judicature Act by the Rules of the Supreme Court. By the practice under the statutes of set-off, no claim which sounded in damages could be the subject of set-off, nor could a claim for a liquidated demand be set off against a claim which sounded in damages: Halsbury's Laws of England, Vol. 25, p. 489, and the cases there referred to. In the same volume, at p. 491, it is stated that the effect of the Judicature Act, and rules on the right of set-off is open to some doubt, and a number of cases are there discussed containing conflicting *dicta,* some of very high authority.

MACDONALD, C.J.A.

The language of Order XIX., r. 3 of the said rules which now govern set-off and counterclaim is quite different from that of the statutes of set-off which it replaced. It reads, so far as it need be quoted:

"A defendant in an action may set off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim."

If unliquidated claims may, as appears by the language used, be the subject of set-off, then the right of counterclaim would seem superfluous, because every cross-claim could be pleaded as a defence to an action—in other words, as a set-off pure and simple. If, on the other hand, set-off is to have the "same effect as a cross-action," it would be reduced to the status of a counterclaim, and in its strict sense and meaning would not exist except perhaps as an equitable defence. If, again, the words "shall have the same effect as a cross-action so as to enable the Court to pronounce a final judgment in the same action both on the original and on the cross-claim" mean that the cross-claim shall have the effect aforesaid merely for the purpose of enabling the Court to pronounce such final judgment, then the right of set-off, in the wide sense of the language of the first part of the rule, is left untrammelled, and would enable any cross-claim to be pleaded by way of defence and not necessarily by way of counterclaim. The best opinion I can form of the meaning of the rule is that the last-mentioned construction is the only feasible one, and that a defendant may elect in what form he will plead his cross-claim, whether as a set-off or by way of counterclaim. Order XX., r. 7, requires the grounds of defence, set-off, or counterclaim to be stated separately and distinctly, and Order XXI., r. 17, enables the Court to give judgment for the balance due a defendant in excess of the plaintiff's claim, though he may not have counterclaimed therefor, but set up his cross-claim by way of set-off only.

MACDONALD, C.J.A.

In the case at bar defendant has not distinctly pleaded a set-off. It is true it has alleged that the plaintiff was indebted to defendant in certain sums therein specified, but this cross-claim

COURT OF APPEAL

1915

June 30.

VICTORIA AND SAANICH MOTOR TRANSPORTATION CO. v. WOOD MOTOR CO.

is distinctly pleaded by way of counterclaim. Defendant has made its election to proceed in that way, and I am, therefore, entitled to treat this litigation as claim and counterclaim. The result on the question of costs is indicated by what I have already said.

The appellant should have the costs of the appeal and cross-appeal on the issues upon which they have succeeded. They have sustained the judgment in respect of the item of $295.25, and have succeeded on the question of the costs of the action.

The respondent, who cross-appealed, failed in all respects. It is true that the plaintiff's judgment has been reduced by $150, but that success, as stated above, was not by reason of the cross-appeal.

IRVING, J.A.

IRVING, J.A.: I concur in the judgment of the Chief Justice, with whom I have discussed the matter.

MARTIN, J.A.: Under section 67 (3) of the Sale of Goods Act, the loss occasioned by the warranty "is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty."

At the time of delivery the value of this special truck of intermediate capacity must be fairly taken to be, on the evidence, what it was sold for, its market price, the only price at the time which it could be bought for, *viz.*: $4,800. If it had been a three-ton truck of the same make and "answered to the warranty," the market price of it would have been $5,500, so I think the learned judge was right in allowing the plaintiff the difference—$700. It is true that the plaintiff did not contract for a three-ton truck of the defendant or any particular make, but the only evidence that we were referred to of the value of any three-ton truck that would answer the warranty was that of a truck of the defendant Company's make at the said price of $5,500, so the matter must be dealt with on that basis.

MARTIN, J.A.

As to the allowance of $295.25 for "further damages" under subsections (4) and (2) of said section 67, I agree that the conclusion of the learned judge should not be disturbed. I need only add that this question of damages arising from breach

of warranty after acceptance has again been before us (since we delivered judgment on the main appeal herein) in *British America Paint Co.* v. *Fogh* [(1915), 8 W.W.R. 1331], to which I refer, wherein the property in the goods had passed, differing in that respect from the present case, and noting the decision of the Ontario Court of Appeal in *Royal Electric Co.* v. *Hamilton Electric Light and Cataract Power Co.* (1909), 13 O.W.R. 791, wherein it was said, pp. 793-4 (after referring to the right of a purchaser under a conditional sale contract to sue, before payment, upon a warranty), in a case respecting machinery, the property to which did not pass till payment:

"The defendants assert that what was delivered, and in the circumstances accepted, never in fact complied with that which the contract called for, and that they are entitled, in the circumstances, to reduce the contract price for which they are now sued, by the difference between that price and the value of what they actually received. And, although there does not seem to be much authority upon the subject, except in cases where the property had passed, justice seems to require that the right to modify the price in this way, when the plaintiff elects to sue for it, should not depend upon whether the property has actually passed or not. The modern practice since the Judicature Act certainly is to have, as far as possible, all questions between parties respecting the subject-matter in litigation determined in the one action."

With respect to the costs, I agree with the construction that the Chief Justice has placed upon the embarrassing and obscure rule 199, though it is difficult to reconcile a practical application of that rule with the true understanding and nature of a set-off, as, *e.g.*, recently considered by their Lordships of the Privy Council in *Bow, McLachlan & Co.* v. *Ship "Camosun"* (1909), A.C. 597; 79 L.J., P.C. 17, an appeal from this Admiralty District.

MARTIN, J.A.

The result is that the appellant should have the costs of this appeal and of its claim at both trials, and the defendant should have the costs of its counterclaim on the first trial, but there could have been no costs of the counterclaim on the assessment of damages, because the counterclaim was admitted in full on the first trial, as the learned judge below points out.

It is desirable to add, by way of precaution, that no point was raised before us respecting the right of the defendant Company to recover on the notes after retaking possession of the motor-truck, as to which I refer to *Sawyer* v. *Pringle* (1891), 18 A.R.

COURT OF APPEAL

1915

June 30.

VICTORIA AND SAANICH MOTOR TRANSPORTATION CO. v. WOOD MOTOR CO.

218; *Arnold* v. *Playter* (1892), 22 Ont. 608; and *Boyce Carriage Co., Ltd.* v. *Squires* (1914), 25 Man. L.R. 47.

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

Appeal allowed in part, Martin, J.A. dissenting as to part and concurring as to part.

Solicitor for appellant: *Frank Higgins.*

Solicitors for respondent: *Barnard, Robertson, Heisterman & Tait.*

COURT OF APPEAL

1915

July 13.

REX v. DE MESQUITO.

Criminal law—Confession—Admissibility of—Free and voluntary—Question of there being evidence one of law—Method of stating case.

REX v. DE MESQUITO

A master, with a police constable in attendance (in plain clothes, but known to the accused to be a constable), threatened his servant, suspected of theft, saying, "You will be arrested if you do not say where the goods are." The servant was then brought to the police station where he made a confession.

Held, that the confession was not free and voluntary.

MARTIN, J.A.: Whether or not there is any evidence upon which the trial judge could hold that a confession was free and voluntary, is a question of law.

A stated case should only set out the evidence which the trial judge considered in reaching a decision on such point, which is a trial within a trial; and all the evidence thereon should be taken at one time.

Statement

CRIMINAL APPEAL, by way of case stated, from the decision of MCINNES, Co. J. in a trial before him at Vancouver on

the 17th of June, 1915, under section 1014, of the Criminal Code. The accused was a commercial traveller in the employ of the complainant, who was in the cigar and tobacco business. The complainant met the accused at the Vancouver Hotel and in the presence of a constable (who was in plain clothes, but known to the accused to be a constable) said to him, "You will be arrested if you do not say where the goods are." The three men then went to the police station, where the accused made out in writing the statement of confession now under consideration. The confession included a statement of the value of the goods taken and an undertaking to pay for them at $2.50 a week. On the trial the confession was tendered in evidence and objected to by counsel for the accused on the ground that it was not shewn that the confession was made freely and voluntarily. The trial judge admitted the confession in evidence and submitted the following question for the opinion of the Court:

Statement

"Was the said written confession or admission properly admitted in evidence by me, or should I have rejected the same?"

The appeal was argued at Victoria on the 29th of June, 1915, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

J. W. de B. Farris, for the accused: A confession must be free and voluntary; the evidence shews that the informant in the presence of a detective, threatened the accused with arrest if he did not tell where the stolen goods were; a confession obtained by this means is not admissible in evidence: see *Ibrahim* v. *Regem* (1914), A.C. 599 at p. 609; *Reg.* v. *Rose* (1898), 18 Cox, C.C. 717 at p. 718; Archbold's Criminal Pleading, 24th Ed. 392.

W. M. McKay, for the Crown: The threat referred to certain goods in Chilliwack and had nothing to do with the theft charged here: see *Rex* v. *Todd* (1901), 13 Man. L.R. 364; 4 Can. Cr. Cas. 514; *Rex* v. *Knight and Thayre* (1905), 20 Cox, C.C. 711; *Rex* v. *Farduto* (1912), 21 Can. Cr. Cas. 144; *Rex* v. *Hoo Sam* (1912), 19 Can. Cr. Cas. 259; *Rex* v. *Cummings, ib.* 358; *Rogers* v. *Hawken* (1898), 67 L.J., Q.B. 526.

Argument

Farris, in reply.

Cur. adv. vult.

COURT OF APPEAL

1915

July 13.

REX v. DE MESQUITO

13th July, 1915.

MACDONALD, C.J.A.: The question submitted for our decision was this: "Was the said written confession or admission properly admitted in evidence by me, or should I reject the same?"

My answer to this is that it was not properly admitted, and it should have been rejected and the conviction should be set aside.

MARTIN, J.A.: The question of law reserved for us is whether or no the confession of the accused was properly admitted in evidence. The learned judge in stating the case says that he "held the statement in writing was voluntarily made," but does not set out the evidence which he considered in coming to that conclusion, as should be done (*Sleeman's Case* (1853), Dears. C.C. 249; *Rex* v. *Todd* (1901), 13 Man. L.R. 364), but simply attaches to the reserved case a transcript of the whole evidence taken at the trial. This has caused a good deal of inconvenience and additional work to us, because, instead of the evidence on the question of the admissibility of the evidence being all taken at one time, according to the established practice, on the decision of that preliminary question, by the judge, which is a trial within a trial (*Boyle* v. *Wiseman* (1885), 24 L.J., Ex. 284; *Reg. v. Viau* (1898), 7 Que. Q.B. 362 at pp. 364 and 368; *Rex* v. *Ryan* (1905), 9 O.L.R. 137; *Rex* v. *Booth and Jones* (1910), 5 Cr. App. R. 177), it was taken at different times and is scattered about through the course of the trial, and the confession was let in subject to its being later displaced; a practice which, if I may say so, is inconvenient and undesirable before a judge *solus,* and before a jury is still more so, and will result in a new trial: *Reg.* v. *Sonyer* (1898), 2 Can. Cr. Cas. 501.

In determining the question of the propriety of the admission of the confession, the onus is upon the Crown to "prove affirmatively to the satisfaction of the trial judge that it was made freely and voluntarily, and not in response to any threat or to any suggestion of advantage to be inferred either directly or indirectly, from language used by a person in a position of authority in connection with the prosecution of the person by whom the confession was made": *per* Osler, J.A. in *Rex* v. *Ryan* (1905), 9 O.L.R. 137, who

"among the legion of varying voices on the subject," adopts that very clear language from *Reg.* v. *Thompson* (1893), 2 Q.B. 12; 17 Cox, C.C. 641.

On the evidence it appears to me clear beyond doubt that the confession should have been rejected because the case is one where the master with a police constable in attendance (in plain clothes, but known to the accused to be a constable) threatened his servant, saying, "You will be arrested if you do not say where the goods are," thus bringing this case within *e.g., Thompson's Case* (1783), 1 Leach, C.C. 291; *Rex* v. *Richards* (1832), 5 Car. & P. 318; *Reg.* v. *Ann Hearn* (1841), Car. & M. 109; *Lockhurst's Case* (1853), Dears. C.C. 245; *Reg.* v. *Rose* (1898), 67 L.J., Q.B. 289; and *Reg.* v. *Jarvis* (1867), L.R. 1 C.C. 96, *per* Kelly, C.B., and Willes, J. at p. 99, as to the technical meaning of such expressions, some of which cases are not, indeed, so strong in favour of the respective prisoners as this is. This admitted fact was alone sufficient to exclude, apart from what might be said about the other statements to the effect that if the servant would pay for the goods the matter would be kept from the knowledge of his wife who was ill; and also the evidence of the constable that the master and servant were "trying to fix it up between them." To my mind, the whole circumstances entirely negative any reasonable inference that the accused was acting "freely and voluntarily": I think, in short, he was terrorized to an unusual degree. The only suggestion that could be made to the contrary was that the threat, or inducement related to another subject-matter, *viz.*: certain goods at Chilliwack, not the subject of the present charge (of stealing goods valued at $128.50 in the master's Vancouver office on the 14th of December, 1914), and therefore could not be imported into it: *Rex* v. *Todd, supra.* But that is not the case on the facts here, because, though the Chilliwack matter was mentioned, as well as some difficulty in Calgary, yet the conversation also related to the Vancouver theft and the threat or inducement extended to that as well as to the others; the accused indeed swore that before he signed the confession his master charged him with having broken into the Vancouver office in December, which is not in any way

MARTIN, J.A.

COURT OF APPEAL

1915

July 13.

REX v. DE MESQUITO

denied, and that is why he put the following note at the end of the confession, which covers the missing Vancouver goods: "Willing for goods taken from office, $128.50, to settle at $2.50 a week."

I wished judgment to be reserved primarily out of respect to the learned judge below, so that I could consider if there was any proper ground for refusing to confirm his decision, because it was submitted that there was evidence before him on which he could reasonably have reached the conclusion he did, and that consequently we could not interfere, as this Court has no jurisdiction to entertain questions of fact except by leave under section 1021: see *Rex* v. *Mulvihill* (1914), 19 B.C. 197; 49 S.C.R. 587; or in the special case of trade conspiracy under section 1012. I agree that if it were the case that the judge had made a finding on conflicting facts before him, it would seem to be impossible to escape from it, because it has long been decided that this question of fact must be tried and adjudicated upon by the judge alone: Starkie on Evidence, 4th Ed. (1853), 788; Russell on Crimes, 7th Ed., Vol. 3, p. 2157; Taylor on Evidence, 10th Ed., par. 23A., p. 25; par. 872, p. 612; Halsbury's Laws of England, Vol. 9, p. 395; *Rex* v. *Hucks* (1816), 1 Stark. 521 at p. 523 (n); *Reg.* v. *Garner's Case* (1848), 1 Den. C.C. 329; *per* Erle, J., and *Bartlett* v. *Smith* (1843), 11 M. & W. 483, particularly the criminal cases cited by Baron Parke.

MARTIN, J.A.

Two of the judges of this Court of Criminal Appeal expressed the opinion in *Rex* v. *Lai Ping* (1904), 11 B.C. 102, that:

"the question as to whether or not a confession was voluntary often depends for its solution on whether or not the judge was right in his estimate of the credibility of the witnesses, in which case it would generally happen that an appeal would be fruitless, but that makes the question none the less a question of law and capable of being reserved."

My view was, p. 108:

"I am strongly of the opinion that where that point of law depends upon conflicting facts, the finding of the magistrate is of the first consequence as to what facts are established by the evidence."

The fourth judge, Mr. Justice Duff, at pp. 108-9, said:

"If the question reserved were whether or not there was any evidence upon which the trial judge could hold that a confession was free and voluntary, that would be a question of law. On the other hand, if the decision of the preliminary question turned upon conflicting statements of fact made by witnesses, I should have thought that it was fairly clear

that the correctness of such a decision could not be raised on a question of law. I should certainly find some difficulty myself, in stating a case arising upon such a decision in the form of a question of law."

This case was cited by me in *Rex* v. *Mulvihill, supra,* at p. 211, in support of the contention that the exercise of a judge's discretion was in postponing a trial a question of law, but that view was not taken by a majority of my learned brothers or by the Supreme Court of Canada (see pp. 589, 592), so it would follow that Mr. Justice Duff's opinion is the one that should be given full effect to. The Court of Criminal Appeal in England in *Rex* v. *Booth and Jones, supra,* recognized the question of custody as being one for the determination of the judge in his finding of fact in the "trial within a trial" before him. And in *Lewis* v. *Harris* (1913), 24 Cox, C.C. 66, the same Court at p. 71, *per* Darling, J., in allowing an appeal from magistrates, who, the facts not being in dispute, excluded a confession, on the wrong assumption that because no caution was given by the constable it was their duty to disregard it, said, after pointing out that the magistrates had not in reality exercised any discretion, "that is a wrong decision in law and, therefore, this appeal should be allowed."

If the judge can determine the often crucial fact of custody, why not any other, such as the "person in authority," etc.? This Court has no power conferred upon it to rehear or review any question of fact, whether found by judge or jury, save as aforesaid. In civil cases, of course, the judge's finding of fact may be reviewed: *Boyle* v. *Wiseman, supra, per* Alderson, B.

MARTIN, J.A.

The Privy Council, as their Lordships recently said in *Ibrahim* v. *Regem* (1914), 24 Cox, C.C. 174 at p. 184, stands in "a particular position" in regard to criminal proceedings, and does not exercise "the revising functions of a general Court of Criminal Appeal," but refuses to grant leave to appeal except on certain specified grounds (*e.g.*, violation of natural justice), and in that case their Lordships refused to interfere with the discretion exercised by the trial judge in allowing a certain confession to be admitted as evidence. The case is noteworthy because of its valuable review of the decisions, and the statement, p. 184, that "the English law is still unsettled, strange as it may seem, since the point is one that constantly occurs in

COURT OF APPEAL

1915

July 13.

REX v. DE MESQUITO

criminal trials." I respectfully venture the suggestion that one cause, if not the principal one, of this unsettlement arises from overlooking the point that it is the exclusive province of the judge below to deal with facts, the appellate Court frequently, without any objection, assuming, without jurisdiction, to deal with what are matters of fact, instead of confining itself to the law.

But in my view of the case at bar, it is not a question of sufficiency of evidence, but of no evidence, which is admittedly a question of law: *Rex* v. *Lai Ping, supra*; *Rex* v. *White* (1914), 24 Can. Cr. Cas. 74. The uncontradicted evidence here is all one way, and the learned judge should, I think, with all respect, have directed himself that no one could reasonably have found that the confession was free and voluntary, and consequently should have rejected it.

MARTIN, J.A.

It follows that as there is no other evidence upon which the conviction can be supported, it should be quashed.

GALLIHER, J.A.

GALLIHER, J.A.: I think the conviction should be set aside.

