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.

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1917.

JUDGES

OF THE

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

During the period of this Volume.

JUSTICES OF THE COURT OF APPEAL.

CHIEF JUSTICE:

THE HON. JAMES ALEXANDER MACDONALD.

JUSTICES:

THE HON. PAULUS ÆMILIUS IRVING.
THE HON. ARCHER MARTIN.
THE HON. WILLIAM ALFRED GALLIHER.
THE HON. ALBERT EDWARD McPHILLIPS.

SUPREME COURT JUDGES.

CHIEF JUSTICE:

THE HON. GORDON HUNTER.

PUISNE JUDGES:

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

LOCAL JUDGE IN ADMIRALTY:

THE HON. ARCHER MARTIN.

COUNTY COURT JUDGES:

HIS HON. JOHN ANDREW FORIN, - - - - - West Kootenay
HIS HON. FREDERICK McBAIN YOUNG, - - - - - - Atlin
HIS HON. PETER SECORD LAMPMAN, - - - - - - Victoria
HIS HON. JOHN ROBERT BROWN, - - - - - - - Yale
HIS HON. FREDERICK CALDER, - - - - - - - Cariboo
HIS HON. DAVID GRANT, - - - - - - - - Vancouver
HIS HON. FREDERIC WILLIAM HOWAY, - - - - - Westminster
HIS HON. WILLIAM WALLACE BURNS McINNES, - - - Vancouver
HIS HON. CHARLES HOWARD BARKER, - - - - - Nanaimo
HIS HON. JOHN DONALD SWANSON, - - - - - - Yale
HIS HON. GEORGE HERBERT THOMPSON, - - - East Kootenay
HIS HON. SAMUEL DAVIES SCHULTZ, - - - - - - Vancouver
HIS HON. HERBERT EWEN ARDEN ROBERTSON, - - - - Cariboo

ATTORNEY-GENERAL:

THE HON. WILLIAM JOHN BOWSER, K.C.

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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

McDONNELL v. McCLYMONT.

MACDONALD, J.

1915

June 22.

McDONNELL v. McCLYMONT

Sale of land—Agreement for sale—Action for instalments overdue—Non-compliance with subsections (4) and (5) of section 28, Land Registry Act Amendment Act, 1914, B.C. Stats. 1914, Cap. 43.

Failure on the part of a vendor to register an agreement of sale in compliance with subsections (4) and (5) of section 28 of the Land Registry Act Amendment Act, 1914, does not debar him from recovering upon the covenants contained in the agreement.

ACTION tried by MACDONALD, J. at Revelstoke on the 10th of May, 1915. The plaintiff seeks to recover three instalments of purchase-money due by the defendant under a covenant contained in an agreement for sale of land dated the 18th of May, 1912. The only defence offered is that the plaintiff has not complied with subsections (4) and (5) of section 28 of the Land Registry Act Amendment Act, 1914, which are as follow:

Statement

"(4) It shall be the duty of any person having heretofore entered into or hereafter entering into an agreement of sale, sub-agreement, or assignment, where the purchase price is payable by instalments, or at a future time, to deliver to the party so buying said land an agreement or

MACDONALD, J.

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other suitable instrument in such form and executed by such parties that the title of the purchaser under such agreement or instrument shall be registrable; the execution of such agreement or instrument shall be duly acknowledged or approved under the provisions of this Act.

"(5) It shall be the duty of any person having sold or hereafter selling land, or who has heretofore entered into or hereafter enters into an agreement for sale, sub-agreement, or assignment, as in the preceding subsection mentioned, to register his own title, in order that any person so buying said land or any interest therein may be able to register his title or interest therein."

There was no evidence adduced at the trial that the agreement for sale was not prepared, executed and delivered as required by subsection (4).

W. B. Farris, for plaintiff.
Briggs, for defendant.

MACDONALD, J. (after stating the facts as set out in statement): The defence that requires consideration arises from the admission of the plaintiff that his title to the property, referred to in the agreement for sale, has not been registered, so that the defendant is not able "to register his title or interest therein." No question arises as to the defendant being entitled to resist payment on the ground that plaintiff is not able to shew good title, irrespective of registration. See as to this defence *Townend* v. *Graham* (1899), 6 B.C. 539, and cases there cited; also *Rutherford* v. *Walker* (1907), 1 Alta. L.R. 122; and *Graves* v. *Mason* (1908), *ib.* 250.

Judgment

In *Thompson* v. *McDonald and Wilson* (1914), 20 B.C. 223, defendant unsuccessfully appealed from an order for judgment made by MURPHY, J., on the 16th of February, 1914, under Order XIV., in an action to recover the final instalment under an agreement for sale. It was contended on his behalf that, as the plaintiff had not a registered title, he could not recover the balance of the purchase price. Defendant relied upon section 104 of the Land Registry Act, which provides that—

"No instrument executed and taking effect after the 30th day of June, 1905, . . . purporting to transfer, charge, deal with, or affect land . . . . shall pass any estate or interest, either at law or in equity, in such land until the same shall be registered in compliance with the provisions of this Act."