McPHILLIPS, J.A.: The question to be determined is whether the confession or admission was properly admitted in evidence?

At the outset, I may say that the alleged confession or admission is in itself an unintelligible jumble of words and figures. In saying this, I do so with the greatest of deference to the learned trial judge, he having, as I can only assume, some way of giving a meaning to that which is otherwise meaningless, and with every respect to the learned trial judge, in my opinion, too much weight was given to this writing, in fact, it would appear that upon this, guilt was held to be established. The questions arising are, then, whether this confession, or admission, was improperly admitted, and if improperly admitted, did some substantial wrong or miscarriage take place on the trial?

MCPHILLIPS, J.A.

It would appear that the accused was a commercial traveller in the employ of one Crowe, the business being the selling of cigars and tobacco, and the accused was charged with unlawfully breaking into and entering the shop of Crowe in the City of Vancouver, and stealing therefrom cigars and tobacco to the value of $128.50.

The confession, or admission of guilt, which was admitted in evidence by the learned trial judge was obtained from the accused by his employer, Crowe, and it is apparent that the circumstances attendant upon the giving of the confession, or admission, were such that wholly disentitled same from being admitted in evidence. I will not here set forth in detail all the evidence which to my mind conclusively establishes that it was not freely or voluntarily given, as that is quite unnecessary. It is sufficient to say that threats of arrest were made by Crowe preceding the giving of the writing, unless the accused stated where the goods were, and the accused was taken into the detective's room, and Crowe and the accused being there, Crowe stated that he did not want the goods, but that the accused should admit that he had stolen the goods and what he had done with them, and it is apparent that Crowe, the employer, induced the accused to make the confession, or admission, with the representation that if made, and the accused accounted for the goods in money, there would be no prosecution. This is well established, in my opinion, by the police officer, Crewe. Further, Crowe, the employer, as a matter of further inducement, it would appear, stated that he would continue the accused in his employment. It is true that this latter inducement rests upon the evidence of the accused alone, but it is to be noted that Crowe, although called in rebuttal, does not deny the statement. Upon all of the facts it cannot be said that the accused, in giving the writing which was admitted in evidence, gave same freely or voluntarily. In *Ibrahim* v. *Regem* (1914), A.C. 599, Lord Sumner at pp. 609-10 said:

MCPHILLIPS, J.A.

> "It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear or prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale. The burden of proof in the matter has been decided by high authority in recent times in *Reg.* v. *Thompson* (1893), 2 Q.B. 12, a case which, it is important to observe, was considered by the trial judge before he admitted the evidence."

When *Reg.* v. *Thompson, supra,* is read, it has elements similar to the present case. There the prisoner made out a list of moneys which he admitted had not been accounted for by him,

COURT OF APPEAL

1915

July 13.

REX v. DE MESQUITO

the prosecution being one for embezzlement. The chairman of the company had said to a brother of the prisoner, "It will be the right thing for your brother to make a statement," and the Court drew the inference that the prisoner, when he made the confession, knew that the chairman had spoken these words to his brother, and it was held that the confession of the prisoner had not been satisfactorily proved to have been free and voluntary, and that, therefore, evidence of the confession ought not to have been received. In the case we have before us we have the direct statements of the employer, Crowe, to the accused, his employee, and what was said by Crowe was much more far-reaching than what was shewn to have been said in *Reg.* v. *Thompson, supra,* where Cave, J. at p. 15 said:

"The question in this case is whether a particular admission made by the prisoner was admissible in evidence against him . . . . If it flows from hope or fear, excited by a person in authority, it is inadmissible."

And at pp. 16-17:

"These principles are restated and affirmed by the present Lord Chief Justice in *Reg.* v. *Fennell* [(1881)], 7 Q.B.D. 147 at p. 150, in the following words: 'The rule laid down in Russell on Crimes is that a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.' It is well known that the chapter in Russell on Crimes containing that passage, was written by Sir E. V. Williams, a great authority upon these matters."

MCPHILLIPS, J.A.

It is exceedingly pertinent to the case now before us to note what Cave, J., continuing, and at pp. 18 and 19 said:

"I would add that, for my part, I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but, when it is not clear and satisfactory, the prisoner is not unfrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession;—a desire which vanishes as soon as he appears in a court of justice."

In this particular case there is no evidence of the guilt of the prisoner, unless it be that this confession, or admission, be held to establish it, and apparently the learned trial judge proceeded upon the confession, or admission, which he interpreted as establishing guilt.

It is, therefore, clear that it was upon the confession, or

admission, that the learned trial judge went, a confession, or admission, which was not satisfactorily proved to have been given freely and voluntarily, and which, consequently, should not have been received.

This Court, sitting as a Criminal Court of Appeal, and passing upon questions of improper admission or rejection of evidence, or anything done not according to law at the trial, or some misdirection given, is not to set aside the conviction or direct a new trial, although error is found, unless of the opinion that some substantial wrong or miscarriage was thereby occasioned on the trial (Criminal Code, Sec. 1019). In the present case, in my opinion, substantial wrong and miscarriage was occasioned, as unquestionably it was upon the confession, or admission, which, in my opinion, was erroneously admitted, that the learned trial judge proceeded, and upon which he found the accused guilty, and without the confession, or admission, upon which the learned judge so greatly relied, it can well be said that there is no evidence upon which the accused could be convicted, and to allow the conviction to stand would offend against the principles of natural justice; and see the judgment of Lord Sumner in *Ibrahim* v. *Regem, supra,* at pp. 613-614.

This Court being a Court of Criminal Appeal, and in particular charged by Parliament with deciding the question whether any substantial wrong or miscarriage was occasioned on the trial, when of opinion that some evidence was improperly admitted, cannot be affected by the question of the judge's discretion. It follows that the discretion of the learned trial judge, in admitting the evidence, was improperly exercised. There can be no fetters upon the powers of the Court of Appeal, other than those imposed by Parliament, in deciding questions so momentous in the safeguarding of the life and the liberty of the subject.

MCPHILLIPS, J.A.

The conviction should be quashed, it not being, in my opinion, a case for the direction that a new trial be had.

Conviction quashed.

MACDONALD, J.

1915

July 15.

IN RE BRITISH COLUMBIA PORTLAND CEMENT COMPANY, LIMITED.

Company law—Debentures—Authorization by bondholders to pledge or sell—Second issue—Issued as collateral security—Priority.

IN RE BRITISH COLUMBIA PORTLAND CEMENT CO.

Under the terms of a trust deed securing a first debenture issue of a company, a majority of the bondholders, by virtue of a majority clause, passed a resolution authorizing the directors to borrow a sum of money, to issue new bonds having a priority over the first issue, and "to pledge or sell the same." The new bonds were issued, in fact, to certain creditors of the Company as collateral security for an existing indebtedness.

Held, that there was no authority given to use the bonds as collateral security for the Company's indebtedness, and the new issue of bonds did not obtain priority over the first issue.

ACTION tried by MACDONALD, J. at Vancouver on the 8th of June, 1915, to determine the question of priority as between the holders of two issues of debentures or bonds of the British Columbia Portland Cement Company, Limited, the plaintiffs being the holders of the first issue and the defendants the holders of the second issue.

Statement

R. M. Macdonald, for plaintiffs.
S. S. Taylor, K.C., for defendants.

15th July, 1915.

MACDONALD, J.: This is an issue directed to determine the question of priority as between the holders of two sets of bonds of the British Columbia Portland Cement Company, Limited. The holders of a first issue are plaintiffs and the holders of a second issue are defendants.

Judgment

After the first issue of bonds, the Company carried on its business for a time, but claims of creditors arose which were being pressed for payment. The situation was then dealt with by the bondholders and shareholders. A trust deed was executed to secure a second issue of bonds, which purported to be in priority to the first issue. The plaintiffs, as holders of the

first issue, contend that such priority does not exist, on the ground that there is no power in the first trust deed to effect this result, or, even if there is sufficient power for that purpose, it was not properly exercised, so as to create such priority. The ground is also taken that, even if such authority exists and was properly exercised, the defendants did not become holders of such bonds under circumstances that entitled them to claim such priority. Dealing with the first point, I think that section 6 of the first trust deed, coupled with section 19, gives authority to a majority of the bondholders to bind all the holders of such issue of bonds for the purposes mentioned. I think, also, that the provisions of such trust deed have been properly complied with, so as to enable such majority to bind the minority and create a second issue of bonds which will take priority over the first issue. The first trust deed would in that event be postponed as a security, and only take effect subject to the second trust deed and the bonds properly issued and secured thereunder. Dissentient bondholders under the first issue would thus be debarred from objecting to the priority of the second issue, if the bonds comprising such issue were received and held by parties in a position to claim such benefit.

In thus forming an opinion that this power existed and was duly exercised, I have considered the necessity for clearness of the authority and the strictness required in carrying out its terms: see on this point, *Mercantile Investment and General Trust Company* v. *International Company of Mexico* (1891), reported in foot-note to *Sneath* v. *Valley Gold, Limited* (1893), 1 Ch. 477 at p. 484.

Judgment

If the second issue of bonds were properly issued so as to apparently create such priority, then did they come into the possession of persons, who are entitled to such priority? I will first deal with the holders of the second issue as a class, and then consider two special cases differing from such class.

Assuming, that dissentient or absentee bondholders of the first issue were bound by the course pursued by the majority of such bondholders, then, as between such majority and the dissentient bondholders, the control thus obtained would only operate to the extent and for the purpose indicated in the trust deed securing

MACDONALD, J.

1915

July 15.

IN RE BRITISH COLUMBIA PORTLAND CEMENT CO.

Judgment

the second issue. The Company had power to postpone or interfere with the rights possessed, by even a single bondholder under the first issue, in so far only, as an authority for that purpose might be conferred by the bondholders through a proper utilization of the provisions of the first trust deed. When such authority was received, the Company purported to act within its scope. A trust deed, dated the 1st of January, 1914, was executed reciting, *inter alia,* that there had been a previous issue by the Company of $400,000 ten year first mortgage bonds, of which $282,000 were held through sale and allotment; that such bonds were secured by a trust deed dated the 2nd of January, 1911, on all the undertaking and property of the Company; that "it was deemed advisable by the bondholders in their own interests and in the interests of the Company to raise for the purpose of the Company by way of loan a further sum not exceeding $150,000"; that a meeting had been regularly called and held by the bondholders, at which the loan of $150,000 was authorized by the Company, and to secure "the amount raised by a trust deed or mortgage to rank in priority to the trust deed or mortgage securing the present issue of bonds and charged on the property comprised in such trust deed or mortgage or any part thereof." Bonds were then executed. A copy of one of these "first mortgage seven per cent. bonds" states that "the Company promises to pay bearer $100," and that the bonds are "equally entitled to the benefits and are equally subject to the provisions of a trust mortgage and pledge, dated the first day of January nineteen hundred and fourteen made by the Company to the Dominion Stock and Bond Corporation Limited at trustee." The second issue of bonds was not sold nor pledged, except as hereafter mentioned. The defendants, however, became the holders of a large portion thereof. They were creditors of the Company, and it is admitted the bonds "were issued and delivered to them as collateral security for the Company's indebtedness to them." It was also admitted that the defendants became the holders of the bonds by way of collateral security "without any actual knowledge of any alleged irregularity in respect to the issuance thereof." If the Company had the right to thus deal with the

bonds, then the defendants held them in priority to the first issue. I do not think, however, that the Company, or its directors, had any right to thus dispose of these bonds. The notice calling a meeting of the holders of the first issue of bonds specified that the resolution to be proposed at such meeting was "to raise by way of loan a further sum not exceeding $150,000." The meeting of bondholders passed the resolution in this form. A by-law to the same effect was approved of at a meeting of shareholders on the same day, and the directors were authorized "to borrow upon the credit of the Company any sum not exceeding $150,000 in addition to sums already borrowed." Authority was also given to the directors to issue bonds, debentures or other securities, and "to pledge or sell the same for such sums and at such prices as may be deemed expedient." It is quite apparent that the intention, at the time, was to borrow money in the manner indicated. There was no authority given to use the bonds as collateral security for the Company's indebtedness. The transfer of such second issue was thus not in accordance with the notice calling the meeting of bondholders nor the resolutions passed at such meeting. In order to bind the bondholders under first issue, and create a priority, strict compliance with the authority conferred on the Company was requisite. It was pointed out that the notice of bondholders' meeting shewed that it was called "to consider the raising of money to pay off pressing claims of the Company and to furnish working capital." It was contended that the result sought to be accomplished had in reality been effected, though in a different way. I cannot agree with this contention. If the creditors had accepted the bonds, dollar for dollar of their indebtedness, or even at a discount, it might have been considered that the bonds to that extent had been sold. There is a decided difference between such a course and the one pursued. A bondholder might be satisfied with a proposition to borrow money by issue of bonds, and thus clear up the indebtedness of a company, and not be agreeable to placing such bonds with its creditors as security and still leaving the indebtedness unpaid. The defendants, in my opinion, cannot obtain any priority as against the plaintiffs unless the form of the bond assists them.

Judgment

MACDONALD, J.

1915

July 15.

IN RE BRITISH COLUMBIA PORTLAND CEMENT CO.

They are "bearer bonds." It is submitted that they are negotiable to such an extent that, being termed "first mortgage bonds," they obtain priority over any previous issue by the Company. The case of *Duck* v. *Tower Galvanizing Company* (1901), 2 K.B. 314, was cited in support of defendants' contention. I do not think it is applicable. It was an interpleader issue between the holder of a debenture and an execution creditor. The debenture was issued without authority, but the holder had no notice of the irregularity. It purported to have been properly signed and sealed and was apparently in order.

"There has been ample authority to shew that no informality will alter the rights possessed by a *bona-fide* holder for value upon a document that purports to be in order":

per Lord Alverstone, C.J. at p. 318. The Company was estopped from setting up the irregularity. The execution creditor could only seize chattels, that the Company as his debtor could honestly dispose of, and so failed as against the debenture holder, who had a prior charge on such portion of the assets of the Company. I am also referred to *Edelstein* v. *Schuler & Co.* (1902), 2 K.B. 144, in support of defendants' position. While this case is authority as to the negotiability of the bonds there referred to, even where the original owner had been deprived of them by theft, still it does not go the length that the defendants require in order to succeed. Such bonds bore on their face the statement that they would be paid "without regard to any equities between the Company and the original or any intermediate holder thereof." The holder for the time being held them with this representation, and any benefit incident thereto, and also with the risk that his ownership might be destroyed by some other person acquiring them for value "without any notice of infirmity in the vendor's title." Even if the second issue of bonds in question were negotiable, they had no similar statement on their face, and were "subject to the provisions of the trust mortgage." If this document had been examined it would be apparent that the bonds intended to be secured by such mortgage were issued in order to borrow money, and not to be transferred as collateral security for an existing indebtedness to the Company. They were thus not

Judgment

negotiable to the same extent as the bonds referred to in the case just cited. I am of opinion that the holders of the first issue of bonds have not lost their priority.

In this connection see *Smith* v. *English and Scottish Mercantile Investment Trust* (1896), W.N. 86, where—

"A company issued debenture stock purporting to be a first charge and which gave a floating security on all its assets. It afterwards issued debentures to other persons which also purported to be a first charge and gave a like floating security:—*Held*, that the holders of the debentures, whether they had or had not notice of the issue of the stock, did not obtain priority over, but ranked after the stockholders."

During the course of the trial it became apparent that all the holders of the second issue of bonds were not in the same position. Two of them—T. W. Fletcher and S. J. Crowe—had received a portion of these bonds as security for present advances to the Company. They were pledged to them, and thus came within the object sought to be attained by the issue of such bonds. It was contended that the form of the order directing the issue did not admit of inquiry, as to these two bondholders. I doubted my right to deal specially with them, but, in order to avoid a further application being made on their part, and to save the consequent expense and delay, I thought it well to receive evidence in support of their position, so that in the event of an appeal all matters pertaining to the rights of the bondholders could be considered.

Judgment

In my opinion, T. W. Fletcher and S. J. Crowe are, to the extent of the money advanced on the strength thereof, entitled to hold bonds of the second issue in priority to the first issue.

I do not require to consider the question of costs, as that has been dealt with in the order directing the issue.

Judgment accordingly.

MARTIN, LO. J.A.

1915

July 17.

COWAN v. THE ST. ALICE.

Admiralty law — Seaman's wages — Sum recovered less than minimum required by Act—Jurisdiction—Costs—Canada Shipping Act, R.S.C. 1906, Cap. 113, Secs. 191, 192—Practice—Choice between conflicting authority.

COWAN v. THE ST. ALICE

Under section 191 of the Canada Shipping Act the plaintiff must recover at least the minimum amount specified or the action will be dismissed, as the Court has no jurisdiction to entertain actions for less than such prescribed amount.

Gagnon v. *Steamship Savoy* (1904), 9 Ex. C.R. 238, followed.

When two cases are inconsistent and the judge who is considering them has "no very clear opinion on the point" involved, the later decision should be accepted as the greater authority if it was given with the knowledge and deliberate disregard of the first decision.

North v. *Walthamstow Urban Council* (1898), 67 L.J., Q.B. 972, followed.

Statement

JUDGMENT on the questions of costs and jurisdiction reserved at the trial for further argument, in an action *in rem* brought to recover the sum of $225 for wages against the defendant ship. Heard by MARTIN, Lo. J.A. at Vancouver on the 15th of May, 1915.

Robinson, for plaintiff.
R. M. Macdonald, for defendant.

17th July, 1915.

Judgment

MARTIN, Lo. J.A.: Two important questions, of interest to all seamen, are raised by this action, which was brought to recover the sum of $225 for wages, by an action *in rem,* against the defendant ship, registered at Vancouver, B.C., with the result that after hearing several witnesses judgment was entered for $88 only, the question of costs being reserved for further argument. It is submitted by the defendant that the effect of section 191 of the Canada Shipping Act, Cap. 113, R.S.C. 1906, is that when it is found at the trial that the plaintiff can only recover a sum less than $200 the Court should thereupon dismiss the action,

with costs, leaving the plaintiff to pursue his remedy in the proper forum, where it should originally have been brought, because this Court can only entertain and adjudicate upon claims in excess of the specified amount, which amount should be determined, not by a fictitious sum wrongly sued for, but by that which is and was really due for the wages earned at the time suit was begun.

Said section provides:

"No suit or proceedings for the recovery of wages under the sum of two hundred dollars shall be instituted by or on behalf of any seaman or apprentice belonging to any ship registered in any of the Provinces in the Exchequer Court on its Admiralty side, or in any superior court in any of the Provinces, unless, [here follow certain immaterial exceptions].

And section 192 is:

"If any suit for the recovery of a seaman's wages is instituted against any such ship or the master or owner thereof in the Exchequer Court on its Admiralty side, or in any superior court in any of the Provinces, and it appears to the court, in the course of such suit, that the plaintiff might have had as effectual a remedy for the recovery of his wages by complaint to a judge, magistrate or two justices of the peace under this Part, the judge shall certify to that effect, and thereupon no costs shall be awarded to the plaintiff."

For the plaintiff it is urged that where, as here, a plaintiff *bona fide* believes he is entitled to recover a sum above the statutory amount, he is entitled to invoke the aid of the Court to determine that matter, and there is no lack of jurisdiction.

Judgment

I have found it necessary to examine at length a very large number of authorities bearing directly and indirectly on the point, including *The Ann* (1871), Young 104; *Margaretha Stevenson* (1873), 2 Stuart 192; Stockton 83-4; *In re Tug "Robb"* (1880), 17 C.L.J. 66; *The Royal* (1883), Cook (Quebec) 326; *The Monark, ib.* 345; *Brown* v. *Vaughan* (1882), 22 N.B. 258; *Phillips* v. *Highland Railway Co. The "Ferret"* (1883), 8 App. Cas. 329; *Beattie* v. *Johansen* (1887), 28 N.B. 26; *The "W. B. Hall"* (1888), 8 C.L.T. 169; *The Jessie Stewart* (1892), 3 Ex. C.R. 132; *The Bessie Markham,* cited by Stockton, p. 85; *The Ship W. J. Aikens* (1893), 4 Ex. C.R. 7; Stockton, 690; *Gagnon* v. *Steamship Savoy* (1904), 9 Ex. C.R. 238; *Beaton* v. *Steam Yacht Christine* (1907), 11 Ex. C.R. 167; Abbott on Shipping, 14th Ed., 1129; MacLachlan on Merchant Shipping, 5th Ed., 116 (note),

MARTIN, LO. J.A.
1915
July 17.

COWAN v. THE ST. ALICE

264; Williams & Bruce's Admiralty Practice, 3rd Ed., 210, 214, 216; Roscoe's Admiralty Practice, 3rd Ed., 263; *The Blakeney* (1859), Swab. 428; and *The Harriet* (1861), Lush. 285. Fortunately, the last-named case, decided by Dr. Lushington, exactly covers the question and decides it in favour of the present defendant. That was a case where a mate sued for wages as being over the prescribed amount (£50) under the corresponding section 189 of the Merchant Shipping Act of 1854 (which is essentially to the same effect as our section 191, except that the prescribed amount is greater), but at the conclusion of the hearing the amount due him was found to be below £50, whereupon the Court said, p. 291, in language which was cited with approval in the *Margaretha Stevenson* case, *supra*:

"I regret that this decision not only deprives the plaintiff of wages which he has justly earned as purser, but must also bar him from recovering in this Court the wages he has earned as mate. His claim, reduced to a claim for mate's wages only, does not amount to the minimum of £50 which the statute requires for a proceeding for seamen's wages in a Superior Court, except in certain contingencies, which are not applicable to this case. It is true that the words are 'No suit or proceeding for the recovery of wages under the sum of £50 shall be instituted,' and that here a claim, and a *bona-fide* claim, has been made for a sum exceeding £50; but I must interpret the statute to require a recovery of £50. I dismiss this case, but I do not give costs."

The learned judge added:

"I am happy to say that an Act is now passing through the Legislature which will remedy the defect in the jurisdiction of the Court, which in the present case has operated with such hardship on the plaintiff."

Judgment

This paragraph refers to The Admiralty Court Act, 1861, assented to on the 17th of May of that year (the judgment being delivered on the 21st of March), as to which I shall speak later. The result of that decision, as applied to this case, is that the same prohibition and restriction extend to cases where the amount sued for, as well as recovered, is less than the prescribed amount, the only difference being that in the former case the lack of jurisdiction appears on the face of the proceedings, and in the latter case it is determined by the result of the trial, and will only be determined thereat, and not by means of a preliminary investigation: *The Nymph* (1856), Swab. 86. One curious result of the unusual wording of the section is that where a sum in excess of the statutory amount is claimed, it is

impossible to object to the jurisdiction till after the case has been decided on the merits, to the extent at least of determining the question as to whether or no the plaintiff can recover up to the said amount.

But the further question remains as to whether or no this Court is prevented by section 191 from entertaining the action. In other words, is its jurisdiction to entertain claims for any amount still unfettered? On that point there is a regrettable conflict of authority in this Court (referred to in *Beaton* v. *Steam Yacht Christine* (1907), 11 Ex. C.R. 167, 171), one of the learned judges thereof, in the Toronto District, having held, after a consideration of the said Admiralty Court Act of 1861 and other statutes, in *The Ship W. J. Aikens, supra,* that the Court has jurisdiction, and another learned judge, in the Quebec District, declining, in *Gagnon* v. *Steamship Savoy, supra,* to follow that decision, thus leaving the matter in a very unsatisfactory state. In these unfortunate circumstances, what is my duty as a judge of the same Court, though in another district? I find a safe guide in the judgment of Channell, J., who was placed in a similar position in *North* v. *Walthamstow Urban Council* (1898), 67 L.J., Q.B. 972, and took this view of it (p. 974):

"Of course, where two cases are inconsistent, the judge who is considering them is entitled, if his opinion inclines to one or the other, to follow the one that he prefers; but where he has no very clear opinion upon the point, I think it is his duty to consider which of the two is the higher authority and therefore the one which ought to be followed, and that, in my view, depends upon whether the second case is a decision given with knowledge of the existence of the first, and with a deliberate disregard of it, or not. If it is, then the second case is the one of greater authority. But if, on the other hand, as sometimes happens, the second case is a decision given in ignorance of the first, then the first is the greater authority, and the second must be treated as having been given inadvertently."

Judgment

Compare, also, *Knowles & Sons, Limited* v. *Bolton Corporation* (1900), 2 Q.B. 253, at pp. 258-9. Now, after a very careful consideration of all the authorities on the point (many of which are cited *supra*), I confess the result is that I have "no very clear opinion upon" it, though if I may be allowed to say so with every respect, in neither of the conflicting judgments did

MARTIN, LO. J.A.

1915

July 17.

COWAN v. THE ST. ALICE

the Court, apparently, have the benefit of an adequate argument, nor were many authorities cited that would have been of assistance. But I can go no further than to say that if I had been in the position of the learned judge who decided the latter case I should have felt it my duty to adhere to the salutary rule *stare decisis,* but since he has felt it his duty to assume the responsibility of going to the unusual length of departing from it, I do not think I would be justified in the circumstances in making confusion worse confounded by delivering another judgment, differing, possibly, in part at least, from both my learned brothers, so, in the public interest, I formally adopt the latter decision as the greater authority, and leave it to the Court above, or Parliament, to take steps, if any, that may be necessary to change the law. I would not, however, have it understood that I think any change is necessary or desirable, because the reason for placing this restriction upon what are sometimes the oppressive and vexatious proceedings *in rem* of small claimants is set out in the case of *The Monark, supra,* and by the Supreme Court of New Brunswick *in banco* in *Beattie* v. *Johansen, supra,* p. 30, wherein the "complete and adequate scheme of relief" under the Act, and its special appropriate remedies, are considered, particularly in the judgment of King, J., p. 31, who furthermore points out that section 57 (now 192), relating to the judge giving his certificate for costs, applies only to the excepted cases under section 56 (now 191), but there is no need for me to express my opinion on section 192, as the case is disposed of by section 191.

Judgment

The result is that the action should be dismissed, but in the circumstances, owing to the conflict of authority, without costs, following in that respect *The Harriet,* and *Margaretha Stevenson, supra.*

I note, by way of precaution, that it has been settled that the separate claims of seamen for wages may be combined in one action so as to confer jurisdiction: *The Ann, supra; The "Ferret," supra; Beaton* v. *Steam Yacht Christine, supra,* followed by *Burke* v. *The Ship Vipond* (1913), 14 Ex. C.R. 326.

Action dismissed.

REX v. JAGAT SINGH.

COURT OF APPEAL

1915

July 22.

REX v. JAGAT SINGH

Criminal law—Murder—Verdict of jury—Charge—Misdirection—Criminal Code, Secs. 1014, 1021—Stated case—Form of.

On a charge of murder three of the witnesses were on the scene when the accused fired three shots at the deceased. One testified that the prisoner and deceased (both Hindus) were from 20 to 30 feet away from one another when the first shot was fired, another that they were close together, and a third that they were scuffling on the ground, the deceased being on the top. There was evidence of powder being around the wound in deceased's head and his turban had caught fire. The prisoner gave evidence on his own behalf, testifying that he shot in self-defence, as deceased (who was the larger and heavier man) was on top of him and beating him. The learned trial judge, in his charge, after defining and illustrating manslaughter, added the words, "but that set of facts, again, does not arise on the evidence here." On motion to the Court of Appeal for a new trial owing to misdirection:—

Held, that there was misdirection and there should be a new trial, as, from the attendant facts and circumstances, a verdict of manslaughter might have been found by the jury.

Remarks on the form of a stated case.

MOTION to the Court of Appeal for a new trial on the weight of evidence on leave given under section 1021 of the Criminal Code and for a direction to the learned trial judge to state a case under section 1014 of the Code. The prisoner was tried by MURPHY, J. and a jury at the Vancouver (1915) Spring Assizes, and convicted of the murder of one Ratan Singh. It appeared from the evidence that about two weeks before the shooting took place the accused had been given two revolvers by a certain clique of Hindus, it being arranged that he was to shoot two men at the Hindu temple. Later he repented of this, but continued to carry the revolvers and a knife, being in fear of the members of the clique to which he belonged. On the night of the shooting the deceased (Ratan Singh), Bela Singh, and Balmurkand (three of the members of the clique) were in the store of one Amur Chand, at 1829 Granville Street, Vancouver. The deceased and Bela Singh

Statement

COURT OF APPEAL

1915

July 22.

REX v. JAGAT SINGH

had been drinking. After being in the store for some time Bela Singh and Balmurkand went out on the street, followed by the deceased. Bela Singh testified that he had gone a short distance when he saw the first shot fired by the accused at the deceased at a distance of some 20 or 30 feet, and that he (witness) ran away. Balmurkand said that as he was walking away he heard shots, and, turning around, saw the accused and deceased standing close together on the sidewalk. Amur Chand (the storekeeper) said he came out of the store and saw deceased on top of the accused in a scuffle when the shooting took place. After the shooting the prisoner ran away, and in a short time was arrested and handcuffed by the police. When the prisoner was handcuffed Bela Singh came up, the prisoner drew his knife and attempted to attack him, using bad language while endeavouring to reach him. The deceased was the heavier man, and the prisoner, who gave evidence on his own behalf, testified that he shot in self-defence when deceased was on top of him and beating him. Three shots were fired. Powder was found around the wound in the deceased's head, and his turban had caught fire. The learned trial judge, in his charge, after explaining and illustrating the crime of manslaughter, finished with the words: "But that set of facts, again, does not arise on the evidence here." Objection was raised as to the form of oath administered to one Partab Singh, who was called as a witness. All the record shews as to what transpired is as follows:

Statement

"Mr. *MacNeill*: I will call Partab Singh.

"The Court: Ask him if he swears on the Bible.

"Interpreter: He will lift his hand up.

"Partab Singh, Sworn. Direct examination by Mr. *MacNeill*."

The Court of Appeal reserved judgment on the motion for a new trial on the weight of evidence and directed that the trial judge should state a case, and the learned judge, after repeating his charge and the facts as to the oath administered to Partab Singh, concluded the stated case in the following words:

"My invariable practice is to examine a witness as to the form of oath so administered as being considered by him as binding on his conscience, in a case of this kind after he has sworn and before his evidence is received, but whether I did so in this case or not I am unable to state as I have no recollection in respect of the facts of this particular instance. The witness

Partab Singh is a Hindu, but whether any more transpired than what the record shews I am unable to say as I have no distinct recollection of the matter. I might further point out that my memory is that my charge as taken down by the official stenographer, and as set out in the reserved case herein does not state what I said to the jury; my recollection is that on page 2 of the reserved case after the word 'found' at line 25 thereof, I added the words to this effect 'that state of affairs of course does not arise here'; and at line 26 after the words 'reduced to manslaughter' my recollection is I added 'by provocation.'"

"The points reserved for the opinion of the Court of Appeal are:

"1. Was my direction to the jury either on the law, or on the law as applicable to the facts of the case proper?

"2. Was the oath properly and legally administered to the witness Partab Singh as above set out and was his evidence therefore properly receivable?"

Statement

The motion was argued at Victoria on the 13th of July, 1915, before MACDONALD, C.J.A., IRVING, GALLIHER and MCPHILLIPS, JJ.A.

McCrossan, for the accused: There is conflict in the evidence as to when the fatal shot was fired. One witness says prisoner was 25 feet away from deceased; they were standing close together, one says; and a third that they were scuffling on the ground at the time, the prisoner (who was the smaller man) being underneath. But the physical facts shew the first witness referred to was wrong, as the wounds in deceased's head were covered with powder, and his turban had caught fire, proving without question that the revolver was fired at close quarters. We say we are entitled to a new trial on the ground of misdirection, as the learned trial judge, in instructing the jury on the distinction between murder and manslaughter, was in error in saying that manslaughter could not be found in the circumstances in this case. The jury might have taken the view that there was a fight which resulted in the firing of the revolver. [He referred to *Rex* v. *Wong On and Wong Gow* (1904), 10 B.C. 555; 8 Can. Cr. Cas. 423; *Rex* v. *Morrison* (1911), 6 Cr. App. R. 159; *Rex* v. *Jenkins* (1908), 14 B.C. 61; 14 Can. Cr. Cas. 221 at p. 226; *Reg.* v. *Brewster* (1896), 4 Can. Cr. Cas. 34 at p. 40.] We also contend the witness Partab Singh was not properly sworn.

Argument

COURT OF APPEAL

1915

July 22.

REX v. JAGAT SINGH

A. H. MacNeill, K.C., for the Crown: It was for the jury to decide whether they were to believe the two witnesses who said the shooting was done when prisoner and deceased were some distance from one another, or whether they should believe the one witness who said they were fighting when the shot was fired, and the threats and attempt to injure Bela Singh by the prisoner when arrested was against him, and was no doubt considered by the jury.

Cur. adv. vult.

15th July, 1915.

Judgment

Per curiam: We think a stated case should be submitted (1) as to whether there was misdirection on the question of manslaughter; (2) as to the form of oath administered to the witness Partab Singh.

The stated case was argued at Victoria on the 22nd of July, 1915, before MACDONALD, C.J.A., IRVING, GALLIHER and MCPHILLIPS, JJ.A.

McCrossan: The crux of the case is the statement of the learned judge after he had defined manslaughter, he saying: "But that set of facts, again, does not arise on the evidence here." This is misdirection that entitles prisoner to a new trial: see *Rex* v. *Eberts* (1912), 20 Can. Cr. Cas. 263 and 273; *Rex* v. *Graves, ib.* 384; (1913), 21 Can. Cr. Cas. 44. The witness Partab Singh was not properly sworn: see Halsbury's Laws of England, Vol. 13, p. 591; *Rex* v. *Shajoo Ram* (1914), 20 B.C. 581. The learned judge states that the stenographer left out certain words from his charge.

Argument

[MACDONALD, C.J.A.: Where these cases are stated, they should be clearly, positively and firmly stated, and not put in a suggestive way. I think we must take the stenographer's notes. It is unfortunate that the issue should be confused by statements of this kind.]

MacNeill: The findings of the Supreme Court in *Rex* v. *Eberts* (1912), 20 Can. Cr. Cas. 262, are in my favour. The charge is substantially correct, and the verdict should not be disturbed.

MACDONALD, C.J.A. (oral): I would answer the first question in the negative. The second question has been withdrawn, and therefore it is unnecessary to answer it.

With respect to the other case, the appeal on the leave given by the learned judge for a new trial on the weight of evidence, it now becomes unnecessary to deal with that. I may say that the conclusion I came to was that we could not set aside the verdict on the ground that it was against the weight of evidence.

IRVING, J.A. (oral): I would answer the first question in the negative. In my opinion, there was put in evidence facts and circumstances from which the jury might reasonably infer that this was a case of manslaughter and not murder; and, therefore, a direction as to manslaughter should have been given. This case is covered, I think, by what is said in *Rex* v. *Eberts* in the Supreme Court of Canada [(1912), 47 S.C.R. 1; 20 Can. Cr. Cas. 273], where it is practically laid down that when the evidence shews the jury may reasonably infer a case of manslaughter, then that there must be a direction on that point. But, as pointed out by Idington, J., at p. 25, that where there is no such evidence, then it would only add to the perplexity of the jury if the judge brought in any reference to manslaughter. In my opinion, a judge ought to be slow to arrive at the conclusion that there are no circumstances that would justify a verdict of manslaughter. I do not agree with the decision in *Rex* v. *Wong On and Wong Gow* (1904), 10 B.C. 555. There the evidence was not such that an inference of manslaughter could possibly be drawn. On the second point I express no opinion.

IRVING, J.A.

GALLIHER, J.A. (oral): I agree. It struck me when the case first came before us, and I certainly am of that opinion now, that where there is an element of reasonable evidence upon which the jury might have come to a conclusion, then a wrong is done to the prisoner if that is taken away from the jury.

GALLIHER, J.A.

MCPHILLIPS, J.A.: The motion is to the Court of Appeal for a new trial, following leave given under section 1021 of the Criminal Code by MURPHY, J., before whom the prisoner was

MCPHILLIPS, J.A.

COURT OF APPEAL

1915

July 22.

REX v. JAGAT SINGH

tried and convicted of the murder of Ratan Singh. The verdict of the jury was accompanied by a recommendation for mercy, and a statement from the jury, that in view of the fact that several murders and violent acts having been committed by Hindus in Vancouver, presumably while under the influence of liquor, that the Hindus should be prohibited from obtaining a supply of intoxicating liquor. The defence was one of justifiable homicide—that is, that the prisoner shot in self-defence.

The learned trial judge, in effect, told the jury that if they did not agree with the defence and the evidence adduced in support thereof, the only verdict capable of being returned would be a verdict of murder. Note this language, occurring in the charge:

"Murder, in some instances may be reduced to manslaughter but that set of facts, again, does not arise on the evidence here."

With great respect, in my opinion this was not a proper direction to the jury, as I submit will appear when the attendant facts and circumstances are considered, and a verdict of manslaughter was a verdict which the jury might have found. In *Rex* v. *Hopper* (1915), 11 Cr. App. R. 136, the Lord Chief Justice, in considering an appeal against a verdict of murder, said at p. 139:

MCPHILLIPS, J.A.

"Now the complaint made is that the judge in directing the jury told them that they must find a verdict of murder or acquit the appellant: in other words that, if the jury did not accept the theory and evidence of the defence that the killing was accidental, they had no alternative but to return a verdict of murder. The appeal has been very properly argued on the view that the true state of facts was, as found by the jury, that it was not an accident. The question left is whether it was open to the jury on the evidence and whether the judge ought to have left to them the option, if satisfied that a verdict of manslaughter would be right, to return such a verdict."