This enactment, however, did not avail to enable the defend-

ant to resist payment. And see on appeal, *per* IRVING and MCPHILLIPS, JJ.A. at p. 225.

The order for judgment in *Thompson* v. *McDonald and Wilson, supra,* was made before said subsection (5) of section 28 became law. Such statutory amendment became effective on the 4th of March, 1914. The question is, has it altered the law as laid down in appeal in *Thompson* v. *McDonald and Wilson?* It is assumed that the Legislature knew the existing state of the law as indicated by the then recent decision of MURPHY, J. If it were intended to impose the penalty of invalidity or impair the effect of the covenant in an agreement for sale, I think this amending statutory provision should have so stated in clear and unambiguous language. It does not purport, even by implication, to invalidate the agreement for non-registration. There is no penalty indicated, as in many statutes, for breach of the duty imposed. There is a strict construction applied to legislation that may, in any way, affect the natural liberty of contracting, or tend to destroy common law rights. Bearing in mind the provisions of subsection (4) of the Statute of Frauds, this amendment, if intended to serve the end contended for by the defendant, might have stated that failure to comply with such subsection would prevent any action being brought under the agreement until such registration. In my opinion, the failure on the part of the plaintiff to register the agreement for sale does not debar him from recovering upon the covenants contained in such agreement.

Judgment

The amount is well within the jurisdiction of the County Court, so costs should only be on that scale. Judgment accordingly.

Judgment for plaintiff.

MACDONALD, J.

1915

March 1.

IN RE PACIFIC GREAT EASTERN RAILWAY CO. AND LARSEN

IN RE PACIFIC GREAT EASTERN RAILWAY COMPANY AND PETER LARSEN *ET AL.*

Arbitration—Stated case—Method of fixing compensation—Foreshore rights—Separate interests to be ascertained by arbitrators—British Columbia Railway Act, R.S.B.C. 1911, Cap. 194, Sec. 57—Arbitration Act, R.S.B.C. 1911, Cap. 11.

In ascertaining the compensation to be made to a landowner where foreshore rights are in question for land expropriated for a railway under section 57 of the British Columbia Railway Act, any increased value which the arbitrators may find is given to the remainder of the lands and foreshore in which the parties are interested beyond the increased value common to all lands in the locality, shall be set off against both the amount which may be awarded as the value of the foreshore taken and also any sum which may be awarded as damages for the taking and severance as distinguished from the value of the lands taken.

The arbitrators, in making their award on a property in which more than one person is interested, shall set out the amount to which each party is entitled.

Statement

CASE STATED by arbitrators for the opinion of the Court on certain questions arising in the course of the reference, heard by MACDONALD, J. at Vancouver on the 12th of February, 1915. The facts are set out fully in the reasons for judgment.

Bodwell, K.C. (*Douglas,* with him), for the Railway Company.

Armour, for Larsen.

1st March, 1915.

Judgment

MACDONALD, J.: The Pacific Great Eastern Railway Company is seeking by expropriation proceedings to acquire a strip of foreshore lying in front of an unsubdivided part of district lot 271, group 1, North Vancouver. Peter Larsen is, for the purpose of this case, admitted to be the owner of such land and foreshore, subject to a lease to A. Linton & Company, which expires on the 1st of July, 1916. During the course of an arbitration to determine the compensation and damages to be awarded to these parties, the arbitrators have submitted a case for the opinion of the Court.

The Railway Company has put in evidence to shew that the remainder of the lands and foreshore in which the parties were interested would, after the taking of such portion of the foreshore, be increased in value beyond the increase of other lands in the locality by reason of the passage of the railway through or over the same. The questions submitted for the opinion of the Court are:

"First: (a) Whether under section 57 of the British Columbia Railway Act any increased value which the arbitrators may find is given to the remainder of the said lands and foreshore beyond the increased value common to all lands in the locality shall be set off only against the damages that may be awarded for the taking and severance of the said foreshore as distinguished from the sum which may be awarded as the value of the foreshore actually taken; or, (b) whether such increased value shall be set off against both the amount which may be awarded as the value of the foreshore taken, and also any sum which may be awarded as damages for the taking and severance as distinguished from the value of the lands taken?"

Section 57 of the British Columbia Railway Act, R.S.B.C. 1911, Cap. 194, is as follows:

"The arbitrators or the sole arbitrator, in deciding on such value or compensation, shall take into consideration the increased value, beyond the increased value common to all lands in the locality, that will be given to any lands of the opposite party through or over which the railway will pass, by reason of the passage of the railway through or over the same, or by reason of construction of the railway, and shall set off such increased value that will attach to the said lands against the inconvenience, loss, or damage that might be suffered or sustained by reason of the company taking possession of or using the said lands."