It may be that in the present case we have not really before us any question of law arising out of the direction of the judge (Criminal Code, Sec. 1014). That, I assume, may still be applied for and be reserved. But it is pertinent, it seems to me, when considering whether the verdict is against the evidence, to consider what the jury really meant by their verdict, and whether, possibly, a verdict of manslaughter was not really meant when the recommendation of mercy accompanied it.

Also, that if the verdict of murder is against the weight of evidence, and a new trial directed, the jury ought to have had the option (adopting the language of the Lord Chief Justice), "if satisfied that a verdict of manslaughter would be right, to return such a verdict."

It appears, as the evidence discloses itself to me, stripped of inconsistencies in evidence, and evidence not capable of being believed when considered with unimpeachable independent corroborative evidence, that on the evening of the 18th of March, 1915, the prisoner, who had a room over the store of Amur Chand, was set upon by Ratan Singh—the deceased—who was in company with Bela Singh, and was thrown down upon the pavement some few feet in front of the store, and whilst down and being throttled by Ratan Singh, the prisoner drew a pistol and struck Ratan Singh with it upon the forehead. Still Ratan Singh persisted in his throttling of the prisoner, being urged on by Bela Singh to kill the prisoner, and Ratan Singh said: "I will kill him this time." When overpowered, and unable, apparently, to successfully withstand the attack made upon him, and being underneath Ratan Singh, who was a much larger and physically more powerful man, the prisoner fired two or three shots from the pistol. The evidence of the surgeon demonstrates very clearly that the wound on the forehead of Ratan Singh was from a blow given with the pistol in his hand, as stated by the prisoner, and the wounds in the head of Ratan Singh caused by the pistol shots were undoubtedly wounds received when the pistol was held close to Ratan Singh's head. The evidence is that immediately previous to the assault upon the prisoner, Ratan Singh and Bela Singh were in the store of Amur Chand and were drinking brandy, Ratan Singh having brought the liquor. Amur Chand desired them to leave his store but they would not, but kept on drinking and arguing and using, as Amur Chand states, "bad language" to Jagat Singh, the prisoner, who, it would appear, had come into view outside the store but had passed on.

MCPHILLIPS, J.A.

It would appear that Ratan Singh, as well as Bela Singh, had been drinking before their arrival at Amur Chand's store. It is clear that Ratan Singh and Bela Singh were enemies of the

COURT OF APPEAL

1915

July 22.

REX v. JAGAT SINGH

appellant. Their conduct and language demonstrated that, and it is not at all improbable, in fact, reasonable, to believe the prisoner's story that this enmity was the result of the prisoner not committing the murders it was desired by them he should commit, and for which he had been given two pistols and a knife.

When the evidence of the two police officers is considered, also the evidence of Jones, the druggist, it is clear that at most only three shots were fired, and when Jadda's evidence is looked at, it is apparent that a great noise and quarrelling was going on. In view of all this testimony, given by unimpeachable witnesses, wholly independent and disinterested, can the evidence of Bela Singh and Balmurkand be believed or given any weight?

With respect to the actual assault—scuffle and shooting—it is plain that the only witnesses that can really speak to this are Amur Chand and the prisoner, and the Crown, in my opinion, cannot rely upon any evidence given by Bela Singh and Balmurkand, as that evidence is so inconsistent with that of Amur Chand, who was best able to detail what took place. Amur Chand was a Crown witness, not treated as being hostile, nor was it attempted to be shewn that he was hostile, and his evidence, even apart from the evidence of the accused, shews that the shots were fired under such circumstances that the verdict as rendered by the jury cannot be said to be other than against the weight of evidence.

MCPHILLIPS, J.A.

Rex v. *Hopper, supra,* was a case where a fight took place, it not being capable of being determined who was the aggressor. Here that seems well proved. It followed as a matter of natural consequence that Ratan Singh would assault the accused in view of his intoxicated condition and bearing in mind that, notwithstanding when he arrived at Amur Chand's store he was already intoxicated, he still further plyed himself with liquor, and all the while spoke abusively of the accused. The Lord Chief Justice said in *Rex* v. *Hopper, supra,* at p. 139:

> "Then one struck the other it is not certain which and this resulted in a fight between the sergeant and Dudley and another man who helped him. The two got the appellant to the ground and as he expressed it 'hammered' him . . . . During the struggle it is said by the appellant that Dudley threatened to stick a bayonet into him."

The shooting in the *Hopper* case did not occur at the time of the fight, as it did here, and the more excusable it is. With respect to the actual shooting in the *Hopper* case, the facts were that later Dudley was required by the sergeant to give up his arms but he would not, as stated by the Lord Chief Justice at p. 140.

In the present case we have the extreme provocation, and the reasonable fear of the appellant that unless he shot he would lose his life, and at the moment of peril, Ratan Singh having him at death grip, the shooting takes place.

The Lord Chief Justice at p. 141, continuing, says:

"Moreover it must be borne in mind that it is very little to be relied on that the fact that there had been so much drinking and a fight as well as other grave insubordination, all tended to make the appellant lose control of himself at a critical moment. In these circumstances we think that the matter should have been left to the jury so that they might find murder or manslaughter as they thought right."

It may be said that the defence raised in the present case was that of justifiable homicide or self-defence only. Even if this be the case, it does not prevent this Court giving consideration to the facts as we see them before us, and directing a new trial in a proper case where the verdict is against the weight of evidence. Upon this point the further language of the Lord Chief Justice, at p. 141 in the *Hopper* case, is expressly in point.

MCPHILLIPS, J.A.

Now, what is a true view of the facts? In the present case the accused is set upon, thrown down, throttled, and when a severe blow on the forehead is ineffectual to compel his assailant to desist from what would appear to have been nothing less than a murderous attack, the appellant shoots. Could any jury, upon such evidence, rightly return a verdict of murder? In my opinion, they could not. The verdict is unreasonable, and cannot be supported having regard to the evidence, and it is against the weight of evidence. To put it in another way, there was not sufficient evidence before the jury to justify them in bringing in a verdict of murder, and if there was not sufficient evidence it would be against natural justice that the verdict should be allowed to stand, and in so holding, this must resolve itself into a determination that the verdict was against the

COURT OF APPEAL

1915

July 22.

REX v. JAGAT SINGH

weight of evidence. As being weighed in the scales, the evidence against any reasonable conclusion that murder was committed greatly outweighs any that can be called up to support such conclusion: see *Rex* v. *Bradley* (1910), 74 J.P. 247; and *Rex* v. *Chainey* (1913), 30 T.L.R. 51. Reverting again to the question of manslaughter, which was a possible verdict upon the evidence before us—although I do not for a moment say it is a verdict that should be found—I would refer to the judgment of Darling, J. in *Rex* v. *Gross* (1913), 77 J.P. 352.

In the present case, there is no question of the assault upon the accused and the fact that Ratan Singh had him down and was throttling him. It is the case that the Crown has established and under such circumstances the shooting takes place. A verdict of murder, in the face of such evidence, must be against the weight of evidence.

Lord Reading, C.J. in *Rex* v. *Lesbini* (1914), 3 K.B. 1116, dealing with murder, and provocation necessary to constitute manslaughter, said at p. 1120:

"We agree with the judgment of Darling, J. in *Rex* v. *Alexander* (1913), 9 Cr. App. R. 139, and with the principles enunciated in *Reg.* v. *Welsh* (1869), 11 Cox, C.C. 338, where it is said that 'there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion.'"

Also see *Eberts* v. *Regem* (1912), 47 S.C.R. 1.

MCPHILLIPS, J.A.

It was stated by counsel for the accused that the learned trial judge, when granting leave to the accused to apply for a new trial, expressed himself as not being satisfied with the conviction. In *Rex* v. *Gaskell* (1912), 77 J.P. 112, Avory, J., delivering the judgment of the Court, said:

"It is obvious that where a case is properly left to the jury and the jury are properly directed by the learned judge, the mere opinion of the learned judge who tried the case that he himself would have found the other way, or that the verdict is unsatisfactory, will not justify interference with that verdict by the Court of Criminal Appeal. But we have here to consider whether the learned judge did give a proper and sufficient direction to the jury in the case."

And the Court held that no proper and sufficient direction was given and the conviction was quashed. In the present case, as I have already pointed out, the learned trial judge erred in his direction to the jury, and although, no doubt, exception thereto

would be expected to be taken and a stated case applied for, yet it is a consideration, perhaps explanatory of the verdict as returned by the jury. Further, I am of the view that it is not a consideration this Court is disentitled from considering when it is for us to decide, untrammelled by any limitations, whether the verdict, as returned, is against the weight of evidence. The English Act, 7 Edw. VII., Cap. 23, Sec. 4, does not speak of the "weight of evidence," but "that it is unreasonable or cannot be supported having regard to the evidence." That verdict must be against the weight of evidence which is not based upon sufficient evidence: see *Rex* v. *Bennett* (1912), 8 Cr. App. R. 10 at p. 11.

MCPHILLIPS, J.A.

In my opinion, the jury could not properly arrive at the verdict given by them. Viewing the whole of the evidence, they could not reasonably find as they did—that is, the verdict was not the verdict of reasonable men, and is against the weight of evidence: *Rex* v. *Williamson* (1908), 24 T.L.R. 619; *Rex* v. *Jenkins* (1908), 14 B.C. 61.

It follows that, in my opinion, the verdict is against the weight of evidence, and the proper direction to make is that the accused be granted a new trial.

New trial ordered.

Solicitors for accused: *McCrossan & Harper.*
Solicitor for the Crown: *A. H. MacNeill.*

COURT OF APPEAL

1915

Aug. 10.

NEWBERRY v. BROWN.

Vendor and purchaser—Sale of land—Description of parties—Statute of Frauds.

NEWBERRY v. BROWN

The description of one of the parties to a contract for an exchange of land as a "client of A" is insufficient to satisfy the Statute of Frauds. The rule is that the description must be such that there can be no reasonable doubt as to who the parties are, or, "such that their identity cannot be fairly disputed."

Semble (*per* MARTIN, J.A.), the word "exchange" does not import more of ownership than the word "sell."

Statement

APPEAL by plaintiff from the decision of MURPHY, J., reported in 20 B.C. 483, in an action for specific performance of an agreement for the exchange of certain lands in the City of Vancouver, tried by him at Vancouver on the 16th of December, 1914. The facts are set out in the report of the trial.

The appeal was argued at Vancouver on the 26th of April, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Ritchie, K.C., for appellant: The action was for specific performance of a contract to exchange two pieces of property. The learned trial judge held there was not a sufficient compliance with the Statute of Frauds. In order to construe a memorandum, it is necessary to obtain the surrounding circumstances. The party not being mentioned in the document is the ground for dismissal. The document shews clearly who the person was, and the judge was wrong in confining himself to the words "client of P. N. Anderson"; he should have included the words "who runs the Cadillac Hotel": see *Rathom* v. *Calwell* (1911), 16 B.C. 201; *Plant* v. *Bourne* (1897), 2 Ch. 281; 13 L.Q.R. 337; *Lewis and Sills* v. *Hughes* (1906), 13 B.C. 228; *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124; *Andrews* v. *Calori* (1907), 38 S.C.R. 588; Halsbury's Laws of England, Vol. 25,

pp. 291-2. On the question of the test that should be applied, see *Oliver* v. *Hunting* (1890), 44 Ch. D. 205; *Carr* v. *Lynch* (1900), 1 Ch. 613; Halsbury's Laws of England, Vol. 7, p. 370; *Cropper* v. *Cook* (1868), L.R. 3 C.P. 194; *Commins* v. *Scott* (1875), L.R. 20 Eq. 11.

S. S. Taylor, K.C., for respondent: In this case there is only the word "client," whereas in the *Calori* case there is a previous document to which they could refer, and the person is identified by the writing: see Browne on Statute of Frauds, 5th Ed., 470; *White* v. *Tomalin* (1890), 19 Ont. 513 at pp. 518 and 521; *McIntosh* v. *Moynihan* (1891), 18 A.R. 237 at pp. 240-1; *Long* v. *Millar* (1879), 4 C.P.D. 450 at p. 455. There is a great difference between tacking together documents to make an agreement and for the purpose of satisfying the Statute of Frauds: see *Taylor* v. *Smith* (1893), 2 Q.B. 65 at pp. 69, 72 and 74; *Williams* v. *Jordan* (1877), 46 L.J., Ch. 681. On the insufficiency of the words "client of A" to satisfy the statute, see *Vandenbergh* v. *Spooner* (1866), L.R. 1 Ex. 316; *Champion* v. *Plummer* (1805), 4 Bos. & P. 252; *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124 at pp. 1140-1; *Jarrett* v. *Hunter* (1886), 34 Ch. D. 182 at pp. 184-5; *Potter* v. *Duffield* (1874), L.R. 18 Eq. 4 at pp. 7-8, in which case the word "vendor" is held not to be a sufficient compliance with the statute: *Wilmot* v. *Stalker* (1882), 2 Ont. 78 at p. 80; *Lavery* v. *Pursell* (1888), 39 Ch. D. 508 at p. 518; Dart on Vendors and Purchasers, 7th Ed., pp. 234-5; Halsbury's Laws of England, Vol. 7, p. 357, par. 759; *Skelton* v. *Cole* (1857), 1 De G. & J. 587; *Coombs* v. *Wilkes* (1891), 3 Ch. 77 at p. 80; *Hubert* v. *Treherne* (1842), 3 Man. & G. 743 at p. 754; *Coote* v. *Borland* (1904), 35 S.C.R. 282. The acceptance is not in the terms of the offer, and he is out of Court on that basis alone.

Argument

Ritchie, in reply.

Cur. adv. vult.

10th August, 1915.

MACDONALD, C.J.A.: I agree with my brother IRVING in dismissing the appeal.

MACDONALD, C.J.A.

COURT OF APPEAL

1915

Aug. 10.

NEWBERRY v. BROWN

IRVING, J.A.

IRVING, J.A.: To satisfy the Statute of Frauds in respect of a description of the property, there must be such a description as will, having regard to the circumstances of the case, shew clearly what is intended to be dealt with: that is the case of *Plant* v. *Bourne* (1897), 2 Ch. 281, a case on the admission of extrinsic evidence, and was decided on the authority of Sir William Grant in *Ogilvie* v. *Foljambe* (1817), 3 Mer. 53, where the property was described as "Mr. Ogilvie's house."

In respect of a description of the contracting parties there exists the same rule for the admission of extrinsic evidence, but as there is more room for error in the description of a number of persons, or a class of persons, the rule is that the description must be such that there can be no reasonable doubt as to who the parties are, or "such that their identity cannot be fairly disputed." In *Carr* v. *Lynch* (1900), 1 Ch. 613, the identity of the purchaser was fixed by the fact that the offer was made to the person who paid the £50. In *Calori* v. *Andrews* (1906), 12 B.C. 236; affirmed (1907), 38 S.C.R. 588, the identity of the purchaser was fixed by the correspondence. But in this case the offer was to "a client of P. N. Anderson." Mr. *Ritchie* would add the words "who owns the Cadillac Hotel." But why not read it to any "client"? The words actually used would include the owner of the equity of redemption, the holder of the option, or any of the mortgagees.

I would dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: This appeal should, I think, be dismissed, for the reasons given by the learned trial judge. It was urged upon us that the word "exchange" imports more of ownership than "sell," and that special significance should be attached to it, but I find myself unable to take that view. We are invited here to enter the realm of speculation as to who the so-called "client" was (and he might have been one of several persons), the very thing the statute was intended to prevent.

GALLIHER, J.A.

GALLIHER, J.A.: I agree with the learned trial judge, and would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: After very careful consideration of the

arguments presented from both sides upon this appeal, and consideration of the numerous authorities cited, I remain of the opinion I formed at the hearing of the appeal, and that is that the learned trial judge arrived at the right conclusion. It is difficult at times, upon the particular facts of each case, to rightly determine whether the plea of the Statute of Frauds is established. In the present case the writing as signed by the defendant cannot be said to be more than an offer. It does not shew to whom the offer is made, that is to say, the purchaser, and the defendant is not shewn to have signed any other writing which makes up for the deficiency apparent in the writing. "Client of P. N. Anderson" would not appear, upon the authorities, to be sufficiently definite: *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124. It is true that upon the facts as proved, independent of the writing, that the defendant knew with whom the transaction was being carried out, and Anderson, who was to some extent the agent of the defendant, well knew who that person was, and it was undoubtedly the plaintiff. Bearing in mind these facts, *Andrews* v. *Calori* (1907), 38 S.C.R. 588, gave me most anxious consideration, especially the language of Maclennan, J. at p. 597, where he said:

"That person, however, had signed nothing, and even his name was not known to him. But his identity and name were not uncertain. Both were known to Clark."

MCPHILLIPS, J.A.

However, the facts were more complete in the case, and the person buying had paid a deposit, and that fact could be established with certainty. Nevertheless, this decision of the Supreme Court of Canada would appear to have proceeded, with the greatest respect to the Supreme Court of Canada, a very long way and gives rise to difficulties of reconciling the long line of decisions bearing upon this very much-debated Statute of Frauds, and somewhat analagous to *Warner* v. *Willington* (1856), 3 Drew. 523, referred to in Fry's Specific Performance, 5th Ed., 282, where, in referring to *Warner* v. *Willington, supra,* this is said:

"It is submitted that this decision is not without difficulties on principle."

Also see *Goodman* v. *Griffiths* (1857), 1 H. & N. 574; *Wood* v. *Midgley* (1854), 5 De G.M. & G. 41, 46. It is, therefore, with some hesitancy, in view of the decision in *Andrews* v.

COURT OF APPEAL

1915

Aug. 10.

NEWBERRY v. BROWN

Calori, supra, that I have arrived at my conclusion that the plaintiff cannot succeed in the action. The defence wholly proceeded upon the Statute of Frauds. Independent of the statute, there was unquestionably an offer made by the defendant to the plaintiff accepted by the plaintiff, and that acceptance duly communicated to the defendant. There would not appear, upon the facts of the present case, that which is requisite to comply with the legal maxim *id certum est quod certum reddi potest*: see *Williams* v. *Jordan* (1877), 6 Ch. D. 517; *Rossiter* v. *Miller, supra,* at pp. 1124, 1140; *Hood* v. *Lord Barrington* (1868), L.R. 6 Eq. 218; *Bourdillon* v. *Collins* (1871), 19 W.R. 556; *Carr* v. *Lynch* (1900), 1 Ch. 613; *Craig* v. *Elliott* (1885), 15 L.R. Ir. 257.

MCPHILLIPS, J.A.

In the language of Turner, L.J. in *Skelton* v. *Cole* (1857), 1 De G. & J. 587 at p. 597 (118 R.R. 241): "On the Statute of Frauds, therefore, the plaintiff's case fails."

The appeal should, in my opinion, be dismissed.

Appeal dismissed.

Solicitor for appellant: *F. G. Crisp.*

Solicitors for respondent: *Bourne & McDonald.*

HEMPHILL AND CUCKOW v. McKINNEY *ET AL.*

MURPHY, J.

1914

Oct. 21.

COURT OF APPEAL

1915

June 7.

HEMPHILL v. McKINNEY

Statute, construction of—Negligence—No statutory remedy—Action at law—Subsequent statute—Not retrospective—Drainage, Dyking, and Irrigation Act, R.S.B.C. 1911, Cap. 69, Secs. 8, 11, 19 and 21—B.C. Stats. 1913, Cap. 18.

The provisions of chapter 18 of the British Columbia Statutes, 1913, amending the Drainage, Dyking, and Irrigation Act, R.S.B.C. 1911, Cap. 69, are not retrospective.

Section 21 of the Drainage, Dyking, and Irrigation Act, R.S.B.C. 1911, Cap. 69, does not apply to work carried on under a general scheme adopted by proprietors under section 8 of said Act, and there being no statutory remedy open to persons who have been injured by the negligent carrying out of the works, an action at law will lie (MARTIN and MCPHILLIPS, JJ.A. dissenting).

A general scheme of drainage formulated by the proprietors provided an efficient and safe outlet for the waters, but it was not opened, and an alternative outlet was employed, which had the effect of flooding the lands of the plaintiffs with alkali water.

Held (affirming the decision of MURPHY, J.), that the defendants had been guilty of negligence, and the fact that another authority had turned additional water into the same drain and increased the flow did not excuse them.

APPEAL from the decision of MURPHY, J. in an action tried by him at Vancouver on the 21st of October, 1914. The plaintiffs, farmers, owned certain farm lands on Lulu Island. The north-west portion of the island was dyked and a system of roads about a mile apart ran north and south and were numbered 1, 2, 3, 4 and 5, starting from the west; a road on the north side of the island, known as No. 20, ran east and west, intersecting the north and south roads and reaching the Fraser River at its west end, just beyond where it intersected road No. 3. Prior to the plaintiffs acquiring their property a railway embankment had been constructed, running from the south end of the island north between roads 1 and 2 for a certain distance, then it turned east and ran to a point between roads 3 and 4, where it again turned north and crossed road 20 at right angles at a point known as Cambie Station. The plaintiffs' property lay immediately south

Statement

MURPHY, J.

1914

Oct. 21.

COURT OF APPEAL

1915

June 7.

HEMPHILL v. MCKINNEY

Statement

of road 20 (between roads 3 and 4) and immediately west of the railway embankment. A bog lying east of the railway embankment contained an alkaline water, from which the plaintiffs' farms were protected by the railway embankment. Prior to the work done by the defendants over which this action arose, a ditch had been constructed west of the railway embankment along the north side of road 20 (14 feet wide by 6 feet deep), which carried the water westerly to a gate in the dyke near the junction of roads 20 and 3. This gate let the waters from both these roads into the Fraser River at low tide. A small ditch had also been built along the east side of the railway embankment, and the water from this ditch was carried by a culvert under the embankment into the ditch on road 20, the road 20 ditch being at that time of sufficient capacity for the drains and ditches emptying into it. During 1908, and subsequently, the defendants formulated a scheme for draining roads 4 and 20 east of the railway embankment, as contemplated by section 8 of the Drainage, Dyking, and Irrigation Act, R.S.B.C. 1911, Cap. 69. The intention was to carry the water north along road 4 and build a gate through the dyking to the Fraser River. The ditch was built on road 4 and along road 20 as far as the embankment, but the gate in the dyke at the north end of road 4 was not constructed until the following year, and in the meantime the drain along road 20, east of the embankment, had been connected with the culvert (which was enlarged) under the railroad embankment. The flow of water was at the same time augmented by the construction of another ditch from road 5, along road 20 to road 4 (built by another authority). The combined flow swelled the waters in the ditch on road 20 to the west of the embankment to such an extent that the plaintiffs' lands were inundated and considerable damage was done by the alkaline waters carried from the aforesaid bog. In an action for damages the learned trial judge held that the defendants were liable, and referred the question as to *quantum* of damages. The defendants appealed.

M. A. Macdonald, for plaintiffs.

C. W. Craig, and *Anderson,* for defendants.

MURPHY, J.: In this case, in the first place, I think I shall have to find there is no question of dominant and servient tenement, in the ordinary sense of the word. It is quite clear that before the B.C. Electric Railway was built, bog water was spreading out in every direction, and some of it, at any rate, got down on the lands in question in this suit, but the construction of the B.C. Electric Railway cut that off entirely.

Now, I am bound to hold, on the evidence, that the commissioners were negligent here. They agree themselves that the construction of the ditch along road No. 4 was proper and that it was essential under the circumstances, and I think they were also negligent in the matter of the outlet at No. 3. They took over the outlet, and apparently used it as their outlet, and never apparently visited it with an idea of repairing it. It is, I think, negligence on their part, particularly when they deepened the ditch from the B.C. Electric Railway east to road No. 4, and I think their negligence was inexcusable when they could not prevent the municipality from putting the water into their ditches they did not immediately see to the construction of a proper ditch down No. 4 road north to the river. I find as a fact that the ditch they constructed in 1910 was not properly constructed, and find if it had been, it would have answered the purpose, and that the commissioners should have known this. In fact, in this drainage scheme, I think they should have called in the services of skilled persons, instead of undertaking it very largely on their own ideas. I am afraid that the real difficulty was an attempt to save money, and it has turned out very disastrously. At any rate, my view of the facts is that the commissioners must be held negligent, and I will find so and refer the question of damages. It is very difficult, in fact, impossible, on the evidence, to say what proportion of damage was done by the bog water as distinguished from the water that was brought down by the ditch constructed by the municipality, but in my view of the matter this need not be considered, as I think the commissioners, by their acts, have rendered themselves liable for the whole damages. I find, as a fact, that no damage whatever was done to this property by river water, if river water got on it. I doubt if river water was there to any great extent, but must

MURPHY, J.

1914

Oct. 21.

COURT OF APPEAL

1915

June 7.

HEMPHILL v. MCKINNEY

hold, on the evidence, that if any of it did get on their land, it did not damage the soil.

I will refer the question of damages, but on the other hand I have to give judgment on the counterclaim for the defendants, but will direct that the collection of it be suspended until after the question of damages is settled. The plaintiffs are entitled to costs of the action and the defendants to the costs of the counterclaim.

The appeal was argued at Victoria on the 19th and 20th of January, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Martin, K.C., for appellants: The injury complained of arose in 1909 and continued for four years. The plaintiffs' remedy is by arbitration, under B.C. Stats. 1913, Cap. 18, Sec. 58. This section is a change in the procedure for enforcing a remedy and is retroactive. The plaintiffs have, therefore, no status for bringing this action. What the commissioners did was under a general scheme of drainage within the scope of their authority under the Act, and anyone injured thereby must, therefore, arbitrate, and anyone seeking redress does not lose his rights under the old Act, but the procedure is under the new: see B.C. Stats. 1913, Cap. 18, Sec. 97; *Corporation of Raleigh* v. *Williams* (1893), A.C. 540. These people are only getting what they were always subject to. The railway right of way protected them, and when we put the drain through the right of way on road 20 we restored them to their original position. The fact of the railway right of way protecting them gave the plaintiffs no right to a continuance of that protection. Our bringing the water through the right of way to the north of their property did not affect any legal right to which the plaintiffs were entitled.

Argument

M. A. Macdonald, for respondent: We contend no one can take away a benefit obtained through the industry of man; the benefit, therefore, obtained by the plaintiff by the railway right of way cannot be taken away by the defendants, and if they do they are liable in damages. Section 58, B.C. Stats. 1913, Cap. 18, does not apply here, as it refers only to expropriation pro-

ceedings; the old Act applies to this case: *Corporation of Parkdale* v. *West* (1887), 12 App. Cas. 602. The question is, does the Act compel arbitration exclusive of the right to bring action? See Maxwell on Statutes, 5th Ed., 84. Is the taking away of the right of action a matter of procedure? See *Vancouver Power Co.* v. *Hounsome* (1914), 49 S.C.R. 430 at p. 437. The old ditch was there to drain a limited area, but when they added the drainage of other areas to it without enlarging it, it was not capable of holding the additional water, and the flooding resulted: see *Geddis* v. *Proprietors of Bann Reservoir* (1878), 3 App. Cas. 430. Section 97 of the 1913 Act repeals the old Act, saving and excepting any rights acquired under the old Act. *Saunby* v. *London (Ont.) Water Commissioners* (1906), A.C. 110, is in our favour. The language of a statute must be clear before it takes away a common law right: see *Canadian Pacific Railway* v. *Parke* (1899), A.C. 535. On the finding of fact by the trial judge, they have not shewn that there is not evidence upon which the finding could be made. We are complaining not of what they have done but of what they have not done, that is, that they did not maintain a ditch sufficient to carry away the water: see *Vanderberg* v. *Markham and Vaughan* (1910), 15 O.W.R. 321; *Ostrom* v. *Sills* (1897), 24 A.R. 526 at p. 539. Whether the railway bank was there or not, the carrying out of a proper water scheme would have taken care of the water.

Argument

Martin, in reply: It is immaterial whether the injury was due to negligence or deliberately done; if it comes within the general scheme of work it must be arbitrated upon.

Cur. adv. vult.

7th June, 1915.

MACDONALD, C.J.A.: That there was a scheme of dyking and drainage formulated by the proprietors, as contemplated by section 8 of the Drainage, Dyking, and Irrigation Act, Cap. 69, R.S.B.C. 1911, is, I think, apparent. I think it is outlined in exhibit 8, but whether or not that scheme was subsequently altered makes no difference in the result of this case, because the defendants say that it was always part of the scheme that the northern outlet should be on road 4 from its intersection

MACDONALD, C.J.A.

MURPHY, J.
1914
Oct. 21.
COURT OF APPEAL
1915
June 7.
HEMPHILL v. MCKINNEY

with road 20 to the river. What the defendants appear to have done was to dig the other drains forming part of the scheme, leaving the outlet to the last, the effect being that water was brought to road 20 before an outlet along road 4 was provided for it. Instead of making this outlet, the defendants greatly enlarged a drain on road 20, from the corner of road 4 to the railway, where they connected it with a large drain previously constructed by the municipality and the railway company along road 20 from the railway to the river. In other words, the defendants, instead of carrying the water, as originally intended, along road 4 to the river, carried it along road 20 to the river at a different point therein, the result being that waters which should never have come near the plaintiffs' lands at all were brought there and allowed to overflow them. This change in the scheme had been objected to by plaintiffs before it was made, and defendants were warned that injury would result to the plaintiffs' lands therefrom.

The immediate result of the defendants' act in carrying the waters down road 20 was to flood the lands of the two plaintiffs with alkaline water, causing injury to the soil as well as injury from inundation. The defendants subsequently made the outlet along road 4 as originally intended, and thereafter flooding of the plaintiffs' lands ceased.

MACDONALD, C.J.A.

Now, the statute in question is a crude piece of legislation, but it was greatly amended and enlarged by a subsequent Act passed in 1913, about four years after the acts complained of. The appellants' counsel contended that the latter Act is retrospective, and that under it the plaintiffs can obtain by arbitration the relief they seek, and hence, cannot maintain this action. In my opinion, that contention cannot be maintained. If there is a statutory remedy open to the plaintiffs it must be found in said chapter 69, and not in the Act of 1913. In the former statute there is no such remedy provided, unless it be by section 21. That section refers to damage resulting from the execution of work carried out under section 11 of the same Act, and, in my opinion, section 11 is not applicable to this drainage scheme. That section applied only, I think, to work undertaken by commissioners in an application by a proprietor whose lands were

not within the benefit, or only partially within the benefit, of the general scheme adopted under said section 8, and has no application at all to work carried on under a scheme adopted by the proprietors in virtue thereof, or adopted by the commissioners themselves in the absence of such a scheme. If I am not in error in thus construing section 11, then no statutory remedy is available to these plaintiffs. Now, had the original scheme, whether that of the proprietors or of the commissioners (the defendants) been carried out in good faith, without negligence in the manner of carrying it out though injury to the plaintiffs' lands resulted from defects in or insufficiency of the scheme, as distinguished from the execution of the work, I think, having regard to the language of section 18 of the said statute, the plaintiffs could not maintain this action. Whatever may be the liability of public bodies, exercising authority such as that exercised by the defendants, for defects or insufficiency in the general scheme of work decided upon, there can be no doubt that if the work is carried out negligently, and there is no statutory remedy given to a person injured thereby, an action at law will lie. The negligence of the defendants in this case was in not providing what has since proven to be a reasonable and safe outlet, the very outlet authorized by their scheme, and the substitution therefor, negligently, I think, of an insufficient and unauthorized outlet.

MACDONALD, C.J.A.

Now, the excuse is that they were unable to secure the consent of the municipality to the digging of the outlet on road 4, but they do not appear to have attempted to get such consent until after they had brought the water from the south of road 20 to the intersection of that road with road 4. The municipality would not allow the defendants to construct that outlet because it would take up too much of the road allowance, but offered to permit part of it to be constructed along the road allowance if the defendants could procure the consent of the adjoining owners to a strip of their lands being utilized in aid of the work. That consent was not obtained, and the evidence indicates that the defendants were not by any means diligent in seeking to obtain it. They chose, rather, to carry the water along road 20 to the plaintiffs' land, notwithstanding the warning of what the result

MURPHY, J.

1914

Oct. 21.

COURT OF APPEAL

1915

June 7.

HEMPHILL v. MCKINNEY

would be, and hence, brought this suit upon themselves. The defendants had power to expropriate private land for the outlet under the statute referred to, and I think they were negligent in proceeding as far as they did before securing, in one way or another, the necessary outlet. At all events, they were not justified in carrying the water down road 20 regardless of the injury which it might do to the plaintiffs' lands, and contrary to the general drainage scheme.

Another ground of appeal was that the damage complained of had been caused by the act of the municipality in connecting its drain east of road 4 with the enlarged drain on road 20 from road 4 to the railway, thus greatly increasing the volume of water flowing to the plaintiffs' lands. That this act of the municipality increased the burden on that drain is not disputed, but to what extent it was increased is not made clear. It is suggested that without the municipal water there would have been no flooding, but when it is made clear that a very large quantity of water was brought by the defendants themselves out of its natural course by artificial channels past the plaintiffs' lands, I think the defendants cannot relieve themselves of blame by saying that another party, namely, the municipality, took advantage of the conduit which the defendants had made on road 20 to pour its water, along with defendants' waters, upon the plaintiffs' lands. I think the conclusive answer to this contention of the defendants is that the municipality could not, by merely bringing water to the intersection of roads 4 and 20, have damaged the plaintiffs' lands but for the defendants' act in making a conduit which conducted them thereto. I see no reason for disagreeing with the result in the Court below, and would, therefore, dismiss the appeal.

MACDONALD, C.J.A.

IRVING, J.A.: Plaintiffs, in 1914, sued for damages sustained by them in 1909-13 in consequence of the negligent construction of drainage and dyking works carried out by the defendants, who were dyking commissioners, and obtained a judgment from MURPHY, J., who ordered a reference to determine the damages.

IRVING, J.A.

On the 1st of March, 1913, a statute was passed, Cap. 18, amending the principal Act, R.S.B.C. 1911, Cap. 69. Under

the amendment of 1913, it is provided, section 58, when any lands not taken are injuriously affected by the works executed by the commissioners, the damage thereto shall, if not mutually agreed upon, be valued and assessed by arbitration (as therein provided).

The appellants obtained leave from this Court to amend their defence by setting up this section. Their contention is that the amendment of 1913 is merely a change in procedure and, therefore, retrospective, and that the plaintiffs have, since the 1st of March, 1913, no right to sue in respect of injurious affection incurred in 1909. I cannot agree with that. The Act of 1913 is wholly different from the Act of 1909 or 1911, and the remedy given by the Act of 1913 does not fully cover the plaintiffs' cause of action.

The area originally proposed to be drained was a portion of Lulu Island, bounded on the north and west by the Fraser River. Later, the north-west portion of the area proposed to be dealt with was, for reasons of policy, dropped out of the scheme. The general slope of the land in the vicinity was to the west, but the land was very level, except that at the northern end, as you approached within a mile of the Fraser River, a slight ridge—called Willows Ridge—running parallel with the river, prevented the land from being perfectly level. Along the river front there was a number of dykes to keep out the river water, and in these dykes have been placed two outlets, about a mile and a half apart. The difference in the height between these two outlets is very slight. The area retained is bounded on the north by road No. 20, of which the westerly end terminates at the edge of the Fraser River. This end is spoken of as the outlet at the church, and which, for convenience, we may call O, and at O there is a gate through which the water which comes along road No. 20 is supposed to empty into the river. This gate is constructed so that it will work automatically—when the tide is high the gate is supposed to close—with the result that the ditch fills up with drainage waters. This imprisoning of the drainage waters brings about what one witness aptly called a question of reservoir capacity for the drainage area between the tides and the time of the outlet. When the tide

MURPHY, J.

1914

Oct. 21.

COURT OF APPEAL

1915

June 7.

HEMPHILL v. MCKINNEY

runs out the gates open and the ditches discharge their waters. The gates will open for two or three hours when there is a full run out of the tide, and for thirty to forty minutes at the half tides. This gate was built before the commissioners were organized, by the municipal council, as the outlet for road No. 3, and it is now the outlet for the ditches coming down No. 3 road as well as the ditch along road No. 20. Through the area retained, running north and south are several parallel roads, *viz.*: roads Nos. 1, 2, 3, 4 and 5, about one mile apart. A railway embankment runs at the south, between roads 1 and 2, then, turning at right angles, it is carried easterly to a point halfway between roads 3 and 4, and from there it runs north to the Fraser River, crossing road No. 20 at right angles at a point called Cambie Station.

The plaintiffs own lots 33 and 34, which lie just to the west of the railway embankment and to the south of road No. 20, and their complaint is that the plaintiffs have brought into a ditch which runs along road No. 20 so much water that the reservoir capacity of the ditch immediately to the north of them is overburdened—the gateway at point O cannot carry it off—and that their lands have been injuriously affected. For convenience, I shall call this western part of the ditch on road No. 20, West 20.

IRVING, J.A.

The water which they complain of is an alkaline water that comes from a bog lying to the east of the railway embankment, and which, were it not for the embankment, would probably flow on to their lands.

Prior to the defendants undertaking their scheme, the plaintiffs were protected from this alkaline water by the railway embankment, which was built about 22 years ago. On the eastern foot of this embankment there was a small ditch, which ditch carried the water flowing into it down to road 20, and there it passed under the embankment, through a small culvert, into the ditch which emptied itself at O into the Fraser River. The ditch West 20 was, prior to the defendants undertaking their scheme, a ditch some 14 feet wide by 6 feet deep, and had been built on the north side of road 20 by the railway company and the municipal council, and was of sufficient reservoir capacity for the drains and ditches then emptying into it.