Section 161 of the Dominion Railway Act is almost identical in its wording with above section 57, and corresponds to section 153 of the Railway Act of 1888 with the insertion after the words "increased value" of the words "beyond the increased value common to all lands in the locality." There are decisions upon the section before such change took place. It was held that the railway company was entitled to the benefit of any increased value that the property might have sustained by the advent of such railway, even though such benefit had been received by all persons resident in such locality. In *Re Ontario and Quebec R.W. Co. and Taylor* (1884), 6 Ont. 338 at p. 348, Cameron, C.J. in dealing with the amount to be allowed by arbitrators under the Railway Act, says:

"It appears to me the value of the land taken is to be determined by

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ascertaining the value of the land of which it forms a part before the severance, and the value of such land after the severance, and the difference will be the actual value to the owner of the piece taken. This method will give to the owner a just compensation for the enforced expropriation of his land; and if the whole land is enhanced in value, a question that must enter into the estimate of the amount to be awarded to the owner, the railway company will get the benefit of the value given to the land by the railway, in setting off such enhanced value against any damage resulting to the owner from the taking of the piece expropriated through inconvenience or depreciated value from severance."

This citation is quoted with approval by Ferguson, J., in *James* v. *Ontario and Quebec R.W. Co.* (1886), 12 Ont. 624 at p. 630. The learned judge then refers to Pierce on Railroads, p. 211, to the following effect:

"'The general rule of damages which covers the part taken and the injury to the remaining land, is, that the owner is entitled to the difference between the market value of the whole lot or tract before the taking and the market value of what remains to him after such taking.'"

This decision was affirmed on appeal: see (1888), 15 A.R. 1.

It is contended that the wording of section 57 is inapplicable and does not evince an intention to set off the increased value to the remainder of the land not taken by the railway company, as against damages that may be allowed through severance. The words used are "inconvenience, loss or damage," and the only one of these words that might be considered to cover the value of the land taken is the word "loss." A more apt word might have been selected, but reading the section as a whole, and considering the object of that portion of the Railway Act providing for compensation through expropriation proceedings, coupled with the authority to which I will presently refer, I think the wording is sufficient. Only absolute intractability of the language used can justify a construction which defeats what is clearly the main object of a statute: *Salmon* v. *Duncombe* (1886), 11 App. Cas. 627 at p. 634.

Judgment

"It would be contrary to sound construction to permit the use of a term not altogether apt to defeat the intention of the Legislature, which must not be assumed to have forseen every result that may accrue from the use of a particular word:"

per Anglin, J., in *Regina Public School District* v. *Gratton Separate School District* (1915), 50 S.C.R. 589 at p. 624; 7 W.W.R. 1248 at p. 1260, and citing *Nairn* v. *University of St. Andrews* (1909), A.C. 147 at p. 161.

It is to be noted that the section gives directions to the arbitrator to take into consideration such "increased value" in deciding on the value or compensation to be awarded, so that the set-off, if allowed, would be against the amount of such value or compensation. Before the amendment to the similar section in the Dominion Railway Act, this matter came before the Supreme Court of Canada for consideration in *Benning* v. *The Atlantic and North-west Railway Company* (1891), 20 S.C.R. 177. An award of $5,000 had been made by a majority of the arbitrators. An action was brought to set aside the award on various grounds, *inter alia,* that the amount was grossly inadequate, and secondly and mainly, on the ground that the arbitrators had taken into consideration, in order to arrive at the amount of their award, matters which they had no right to consider. The action was dismissed, and such dismissal was affirmed in the Court of Appeal. Upon further appeal to the Supreme Court of Canada particular reference is made to the following ground of appeal, *viz.*:

"Because the said two arbitrators took into consideration the increased value alleged to be given to the remainder of the plaintiff's property by the construction of the railway, and set it off not only against the inconvenience, loss and damages to be suffered by the plaintiffs using the land to be expropriated, but also in deduction of the value of the land and buildings to be taken."

Judgment

This is precisely the contention raised by the "owners" herein and upon which the opinion of the Court is being sought. The Supreme Court, in its judgment dismissing the appeal, dealt with this ground as follows (p. 180):

"The arbitrators were the sovereign judges of the amount the plaintiffs were entitled to, and there is no foundation for the allegation that they ever took into consideration matters which they were not entitled to consider. They seem to have considered the whole matter with utmost fairness, taking the value of the property before the railway passed, then its value after the railway passed, and deducting the one from the other awarded the difference to the plaintiffs."