That was the condition of affairs when Hemphill came there some eight years ago. The trouble began in 1909, when the defendants constructed or enlarged a north and south ditch down road No. 4, and an east and west ditch along the eastern portion of road No. 20, between the embankment and road No. 4, so as to carry the water of this new No. 4 ditch into ditch West 20. It was later aggravated by the construction of another ditch down road No. 5 and carrying its water, by means of a ditch opened by another authority on that portion of the road No. 20 lying to the east of road No. 4. The No. 5 ditch and the enlarged ditch No. 20 between roads 4 and 5, which portion may be called east, were made by the municipal council, and not by the defendants, just about the time the defendants had completed their scheme, which had its eastern extremity at the junction of roads 4 and 20. To meet this increased flow of water the defendants did not deepen or widen West 20, nor did they alter the outlet at O, but they employed a Chinaman to dig a ditch twelve feet top, five feet deep, four feet bottom, from road 20 in a northerly direction down towards the Fraser River, but as this passed through the Willows Ridge and the Chinaman did not dig to grade, there was for a considerable period no outlet for these waters. The gate, or intake, of this Chinaman's ditch from ditch No. 20 was also defective, in that it was 18 inches above the level of the bottom of ditch No. 20. These two defects were remedied later, probably in 1911, and in 1914 a new relief ditch, 18 feet wide and 7 feet deep, was built alongside road No. 4. This was built at the joint expense of the defendants and the municipal council, and emptied into the Fraser River at the outlet a mile and half above O.

The combined flow of ditches Nos. 4 and 5, passing through the gate at Cambie Station, swelled the waters in ditch West 20 to such an extent that the plaintiffs' lands were inundated.

It is charged against the defendants that they were guilty of negligence in (1), bringing all this water from their ditch on road No. 4 into West 20; (2), in permitting the municipal authorities to empty in West 20 the water from No. 5 ditch; (3), in not enlarging the gate at O so as to accommodate the increased supply, and (4), in not constructing a relief ditch of

MURPHY, J.

1914

Oct. 21.

COURT OF APPEAL

1915

June 7.

HEMPHILL v. MCKINNEY

sufficient capacity from road 20, in a northerly direction, so that the water from Nos. 4 and 5 could flow northerly into the Fraser River. This relief ditch, when built in 1914, proved sufficient.

The learned judge found that the railway embankment acted as a complete protection to the plaintiffs' lands against the alkaline waters of the bog. He found that damage had been done to the plaintiffs' lands by the alkaline waters of the bog, and not by the river water, as suggested by the defendants; that the alkaline water had come down by ditch No. 4, and also by ditch No. 5; that the commissioners had adopted the already constructed outlet at O for the combined waters without looking at it to determine whether it required repairs or alterations for the increased service; that they were negligent in not properly constructing the Chinaman's ditch in 1910, and in not constructing earlier a sufficiently large relief ditch when the council turned into ditch East 20 the waters from road No. 5.

I agree with him in these findings of fact, and in the conclusion that there was negligence on the part of the commissioners in not calling in the services of skilled persons to advise them of their rights (if any) to resist the action of the council in bringing in this foreign water, and if they were unable to do that successfully, to secure competent engineers to advise as to and superintend the construction necessary to relieve the pressure on the reservoir capacity of West 20, instead of relying on their own ideas.

IRVING, J.A.

What gives a nasty look to this piece of negligence is that Alexander, to whom the other commissioners committed the management of the drainage of this bog water was himself a sufferer from its ill effects in respect of a piece of property owned by him to the east of the embankment which protected the plaintiffs' land. I would support the learned judge's decision that the commissioners are liable for such negligence in an action.

Geddis v. *Bann Reservoir* (1878), 3 App. Cas. 430, *per* Lord Blackburn at p. 455:

"An action [will] lie for doing that which the Legislature has authorized, if it be done negligently."

Sanitary Commissioners of Gibraltar v. *Orfila* (1890), 15 App. Cas. 400, *per* Lord Watson at p. 411:

"It is an implied condition of statutory powers that, when exercised at all, they shall be executed with due care."

And in the same case, at p. 412, Lord Blackburn is quoted as saying:

"'In the absence of something to shew a contrary intention, the Legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same thing.'"

Corporation of Raleigh v. *Williams* (1893), A.C. 540, did not say anything counter to this. That case was decided, so far as the Bell drain is concerned, on the ground that although there was negligence in the execution of the scheme, yet, as the commissioners had in good faith accepted the engineers' scheme and by by-law made the execution of it lawful, the persons prejudiced are limited to the statutory remedy. That was a wholly different scheme of legislation from that under our consideration.

The liability of a body created by statute must be determined upon the true interpretation of the statute under which it is created. We must, therefore, examine the Act at the time the damage was done—that is, in 1909. That Act then in force would be chapter 64 of the Revised Statutes of 1897.

The commissioners when appointed, or selected, were to be limited by the determination of the majority of landowners "as to the general extent, scope and limits of the works," but the commissioners were "to have full power in all matters of detail." In the event of it being proposed to extend the payment for the works over a term of years, a plan was to be prepared shewing the proposed scheme and the lands proposed to be benefited. An estimate of the cost was to be made and an assessment roll prepared and a scheme devised shewing how the cost of the works was to be met. In the case of works of small extent, where it was proposed to meet the cost by assessments levied as the work progressed, no plan or estimate was necessary. Provision was made for altering the plans. Then it was to be the duty of the commissioners to cause the works shewn upon the plan, or in the determination deed, to be executed, and to see that the same were "duly operated and maintained in a proper state of repair." These duties to operate and repair are specific statu-

MURPHY, J.

1914

Oct. 21.

COURT OF APPEAL

1915

June 7.

HEMPHILL v. MCKINNEY

tory duties, and would be enforceable by *mandamus* or indictment irrespective of consequences. The common law liability (if any) would arise only in the event of damage being sustained.

Powers of expropriation were given, and the compensation payable in respect thereof, which was to be regarded as portion of the cost of the works, was to be settled by arbitration. No provision was made for compensation in respect of land injuriously affected though not actually taken, nor did the Act require preparation of the plan by an engineer (as in the *Raleigh* case), nor was there any provision made, (1), as to the utilization of highways, the possession of which is, by the Municipal Act, vested in the municipalities; or (2), as to the use of any municipal ditches either exclusively or jointly with the municipal authorities. On the whole, I read the Act as simply incorporating these persons so that they could conveniently exercise a scheme to be mutually determined upon, and to that end borrow money by assessments to be levied. It was a substitute on a large scale for individual enterprise. In general, although the statute defines the relation of the defendants to the subject-matter, it is the general or common law which defines the legal results of that relation. It did not exempt them from the general law for liability to keep their waters within their ditches or reservoirs, on the principles laid down in *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; see on this point *Shipley* v. *Fifty Associates* (1870), 106 Mass. 194.

IRVING, J.A.

In *Harrison* v. *Southwark and Vauxhall Water Company* (1891), 2 Ch. 409; 60 L.J., Ch. 630, Vaughan Williams, J. laid down that where a statute authorizes the execution of a work it authorizes all things reasonably necessary for the execution of the work, and to what extent the defendants might go under this Act is a difficult question. Certainly it would justify them in building a relief ditch to the north and taking all precautions possible to keep down risk of flooding.

In regard to the right of the defendants to make use of the roads and ditches the property of the municipality, there is a difficulty in finding out how this was obtained. I suppose there was a licence to do so. No by-law was proved. The council,

therefore, would be in a position to terminate the licence at any time, but in view of the injury that would be done by an untimely revocation, it may be argued that the making of these ditches, and the construction of a reservoir, without taking steps to have the licence first obtained, was negligence on the part of the defendants. I think it was negligence.

Exhibit 6, which was signed in or about August 1906, authorized the defendants to

"establish drainage for the lands within the above-defined district by widening and deepening the present existing road-ditches running north and south within the same; to put in large flood-boxes sufficient to discharge the water carried by the said ditches from the said lands, and to do everything that may be necessary to thoroughly . . . . drain the said lands."

The north and south ditches at that time were two small ditches, one on each side of the embankment—two small ditches (choked up) on each side of No. 4. These were carried across road 20 ditch in boxes down to the Fraser River—the predecessor of the Chinese ditch. I presume there would be ditches at both sides of road No. 3, which terminates at point O. The road No. 20 was an east and west road, and it is questionable whether the omnibus clause would include it. In my opinion, it would not.

That ditch No. West 20 (I may be repeating myself) was then a 14-foot ditch west of the embankment, but east of the embankment was a small 2½ feet deep ditch at the side of the road. That was the original plan, and it bears out the plaintiffs' contention that the system was to be a north and south system of drainage. Then there seems to have been a change made. In what way and to what extent it is not clear. No document shewing any alteration of the general scope, extent and limits of the works was put in.

A memorandum of work to be done was drawn up and registered. This memorandum, as I understand it, shewed no details, but authorized a north and south ditch on No. 4, and, necessarily, the carrying of that water westerly along road No. 20. The water that came down 5, and was also carried westerly, was not included in the memorandum filed.

The failure of the defendants to prevent this accumulation of

MURPHY, J.

1914

Oct. 21.

COURT OF APPEAL

1915

June 7.

HEMPHILL v. MCKINNEY

waters being turned in West 20 was a failure on their part to "duly operate" the ditches built by them. I think that, under their duty to keep in a proper state of repair, they were required to close the ditch on No. 20 at their easterly terminus when they found that the municipal board had turned their foreign waters into them. If they were unable to prevent the council turning the waters of No. 5 into No. East 20, and the evidence is not satisfactory that they made any effort to do so, they should have appealed to Parliament for relief to enable them to "duly operate" their scheme. A licensee is entitled to a reasonable time for the removal of goods placed by him on licence on another's property: *Cornish* v. *Stubbs* (1870), L.R. 5 C.P. 334; 39 L.J., C.P. 202; *Mellor* v. *Watkins* (1874), L.R. 9 Q.B. 400, and the commissioners, I think, would have been entitled to time had they applied for it; and compare acquiescence in the case of a nuisance—*Davies* v. *Marshall* (1861), 10 C.B.N.S. 697; 31 L.J., C.P. 61. The municipal council would not be estopped by their laches: *Islington Vestry* v. *Hornsey Urban Council* (1900), 1 Ch. 695 at pp. 705-6, but time, I have no doubt, would have been given by the Courts to enable the commissioners to make other arrangements, as was done in that case.

Bigelow v. *Powers* (1911), 25 O.L.R. 28, is a case that may have a bearing on the plaintiffs' rights to recover damages from their co-operating neighbours if it should be held that the board is not an incorporated body.

IRVING, J.A.

When the commissioners began to convert the small road ditches along road 20 into drainage ditches, and to enlarge the culvert under the embankment, the plaintiffs protested again and again, but to no purpose. Hemphill's protest at a meeting was ruled out of order because he could find no seconder. I venture to think that was not the proper way to deal with the matter. He was before a board who had a certain duty to perform with reference to him, and the matter should have been considered. Speaking generally, the defendants, having regard to their discretionary powers, did not give the plaintiffs the consideration they should have given. I think they were over-impressed with the powers of the council, or perhaps, to speak

more strictly, that in their desire not to lose the assistance the members of the council were willing to give to their scheme, they overlooked the plaintiffs' rights.

I would dismiss the appeal.

MARTIN, J.A.: I agree that the amendment of 1913 is not retrospective, and so this case must be determined upon chapter 69 of R.S.B.C. 1911.

But I am of opinion that there is a statutory remedy provided by said chapter to which the plaintiffs should have resorted instead of bringing this action. Section 11 thereof is the principal and controlling one in the whole enactment, and under it the work in question must necessarily have been performed. Unless that section is resorted to, effect cannot be given to the statute, either as regards works under sections 8 or 11, because, by no other section is "power" directly or definitely given to the commissioners to assess and levy "for the cost of such works and for damage arising therefrom," and so, apart from it, the statute breaks down in its practical operation. Sections 18, 40 and 44 are clearly only complementary, and supplementary, or explanatory, and while section 18 says generally and loosely that it shall be the duty of the commissioner "to attend to the making, levying and collecting of assessments," it does not specify upon what lands or upon what proprietors that assessment shall be made, nor for what cost or damage. To determine this, resort must be had to section 11, as already noted. The commissioners mentioned in section 11 are of three classes, *viz.*: those appointed by the Crown, under section 3, those selected by the "proprietors," under section 4, and those jointly nominated and selected by the Crown and the "private owners," under section 5. Section 8 applies to and may be resorted to by these three classes; the word "proprietors" therein (as interpreted by section 2) clearly includes the Crown as well as the "private owners" mentioned in section 5. These proprietors are given the right, if they see fit to exercise it, to "determine the general extent, scope and limits of the works with the execution of which the commissioners shall be entrusted, but the commissioners shall, subject to the provisions of this

MURPHY, J.
1914
Oct. 21.
COURT OF APPEAL
1915
June 7.
HEMPHILL v. MCKINNEY

Act, have full power in all matters of detail." If the proprietors do not see fit to exercise this right, then section 11 must be resorted to for that purpose. That section gives broad and general working powers to the commissioners, and it also contains the all-important powers to determine what lands are benefited by the works, and to assess and levy as aforesaid. The "application" to the commissioners referred to in that section embraces all works which may be initiated under other sections as well as by the application of any one or more proprietors thereunder. Sections 3, 4 and 5 are only ones relating to the selection of commissioners for particular "districts," as interpreted by section 2. Section 8 confers a special right of definition; section 11, as has been said, is the main constructive section. In cases where the work is not defined under section 8, there would have to be an "application" in writing by one or more of the interested proprietors to define the "works" that are to be "executed" for reclaiming or irrigating the lands, as set out in section 4, as well as in 11, and the "direction" or "order" of the commissioners authorizing and defining the works to be executed must be obtained before the plan, estimate, etc., required by section 13 can be filed. But whether the matter be initiated under sections 4, 8 or 11, once the commissioners are in office and authorized to execute the specified works in their "district," section 11 applies to them, and they are clothed with all its wide powers. Even where section 8 is invoked to determine the general extent, scope and limits of the works, yet, after that is done, resort must still be had to section 11 for the exercise of said further essential powers, without which nothing can be done. So, it is literally correct to say that all these works, however initiated, must be done under section 11. That is the only way I can give consistent effect, after much study, to this clumsy and disjointed piece of legislation.

MARTIN, J.A.

Then we come to section 21. This relates to land which has "been injured by the execution of works under section 11," just as section 19 relates to land which has been entered upon or taken by the commissioners "for the purpose of the construction, operation, maintenance or repair of" the work. Holding the view hereinbefore expressed, that the work in question was

executed under section 11, and all that was done being part of the authorized scheme, and the damage to the land thereby caused being admitted, it is unnecessary, on the facts of this case, for me to consider the question of negligence, because the commissioners are made liable for the injury apart from negligence, and it is provided that "the damage shall be valued, assessed and paid in the same manner as directed for the cost of the works," which is directed by section 11 to be done by the commissioners in the manner therein specified, both "for the cost of such works and for damage arising therefrom." While I agree with my brother McPhillips in his application of the *Raleigh* case to section 21, and the sufficiency of the language of that section to cover the damage in question, yet I am unable, with all due deference, to take the view that under that section this is a case for that arbitration which is provided for by section 19 where lands are taken. In my opinion, section 21 appoints another, and, in the circumstances, more appropriate tribunal, *viz.*: the commissioners, for the "valuing" and assessment of damage for injury under section 21, in the same way that they are given the power by section 11 to assess, levy and collect damages against the lands benefited, and their proprietors. This is the special statutory tribunal to which the plaintiff should have resorted, and, therefore, this Court has no power to entertain this action. I shall only add to the cases cited by my learned brothers the following: *Jones* v. *City of Victoria* (1890), 2 B.C. 8; *Hornby* v. *New Westminster Southern Railway Company* (1899), 6 B.C. 588; *Lawrence* v. *Great Northern Railway Company* (1851), 16 Q.B. 643; and *Coe* v. *Wise* (1866), L.R. 1 Q.B. 711.

The appeal, I think, should be allowed.

MURPHY, J.

1914

Oct. 21.

COURT OF APPEAL

1915

June 7.

HEMPHILL *v.* MCKINNEY

MARTIN, J.A.

Gallihier, J.A., agreed with Macdonald, C.J.A.

GALLIHER, J.A.

McPhillips, J.A.: This appeal calls for the consideration of the Drainage, Dyking, and Irrigation Act (R.S.B.C. 1897, Cap. 64; R.S.B.C. 1911, Cap. 69), as, in my opinion, upon the facts of the present case, it is the governing statute, the Drainage, Dyking, and Irrigation Act, 1913, having no application,

MCPHILLIPS, J.A.

MURPHY, J.

1914

Oct. 21.

COURT OF APPEAL

1915

June 7.

HEMPHILL v. MCKINNEY

although it does repeal the first-mentioned Act. Section 97 thereof provides:

"The 'Dyking, Drainage and Irrigation Act,' being chapter 69 of the 'Revised Statutes of British Columbia, 1911,' is hereby repealed, saving and preserving any rights and privileges acquired thereunder."

This latter statute was passed and took effect on the 1st of March, 1913.

Upon the argument of this appeal, it was stated by counsel for the plaintiffs (respondents) that no damages were claimed arising after the 1st of March, 1913. If the Act of 1913 were to be considered as having application to the matter in question herein, it would only accentuate the view at which I have arrived, in no way demonstrate, that without it the requirement to proceed to arbitration is not as forceful under the provisions of the Drainage, Dyking, and Irrigation Act (R.S.B.C. 1897, Cap. 64; R.S.B.C. 1911, Cap. 69).

The respondents, who were plaintiffs in the action, sued the appellants, the defendants in the action, being the Lulu Island West Dyking District Commissioners, acting under the Drainage, Dyking, and Irrigation Act. The action is one claiming damages to the lands of the plaintiffs, damaged and injuriously affected by flooding through the negligence of the defendants.

MCPHILLIPS, J.A.

The defendants denied the several allegations of negligence as made, and alleged that the works constructed were carried out without negligence, were adequate, and were constructed according to the advice and under the supervision of competent engineers, and claimed the benefit of all statutes in force for the limitation of actions.

The defendants did not take the objection that the plaintiffs ought to have proceeded by arbitration and not by action. However, this would not appear to be necessary in view of the decision of the Court of Appeal in *Norwich Corporation* v. *Norwich Electric Tramways Co.* (1906), 75 L.J., K.B. 636. Vaughan Williams, L.J. at p. 639 there said:

"It has always been my view that an objection to the jurisdiction of the High Court to entertain a case is one which (in the High Court) may be taken at any time. In my judgment it is well established law that the Court may itself take the initiative if it is satisfied that it has no jurisdiction to try the case."

The objection in the present case was first taken, as in *Norwich Corporation* v. *Norwich Electric Tramways Co., supra,* in the Court of Appeal, not being pleaded or taken in the Court of first instance. Therefore, in my opinion, the objection is not too late.

In this case the works that were executed were apparently carried out in the years 1908, 1909 and 1910, and caused, commencing with the year 1909, serious flooding of the plaintiffs' land, and in the year 1914 further work was done, which has resulted in curing the situation and removed all possibility of damage such as the plaintiffs theretofore suffered by reason of the execution of the works.

The learned trial judge, in his reasons for judgment, said: [His Lordship read the judgment, and continued]:

I find, upon the evidence, that it is difficult to reconcile the dates as to the doing of the work, and it is urged that it is not established that any works were executed in 1910 giving rise to damage. But that, after all, would seem to be immaterial, and nothing really turns upon it. The learned counsel for the appellants frankly states that if the works as carried out by his clients have injuriously affected the lands of the respondents and whether executed with or without negligence his clients are liable therefor, to be determined, though, only by arbitration.

It becomes necessary now to refer to the sections of the Act (R.S.B.C. 1897, Cap. 64) under which the works were executed, and under which it is claimed by the appellants that the damages may only be assessed by arbitration. The sections which I think need to be particularly referred to are the following: [His Lordship read sections 11, 19 and 21, and continued]:

It was not contended upon the argument that the respondents did not, in the execution of the works, proceed in presumed accordance with and in the exercise of the powers conferred upon them by the statute law, but that, having been guilty of negligence in the carrying out of the works, the respondents are not driven to arbitration, but may bring action for the damages sustained. In my opinion, the language of Lord Macnaghten in *Corporation of Raleigh* v. *Williams* (1893), 63 L.J., P.C. 1 at pp. 5 and 6 are exceedingly apposite to the present case. In

MURPHY, J.

1914

Oct. 21.

COURT OF APPEAL

1915

June 7.

HEMPHILL v. MCKINNEY

comparing the Ontario statute which was under review with the Act which has to be construed in the present case, I cannot say that I was not to some considerable extent affected by the absence of the words having reference to damages occasioned, *viz.*: "necessarily resulting" and "in the construction of drainage works or consequent thereon," referred to by Lord Macnaghten, yet, after anxious consideration, I feel fortified that in construing section 21 of the Act—under which, admittedly, the assessment of damages, if to be by arbitration, must necessarily be made—the word "execute," in section 2 of the Act, is to "have such meaning as shall be appropriate to describe the performance of the particular work or works referred to in the context."

Now, in section 21, we have "when the land . . . . shall have been injured by the execution of works . . . . the damage shall be valued . . . ." This, therefore, in my opinion, covers the execution of the works and the complete performance thereof, and is comprehensive enough to cover the resultant damage by reason thereof. There is always the frailty of language, and not the less is it to be found in statute law, but to my mind it is clear that the spirit, intent and meaning of the statute is to provide that all such damages as are herein sued for should be determined and assessed, and determined and assessed only by arbitration.

MCPHILLIPS, J.A.

Unquestionably the gravamen of that alleged is, as in *Corporation of Raleigh* v. *Williams, supra,* with regard to the Bell drain, "the insufficiency of the outlet," and that by reason thereof the action is sustainable, being actionable negligence on the part of the dyking commissioners. Their Lordships, however, of the Privy Council said "this argument in their Lordships' opinion is wholly untenable." Likewise, in my opinion, is it "wholly untenable" in the present case.

The case previously referred to of *Norwich Corporation* v. *Norwich Electric Tramways Co.* is a case which deals most precisely with legislation which was there held to have the effect of ousting the jurisdiction of the Court, and *Joseph Crosfield & Sons, Limited* v. *Manchester Ship Canal Company* (1905), A.C. 421; 74 L.J., Ch. 637, is also referred to therein.

MURPHY, J.

1914

Oct. 21.

COURT OF APPEAL

1915

June 7.

HEMPHILL v. MCKINNEY

I must say that during the argument, and since I have entered upon the consideration of this judgment, I have been greatly exercised as to whether or no the action could not be sustained—owing to possible necessary preliminary steps not being taken—founded upon the principles enunciated by their Lordships of the Privy Council in *Corporation of Parkdale* v. *West* (1887), 12 App. Cas. 602; 56 L.J., P.C. 66; and *Saunby* v. *London (Ont.) Water Commissioners* (1905), 75 L.J., P.C. 25; (1906), A.C. 110. But I have finally concluded, after long and anxious consideration, that the position is not an analogous one, it not being, upon the facts, a case similar to that called attention to in *Saunby* v. *London (Ont.) Water Commissioners, supra,* where Lord Davey at p. 27 used the following language:

"Their Lordships are of the opinion that, before the Commissioners can expropriate a landowner, they must first set out and ascertain what parts of his land they require and must endeavour to contract with the owner for the purchase thereof. In other words, they must give to the landowner notice to treat for some definite subject-matter. And a similar procedure seems to be necessary where the Commissioners desire to appropriate a person's water rights, or to acquire some easement over his property."

It may be said that the point of distinction is that in the present case nothing is appropriated, nor is any easement over the plaintiffs' land intended to be acquired by the dyking commissioners, in fact, nothing of a permanent nature to be acquired or any damage of a permanent nature caused. It is, in fact, now seen that a proper outlet drain has eliminated all damage. I am the more influenced to be no longer embarrassed by this consideration when I note that Lord Macnaghten, who delivered the judgment of their Lordships of the Privy Council in *Corporation of Parkdale* v. *West, supra,* also delivered the judgment of their Lordships in *Corporation of Raleigh* v. *Williams, supra,* some seven years afterwards, and makes no reference in his judgment to *Corporation of Parkdale* v. *West.*

MCPHILLIPS, J.A.

It follows that, in my opinion, the action should stand dismissed, but in so deciding, I think it is a proper case to give the same direction in principle as given by Lord Macnaghten in *Raleigh Corporation* v. *Williams, supra.* At p. 6 he said:

"And that the action as regards the Bell drain ought to be dismissed without prejudice to any claim on the part of the respondents to have the

MURPHY, J.
1914
Oct. 21.
COURT OF APPEAL
1915
June 7.
HEMPHILL v. MCKINNEY

amount of the damages to their property occasioned by the construction of the Bell drain and consequent thereon determined by arbitration . . . ."

This would be a direction that the action, in being dismissed, is so dismissed without prejudice to the determination by arbitration of any claim on the part of the respondents for damages to their property caused by the overflow of waters upon their lands and occasioned by the execution of the works of the respondents.

The appeal, therefore, in my opinion, should be allowed.

Appeal dismissed,
Martin and McPhillips, JJ.A. dissenting.

Solicitors for appellants: *Martin, Craig, Parkes & Anderson.*
Solicitors for respondents: *Russell, Macdonald, Hancox & Farris.*

COURT OF APPEAL
1915
Aug. 10.
SHARP v. INGLES

SHARP v. INGLES: GILLESPIE, THIRD PARTY: THE SHERIFF OF THE COUNTY OF VANCOUVER, FOURTH PARTY.

Sale of goods—Conditional sale—Right of purchaser to mortgage his interest.

A conditional sale of goods gives the purchaser an interest that may be mortgaged.

Statement

APPEAL by plaintiff from the decision of GRANT, Co. J. in an action for $1,200 damages for breach of covenant for good title to a motor-car, tried at Vancouver on the 11th of November, 1914. The facts are set out fully in the reasons for judgment of MACDONALD, C.J.A.

The appeal was argued at Vancouver on the 31st of April, 1915, before MACDONALD, C.J.A., IRVING and MCPHILLIPS, JJ.A.

Killam, for appellant: We are entitled to the return of the purchase price on vendor's covenant: see *Wickham* v. *The New Brunswick and Canada Railway Co.* (1865), L.R. 1 P.C. 64 at p. 75; *Crane & Sons* v. *Ormerod* (1903), 2 K.B. 37; *Jarvis* v. *Jarvis* (1893), 69 L.T.N.S. 412; Barron and O'Brien on Chattel Mortgages, 2nd Ed., 19; *Coyne* v. *Lee* (1887), 14 A.R. 503.

W. C. Brown, for respondent: We have a covenant from Gillespie, who must indemnify us if judgment goes against us.

Armour, for the sheriff: The sheriff is unfortunate in overlooking the right of the chattel mortgagee. There should be an action to test the validity of the chattel mortgage. We contend what interest the mortgagee had has been cut out. The owner had a defeasible interest and the mortgagee only had a mortgage in an interest: see Barron on Conditional Sales, 2nd Ed., p. 37; *Crompton* v. *Pratt* (1870), 105 Mass. 255. The mortgagee should have come in and redeemed when the sale took place.

Argument

Killam, in reply.

Cur. adv. vult.

10th August, 1915.

MACDONALD, C.J.A.: As the transactions referred to in evidence are somewhat involved, I shall briefly state the facts.

The French Auto Company, in April, 1912, sold the car in question to one Frith, and took a conditional sale agreement, which was duly registered, and which declared that the property in the car should remain in the seller until the note given for the purchase price—$2,400—should be paid in full. Frith, by a bill of sale, dated the 9th of May, 1913, and duly registered, mortgaged the car to one Morton for $1,000. The car was seized by the sheriff under a *fi. fa.* at the instance of creditors, in September, 1913, and the French Auto Company put in a claim to the car under their said conditional sale agreement. The sheriff agreed with the Auto Company that if the car brought a sum in excess of the company's claim upon it, which was then $405.40, that that sum should be paid over to the company, but if that sum were not realized, he should refrain from selling, and should deliver the car to the Auto Company. The sheriff then proceeded to sell, as he says, under the *fi. fa.,* and realized therefrom the sum of $518, out of which he paid

MACDONALD, C.J.A.

COURT OF APPEAL

1915

Aug. 10.

SHARP v. INGLES

the Auto Company's claim against the car. The balance was distributed under the provisions of the Creditors' Relief Act, the registered mortgage of Morton being ignored, presumably because the records were not searched. The sheriff gave an absolute bill of sale of the car to the purchaser, Gillespie, containing a covenant for good title and of indemnity against failure of title. On the following day Gillespie, by a similar instrument, transferred the car to the defendant, who, in April, 1914, by a similar instrument, transferred it to the plaintiff for the consideration of $1,200. Shortly after the last-mentioned sale the car was seized by the mortgagee, Morton, and by him given back to the plaintiff upon his giving a bond in the penal sum of $1,200 to secure its return to Morton at the conclusion of contemplated litigation, which was afterwards commenced by the issue of the writ in this action.

The plaintiff sued for $1,200 damages for the breach of the covenant for good title. The defendant brought in Gillespie as third party and claimed indemnity against him, and Gillespie, in turn, brought in the sheriff as fourth party, claiming indemnity against him. The learned judge dismissed the action, and from that judgment the plaintiff has appealed.

In my opinion Morton's position was that of a second mortgagee, the Auto Company being in a sense first mortgagee. The sheriff was entitled, therefore, to sell under the *fi. fa.* only the interest of Frith in the car. The right of the Auto Company, under its conditional sale agreement, was "to take possession of the said automobile without process of law and sell the same at public or private (sic) auction" to satisfy its claim for balance of purchase-money. The company did not take possession, nor did it sell or direct the sale of the car. It simply consented to the sheriff doing so under legal process, agreeing to waive its right to interfere, if paid in full out of the proceeds of the sale.

MACDONALD, C.J.A.

There is nothing to shew that the sheriff was purporting to sell for the first mortgagee, the Auto Company, or that Morton's interests were being in any way endangered. He took his mortgage with knowledge of the conditional sale agreement, and would be bound by any proper exercise of the Auto Company's

power of sale. That was the risk he took. He had nothing to fear from a sale under a judgment subsequent in date to his mortgage.

Counsel for the sheriff contended that Morton's mortgage could not attach because of the antecedent charge of the Auto Company. Judge Barron, in the second edition of his work on Chattel Mortgages and Bills of Sale, at p. 19 says:

"Both the seller and buyer on a conditional sale of goods have such an interest therein as may be mortgaged."

I cannot, therefore, see any escape from the conclusion that the plaintiff is entitled to succeed and to have judgment for the sum claimed. Defendant is entitled to be indemnified by the third party, Gillespie.

The position of the fourth party, the sheriff, is unfortunate. He has sworn that the covenant for title in the bill of sale to Gillespie was either not noticed by him, or not understood when he signed it. No such covenant could be required from him as sheriff, and none such was intended to be given. Still, Gillespie swears that he expressly requested this covenant from him, after explaining the circumstances under which he (Gillespie) had purchased the car at the sheriff's sale. No case is made out of fraud or mutual mistake, and I cannot see how the sheriff can be relieved from his covenant. Hence, he must indemnify the third party.

MACDONALD, C.J.A.

It may be, though I express no opinion, that the sheriff is entitled to be subrogated to the rights of the Auto Company as against Morton, but that is a matter outside the scope of this appeal.

The appeal should be allowed.

IRVING, J.A.: The plaintiff sues on a covenant contained in a bill of sale of a motor that the defendant had a right to assign, and for quiet possession. Some months after the sale the motor was taken out of his possession by one Morton, who held a chattel mortgage on it, given by one Frith.

IRVING, J.A.

The defence in the dispute note was: (5) A denial that Morton was the mortgagee on the day of the seizure; (6) a denial that Frith, at the date of the mortgage had any property or mortgageable interest in the motor.

COURT OF APPEAL

1915

Aug. 10.

SHARP v. INGLES

The learned trial judge dismissed the action "on the record." I presume that he refers to these pleadings.

In my opinion, there was a *prima-facie* case made by the plaintiff when he produced the registered mortgage and proved the signature thereto of Frith, who was the original purchaser of the car under the hire and purchase agreement.

The plaintiff was, therefore, entitled to judgment, and the third and fourth parties also.

I would allow the appeal.

IRVING, J.A.

Since reaching the above conclusion it has been suggested that if time were given, Morton's mortgage might be bought up by the sheriff at a small figure and the sheriff enabled to give a good title to the car. I am agreeable to the proposal that counsel should be at liberty to speak to this point.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree with the reasons for judgment of the Chief Justice, and that the appeal be allowed.

Appeal allowed.

Solicitors for appellant: *Lucas & Lucas.*

Solicitors for respondent: *Ellis & Brown.*

Solicitor for third party: *T. J. Baillie.*

Solicitors for fourth party: *Davis, Marshall, Macneill & Pugh.*

RAMSAY v. BOARD OF SCHOOL TRUSTEES OF THE CITY OF VANCOUVER. BOARD OF SCHOOL TRUSTEES OF THE CITY OF VANCOUVER v. RAMSAY AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY.

COURT OF APPEAL

1915

Aug. 10.

RAMSAY v. VANCOUVER BOARD OF SCHOOL TRUSTEES

Building contract—Clause providing for extras—Power to vary—Scope of —Substantial changes in contract not permitted.

A building contract containing a clause providing that "the contractor shall, when authorized by the employer and the architect, vary, by way of extra or omission, from the drawings or specifications," does not authorize any substantial change in the character of the work contracted for.

Rex v. *Peto* (1826), 1 Y. & J. 37, applied.

APPEAL from the decision of MACDONALD, J. in an action for breach of contract for the erecting and installing of a heating and ventilating system in the Dawson School in the City of Vancouver, tried at Vancouver on the 21st of September, 1914. The contract was entered into on the 2nd of January, 1913, for which the contractor (plaintiff) was to receive $16,973. He proceeded with the work until April 23rd, when he received instructions to do certain extra work in the way of altering steam risings, which he did, and for which he received $135.19 as an extra charge. The contractor commenced work under the plans and specifications of one Waddington, who was the architect until February 1st, when he was superseded by one Turnbull, who resigned on the 27th of February, when one Sprague became the architect. On the 23rd of May the contractor was ordered to stop work under the old plans and continue under new plans and specifications prepared by Sprague. This he refused to do, owing to the radical change from the original contract, unless a new contract was entered into, and on the 24th of June the work was taken over and completed by the architect according to his own plans and specifications, the total

Statement

COURT OF APPEAL

1915

Aug. 10.

RAMSAY v. VANCOUVER BOARD OF SCHOOL TRUSTEES

cost being $22,000. The changes made by Sprague's plans and specifications included the installation of an entirely different engine and an entirely different boiler feed pump, with a large number of other changes in connection with both engine and boiler. The provision in the contract for varying the work to be done under the contract was as follows:

"The contractor shall, when authorized by the employer and the architect, vary by way of extra or omission from the drawings or specifications."

The specifications contained the following clause:

"CHANGES AND EXTRA WORK: The Board of Trustees reserve the right under this contract to make changes from time to time during the progress of the work, provided that no change shall be made without a written order from the Board of Trustees, countersigned by the architect, setting forth the nature of the work performed or omitted and the material furnished or omitted."

Statement

The plaintiff claimed $1,589.15, balance for work done on the contract and damages for breach of contract. The defendant counterclaimed for the difference between the contract price and the cost of work when completed. The trial judge found in favour of the plaintiff for the amount claimed for work done on the contract, and dismissed the counterclaim. The defendant appealed.

The appeal was argued at Vancouver on the 16th and 19th of April, 1915, before MACDONALD, C.J.A., IRVING and MCPHILLIPS, JJ.A.

Argument

Sir C. H. Tupper, K.C., for appellant Board: The trial judge held that the changes we proposed amounted to a breach. We contend there is an express provision in the contract for making the proposed changes. There were three architects: Waddington, Turnbull and Sprague. Waddington left on February 1st, when Turnbull came on, and Sprague relieved him on February 27th. One change was made on April 23rd, to which Ramsay agreed, and was paid for the extra work. On the 23rd of May the plaintiff was ordered to stop work until the new plans made by Sprague were completed, when the work was to be continued in accordance therewith. On their completion the plaintiff refused to continue the work under the new plans, and on the 9th of June he was notified that in three days the work would be taken over and completed by the architect.

As to what constitutes a breach when there is provision for a change of plans in the contract, see *Cort* v. *Ambergate, &c., Railway Co.* (1851), 17 Q.B. 127; *Lines* v. *Rees* (1837), 1 Jur. 593; *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1884), 9 App. Cas. 434. On the question of the repudiation of the contract, see *Rhymney Railway* v. *Brecon and Merthyr Tydfil Junction Railway* (1900), 69 L.J., Ch. 813 at p. 818; *Planche* v. *Colburn* (1831), 8 Bing. 14. In regard to the variations in the contract, see Halsbury's Laws of England, Vol. 3, p. 230; *Rex* v. *Peto* (1826), 1 Y. & J. 37; *Pepper* v. *Burland* (1792), Peake, N.P. 139; Hudson on Building Contracts, 4th Ed., Vol. 1, p. 439.

O'Neil, on the same side: The counterclaim was with relation to events after the commencement of the action: see *Beddall* v. *Maitland* (1881), 17 Ch. D. 174. There was no change necessary in the work done by Ramsay with one small exception, and in any event we are entitled to damages by reason of the breach: *Hurst* v. *Hurst* (1849), 4 Ex. 571; *Welch, Perrin & Co.* v. *Anderson & Co.* (1891), 61 L.J., Q.B. 167; *Elbinger Actien-Gesellschafft* v. *Armstrong* (1874), L.R. 9 Q.B. 473.

C. W. Craig (*G. G. Duncan,* with him), for respondent Ramsay: Sprague was to set out new plans. Ramsay was stopped until these plans were prepared. He had worked entirely on Waddington's plans. No work had been done on Turnbull's plans at all. Sprague's plans were a radical change from the original and we could not accept them; they went beyond the provisions in the contract for extras and changes. On the 14th of June we were served with notice, from which it was impossible to tell what we should do. If they are to hold us responsible they should have finished the work the way they ordered us to do it, and not having done so, their counterclaim fails. Under the contract, variations mean they can add something to or take something away, but they cannot make changes in the contract: see Hudson on Building Contracts, 4th Ed., 449. Sprague was the heating engineer. The contract was not carried out according to the Waddington plan and the notice of the 11th of June.

Argument

G. Bruce Duncan, for respondent Guaranty Company: As

COURT OF APPEAL

1915

Aug. 10.

RAMSAY v. VANCOUVER BOARD OF SCHOOL TRUSTEES

there has been a change in the contract, that frees us from any obligations: see *Sumner* v. *Powell* (1816), 2 Mer. 30; 23 E.R. 852; *Van Praagh* v. *Everidge* (1903), 1 Ch. 434; *Falck* v. *Williams* (1900), A.C. 176. As to costs, even if the judgment is against the respondents, they should not be liable for costs: see Halsbury's Laws of England, Vol. 15, p. 504, par. 952; *The Mayor, etc., of Berwick-upon-Tweed* v. *Murray* (1857), 7 De G.M. & G. 497.

Tupper, in reply.

Cur. adv. vult.

10th August, 1915.

MACDONALD, C.J.A.: The respondent, the contractor, agreed to instal a heating and ventilating system in one of the school houses of the appellant for the lump sum of $16,973. The contract was entered into in January, and about the 3rd of March the appellant's architect or heating engineer, Sprague, notified the respondent to discontinue the installation, as changes in the plans of the work were in contemplation. This request was acceded to, and respondent was notified to submit a tender based on the new plans, which he did. Nothing, however, came of this, and later on the appellant ordered the respondent to proceed with the work, with certain changes, specified in a letter. The respondent declined except on conditions which were not acceptable to appellant, and the appellant then took the work out of the hands of the respondent and completed it in another way. The judgment appealed from awards the respondent $1,589.19 by way of damages for breach of contract or *quantum meruit* for the work performed and materials supplied.

MACDONALD, C.J.A.

Condition 12 of the contract between the parties is as follows: [already set out in statement.]

The specification contains this clause: [already set out in statement.]

I think the last-mentioned clause was merged in the former, which is the one embodied in the formal contract, but in any case both clauses point to the same limitations of the power to vary, namely, by extra or omission. This is not the wide condition set out in the form in Hudson on Building Contracts, 4th Ed., Vol. 2, p. 528 (91). It is more like that found in the

contract in question in *Rex* v. *Peto* (1826), 1 Y. & J. 37 at p. 53, which entitled the owner to order

"'any extra work to be done or executed, besides such as is expressed or shewn in any of the said plans . . . . or that any part of the said work . . . . shall not be done or executed.'"

The only verbal difference open to comment between the two conditions is contained in the words "besides such," etc. That difference is more apparent than real, as the expression "extra" means in addition to, over and above, or besides the work specified. Some stress has been laid in argument on the word "vary," used in condition 12, but its meaning must be restricted by the controlling words "by way of extra or omission." Now, if the extra work and materials which appellant ordered respondent to do and supply, and which were specified, are not, or are only partially within the right to demand extras or omissions under condition 12, the appeal must fail.

There is some confusion with regard to the changes sought to be made in the plans. The original plans on which the contract was based were made for appellant by Waddington, then engineer; then Turnbull, Waddington's successor, appears to have either materially changed these plans or prepared new ones. Respondent says that he had never been shewn or made aware of Turnbull's plans. Then Sprague succeeded Turnbull, and it was at Sprague's request that the work was suspended pending the preparation of the new plans. Now, it is not clear to my mind that the changes ordered to be made, and specified, were the only changes involved in the carrying out of the work to completion. I rather infer that the specified changes are changes not from the Waddington plan, but from the Turnbull plan, of which respondent had no knowledge. Taking as an example the engine mentioned, I turn to the Waddington specification and find that the engine is not specified as 14 x 7, but as Robb-Armstrong or C. & T. 10 x 12 horizontal engine. It is, therefore, evident that the change ordered in the engine is not a change from the original specification of Waddington, but a change from some other specification or drawing, presumably Turnbull's. The changes ordered may, therefore, be much more comprehensive than would appear, and this must be so if the evidence of the respondent is to be believed.

MACDONALD, C.J.A.

COURT OF APPEAL

1915

Aug. 10.

RAMSAY v. VANCOUVER BOARD OF SCHOOL TRUSTEES

After being taken by appellant's counsel in cross-examination over the changes specified, the respondent, in answer to the question, "We have pretty well covered everything?" said, "Oh no, we have not started yet." He then enumerated a large number of other changes and substitutions which would be necessitated by the "new lay out," as he called it.

Now, in my opinion, condition 12 does not authorize the appellant to substantially change the character of the work contracted for, and if the clause in the specification under the heading "Charges and Extra Work" is more comprehensive and can now be appealed to, it does not authorize such radical changes in the plan as the respondent was ordered to carry out. *Rex* v. *Peto, supra,* is in point. In that case Hullock, B. at p. 61 said:

"It has been strongly argued, that this is an omission. That they omitted one description of work, and added another, but that is not a proper construction of the English language."

And again:

"The surveyor, also, may direct him to do or omit any work; but in fair legitimate construction, it is impossible to construe these words so largely as to give them the sense they have been contended to bear; for the consequence of such a construction would be, that the contractor might have completely changed the whole materials and construction of this building."

MACDONALD, C.J.A.

That these changes disturbed the whole plan of the work is apparent from the fact that Sprague found it necessary to prepare what he called "superseding" plans, which "superseding" plans I infer are the result of Turnbull's work and his own. The increased cost of the work under the new plans further indicates the substantial character of the changes ordered. Respondent's new tender increased the price by nearly $3,000, and the work when finally completed by Sprague cost upwards of $22,000, although before undertaking it, Sprague, in a letter, had declared that it could be finished for the amount remaining unpaid under the contract.

I am, therefore, unable to say that the learned trial judge came to a wrong conclusion, and I think the appeal should be dismissed.

IRVING, J.A.

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

McPHILLIPS, J.A.: I agree with the Chief Justice and have nothing to add. I would, therefore, dismiss the appeal.

Appeal dismissed.

COURT OF APPEAL

1915

Aug. 10.

RAMSAY v. VANCOUVER BOARD OF SCHOOL TRUSTEES

Solicitors for appellant Board: *Tupper, Kitto & Wightman.*
Solicitor for respondent Ramsay: *G. G. Duncan.*
Solicitors for respondent Guaranty Company: *McPhillips & Wood.*

SHIPWAY v. LOGAN.

COURT OF APPEAL

1915

June 29.

SHIPWAY v. LOGAN

Practice—Appeal from County Court—Time in which appeal must be taken computed from delivery of judgment and not from taking out of formal order—County Court Marginal Rules 343 and 493.

The time for taking an appeal from a judgment of the County Court to the Court of Appeal must be computed from the delivery of the judgment and not from the taking out of the formal order.

Kirkland v. *Brown* (1908), 13 B.C. 350, followed.

APPEAL by defendant from the decision of LAMPMAN, Co.J. in an action for the enforcement of a judgment obtained in the city of New York for $617.97, tried at Victoria on the 15th of April, 1914. The respondent took the preliminary objection that the appeal was not taken in time. Judgment was delivered on the 16th of December, 1914, but the formal judgment was not finally settled by the judge until the 23rd of February, 1915, on which day it was entered. Notice of appeal was given on the 27th of March, 1915.

Statement

The appeal was argued at Victoria on the 29th of June, 1915, before MACDONALD, C.J.A., MARTIN, and GALLIHER, JJ.A.

COURT OF APPEAL

1915

June 29.

SHIPWAY v. LOGAN

W. J. Taylor, K.C., for appellant.
Harold B. Robertson, for respondent.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: As to the main preliminary objection, I think it is disposed of by *Kirkland* v. *Brown* (1908), 13 B.C. 350. I am not sure that I should have agreed with *Kirkland* v. *Brown,* or if the matter were still open I should have come to the same opinion, but this very question in all its phases appears to have been fairly considered, argued and disposed of by the Full Court. That has been recognized as the law since the date of that judgment.

With respect to extending time, in view of all the circumstances which have just been discussed, particularly in view of the circumstance that the main question in the action was decided on an interlocutory application and no appeal was taken from that, I do not think that at this late day we ought to extend the time.

MARTIN, J.A.

MARTIN, J.A.: I agree.

GALLIHER, J.A.

GALLIHER, J.A.: I agree. I just wish to state with regard to the case of *Kirkland* v. *Brown,* I will assume that the learned judges who heard that case, and gave judgment, did so after consideration of the statutes and rules that govern these cases, and in the absence of anything to the contrary, these statutes and rules should apply in this case.

Appeal dismissed.

Solicitors for appellant: *Eberts & Taylor.*
Solicitors for respondent: *Barnard, Robertson, Heisterman & Tait.*

ROBERTSON v. LATTA.

COURT OF APPEAL

1915

June 30.

ROBERTSON v. LATTA

Practice—Omission to obtain judge's notes—Application to include examination on discovery in appeal book—Conflict of evidence—No appeal from County Court judge's settlement of appeal book—Marginal Rule 875—County Courts Act, R.S.B.C. 1911, Cap. 53, Sec. 116.

Any party to an action dissatisfied with the settlement of an appeal book by the registrar, may go to the County Court judge who can make any amendment to his notes that he sees fit, but his action is not in the nature of an order or decree from which there is a right of appeal under section 116 of the County Courts Act.

Per MACDONALD, C.J.A.: The hearing of an appeal may proceed in the absence of the note of the County Court judge and it is for the Court in each case to say what satisfies it when it cannot get the best evidence of what took place.

APPEAL from the order of MCINNES, Co.J. of the 10th of June, 1915, dismissing the defendant's application by way of appeal from the registrar's settlement of the appeal book, the registrar refusing to include the defendant's examination for discovery.

Statement

The appeal was argued at Victoria on the 29th and 30th of June, 1915, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Steers, for appellant (defendant), referred to *Rendell* v. *McLellan* (1902), 9 B.C. 328; *C. W. Stancliffe & Co.* v. *City of Vancouver* (1912), 18 B.C. 629; *Ex parte Firth. In re Cowburn* (1882), 19 Ch. D. 419.

Argument

J. Sutherland Mackay, for respondent.

MACDONALD, C.J.A.: On this motion to amend the appeal book, I wish to say this: The practice seems to have been somewhat uncertain in the past, perhaps because it never became necessary to take the course which the appellant has taken here—that is to say, an appeal from the settlement of the appeal book by the County Court judge.

MACDONALD, C.J.A.

As far as I can make out from the rules, and particularly

COURT OF APPEAL

1915

June 30.

ROBERTSON v. LATTA

the statutes governing an appeal, a review of the registrar's decision by a County Court judge is more or less in the nature of a gratuitous one. The appeal book is settled by the registrar, and if either party is dissatisfied with that they go to the County Court judge for the purpose of having any amendment he may think fit to make of his notes. But I can hardly regard anything that he may do as being an order or decree of that Court, so as to fall under section 116 of the County Courts Act. But nevertheless, where something has been left out, or improperly put in an appeal book which the learned County Court judge can correct, it is undoubtedly within his jurisdiction to make such addition or correction as may do justice in the particular case. The question arises usually where no notes have been taken by a stenographer and where the parties have to rely on the notes of the learned trial judge, and where these notes are alleged to be deficient. In such a case, if the learned judge is not able to supplement his notes, or, from lack of memory, to supply the deficiency, then it appears to be clear that if the Court of Appeal can satisfy itself that that defect can be cured, that the evidence can be got from some other source, the Court of Appeal may permit the appeal book to be amended by the insertion of that evidence.

MACDONALD, C.J.A.

The matter is laid down with very great clearness in *Abrahams* v. *Dimmock* (1914), 84 L.J., K.B. 802 at p. 806. There it was stated—speaking of Order LIX., r. 8—that

> "The rule contemplates that the appeal may proceed in the absence of a note by the County Court judge, and it is for the Court in each case to say what satisfies it that it cannot get the best evidence of what took place, namely the judge's note. In the present case I am satsified that there is no note."

That is true in the case at bar as well. Evidence is given that the judge took no notes. To that extent the facts are identical.

Proceeding, the learned trial judge in that case, says:

> "The County Court judge in his certificate, as it is called, says that the newspaper reports are fairly accurate, though somewhat condensed. In these circumstances we have allowed a report in a local newspaper to be used. . . . . We have before us in the circumstances the best materials for ascertaining what took place before him, and we proceed to act upon them."

In that case the Court of Appeal took the extraneous report of the evidence.

In this case there was no note. The learned County Court judge has never said what Mr. *Steers,* for the appellant, says:

"The evidence which the learned judge omitted to put down is contained in the depositions upon discovery, and is practically the same, and therefore the Court can safely resort to that evidence to supply the omission."

If that were uncontradicted, we should have no difficulty in admitting it to supplement the notes taken by the learned judge. But counsel on the other side deny that statement. The statement is made on affidavit, and denied on affidavit, and in these circumstances there is nothing before the Court to satisfy it that depositions upon discovery will properly and truly supply the omissions of the learned trial judge to take the note.

MACDONALD, C.J.A.

In these circumstances, I see no possible way of granting the application to admit the deposition upon discovery.

The only other branch of the application is this—Mr. *Steers* swears that one party or the other put in the depositions for discovery on the trial. There again there is a conflict of evidence. There is nothing in the proceedings to shew, and counsel are diametrically opposed as to whether that was done or not.

I think, therefore, I would dismiss the application to admit the depositions upon discovery as evidence in the appeal.

MARTIN, J.A.: I agree in the result, and very largely in what the Chief Justice has said, and of course the case he cited is a valuable guide to us, so far as the English rule is applicable, as hereinafter mentioned.

The position on the facts of this case is adequately covered by our decision in *C. W. Stancliffe & Co.* v. *City of Vancouver* (1912), 18 B.C. 629, and I also agree that this matter is not in the nature of an appeal—that this application should not come before us in the way or in the nature of an appeal from the learned judge, owing to the fact that under our statute (Court of Appeal Act, Sec. 24) the registrar is delegated to settle the appeal book, and the appellant should get it settled by him. Any subsequent application for settlement to the

MARTIN, J.A.

COURT OF APPEAL

1915

June 30.

ROBERTSON v. LATTA

learned judge is not in strict discharge of his judicial duty, and in such circumstances, if there is any desire to review the settlement of the appeal book by the learned judge, it is impossible to do so in the proper sense of the word. We should adopt the course taken in the Supreme Court of Canada and refer it back to the learned judge to settle any questions as to whether matters should or should not be included in the appeal book, provided he has not already applied his mind to it: *Carrier* v. *Bender* (1886), Cameron's Supreme Court Practice, 2nd Ed., 446; Coutlee's Digest, 1904, p. 1101.

In the case of *Clabon* v. *Lawry* (1898), 2 M.M.C. 38, an appeal was referred back to his Honour to determine whether a piece of evidence should be included in the appeal book.

MARTIN, J.A.

I have only to add this word of warning. The English rule 875 in regard to the supplemental material or in regard to material which this Court would be entitled to look at is not the same as our rule and our subsection (*c*), which casts a duty upon the appellant to apply to the judge appealed from, in certain circumstances, is absent from the English rule—see *Rendell* v. *McLellan* (1902), 9 B.C. 328, where, as here, there was no official stenographer present, and the course to be adopted in such case was laid down.

GALLIHER, J.A.

GALLIHER, J.A.: I agree. I think in the absence of any note of the judge, and in view of the contradictory statements of counsel on either side, that in the absence of any extraneous evidence, that we can look to, it seems to me that there is nothing to shew that any evidence was given at the trial, such as is contained in the depositions which Mr. *Steers* desires to have made part of the appeal book. That being the case, there seems nothing, as far as I can see, that the Court can satisfy itself with that there was any evidence given on the trial of that nature.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree in the result.

Appeal dismissed.

Solicitor for appellant: *Edwin B. Ross.*
Solicitor for respondent: *F. G. Crisp.*

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada:

DANA AND FULLERTON v. THE VANCOUVER BREWERIES, LIMITED (p. 19).—Affirmed by Supreme Court of Canada, 2nd November, 1915. See 52 S.C.R. 134; 9 W.W.R. 1018; 26 D.L.R. 665.

DUNPHY AND ROLPH v. CARIBOO TRADING COMPANY, LIMITED (p. 484).—Affirmed by Supreme Court of Canada. See 9 W.W.R. 1180.

LILJA v. THE GRANBY CONSOLIDATED MINING, SMELTING AND POWER COMPANY, LIMITED (p. 384).—Affirmed by Supreme Court of Canada, 2nd November, 1915. See 9 W.W.R. 662.

RAMSAY v. CORPORATION OF THE DISTRICT OF WEST VANCOUVER (p. 401).—Affirmed by Supreme Court of Canada, 24th June, 1916. See 10 W.W.R. 1184.

ROYAL BANK OF CANADA, THE v. WHIELDON AND BALL (p. 267).—Reversed by Supreme Court of Canada, 29th November, 1915. See 52 S.C.R. 254; 9 W.W.R. 776.

Cases reported in 20 B.C., and since the issue of that volume appealed to the Supreme Court of Canada:

ASSESSMENT ACT AND HEINZE, *In re* (p. 99).—Affirmed by Supreme Court of Canada, 4th May, 1915. See 52 S.C.R. 15; 26 D.L.R. 211. Leave to appeal to Privy Council refused, 3rd February, 1916.

ATTORNEY-GENERAL OF CANADA *et al.* v. RITCHIE CONTRACTING AND SUPPLY CO. *et al.* (p. 333).—Affirmed by Supreme Court of Canada, 2nd November, 1915. See 52 S.C.R. 78; 9 W.W.R. 694; 26 D.L.R. 51. Leave to appeal to Privy Council granted, 20th December, 1915.

COLE v. READ (p. 365).—Affirmed by Supreme Court of Canada, 2nd November, 1915. See 52 S.C.R. 176; 9 W.W.R. 1137; 26 D.L.R. 564.

INDEX.