In Abbott's Railway Law, pp. 156-61, this matter is fully dealt with, and the author refers to certain decisions as being in conflict with *Benning* v. *The Atlantic and North-west Railway Company, supra.* He is dealing with section 153 as it then existed, and if any such contradiction prevailed between

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the decisions at that time, the reason therefor disappeared when the section was amended. Previously to this, there might have been the injustice referred to by Mr. Lewis in his work on Eminent Domain,—that if the increased value could be set off against the land taken "one person might be obliged to pay for general advantages by a contribution of land, while his neighbour whose property is not taken enjoys the same advantages without price": Wilde, B., in *Senior* v. *Metropolitan Railway Company* (1863), 32 L.J., Ex. 225.

In my opinion, the first question (b) submitted, should thus be answered in the affirmative. It necessarily follows that the first question (a) should be answered in the negative.

The second question is as follows:

"(a) Whether the arbitrators shall make one award for the amount of damages, if any, which they shall find have been caused to the whole fee of the lands in district lot 271 and foreshore appurtenant thereto, which the said Peter Larsen claims to own, and lying south of Esplanade Street, by the taking of part of the foreshore thereof by the said Railway Company, after making the necessary deductions for increased value, if any, in accordance with the Court's opinion on the first question, and in such case leaving the distribution of the fund to the Court under the provisions of sections 71 and 72 of the Railway Act; or (b) whether the arbitrators shall make one award to Peter Larsen representing the damages (after making the necessary deductions as aforesaid) which shall be found to have been caused to his interest in the said lands and foreshore by the taking of a part of the foreshore thereof, and a second award to A. Linton & Company representing the damages (after making the necessary deductions as aforesaid) which shall be found to have been caused to their interest in said lands and foreshore by the taking of part of the foreshore thereof."

Judgment

In my opinion, the award of the arbitrators is intended to be final and conclusive as to the property affected by the passage of the railway. If the total amount to be awarded were simply, as suggested by the Railway Company, to be paid into Court, and the different amounts to which each might be entitled were not settled by the parties amicably, this would involve litigation. It could not be intended that the Railway Company had not only the right to expropriate the land required, but in this way to force the parties to expensive legal proceedings. There should be no reason why the amount to which each party is entitled should not be determined in the arbitration proceedings. The amount to which Peter

Larsen is entitled can be stated and then, separately, what is allowed to A. Linton & Company. The right of both mortgagor and mortgagee, to be considered separately in arbitration proceedings and an award made accordingly is considered in *Re Toronto Belt Line R.W. Co.* (1895), 26 Ont. 413. The rights of both landlord and tenant are also recognized as being severable under similar legislation in the case of *Johnson* v. *Ontario, Simcoe, and Huron Railroad Co.* (1853), 11 U.C.Q.B. 246.

It was contended by the railway company in that action that the tenant should resort to his landlord for compensation. Draper, J., in his judgment, at p. 249, deals with the matter as follows:

"It does not appear to me any answer to say that the tenant may resort to his landlord for compensation. The landlord has no right to receive it, for it is a compensation for the immediate right of occupation, to which the landlord is not entitled. . . . In cases like the present the defendants [railway company] must deal with the 'owners and occupiers,' with the tenant in possession and the reversioner, for their respective interests."

There seems to have been no objection on the part of the landlord and tenant as to their rights being dealt with at the same time in these proceedings. Under, presumably, similar legislation in force in Quebec, it was decided that the right existed in such circumstances to separate expropriation proceedings and separate awards.

Judgment

"In a railway expropriation, a tenant is entitled to compensation different from that of the proprietor, and to have his compensation ascertained by a different board of arbitrators":

The Canadian Northern Ontario R. Co. v. *The Daniel J. M. McAnulty Realty Company,* 15 Que. P.R. 168, referred to in the Canadian Annual Digest, 1913, at p. 367. All parties in these proceedings seem satisfied that the board of arbitrators should determine the compensation to be allowed, both the proprietor and the tenant. In my opinion, the second question (b) should be answered in the affirmative, but the award should be in the form indicated, *i.e.,* one award, with the amount to which each party is entitled separately allotted.

Judgment accordingly.

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1915

June 17.

HOGUE v. LEITCH

HOGUE v. LEITCH: THE ROYAL BANK OF CANADA, GARNISHEE.

Garnishee—Order by district registrar—Jurisdiction—Attachment of Debts Act, R. S. B. C. 1911, Cap. 14, Secs. 3, 20, 21 and 22—A bank not a company.

Section 20 of the Attachment of Debts Act does not take away the power which is expressly given to the district registrar to issue a garnishee order under section 3 of said Act.

Per MCPHILLIPS, J.A.: A company is not a bank nor is a bank a company.

Statement

APPEAL by the plaintiff from an order of GRANT, Co.J. made at Vancouver on the 5th of May, 1915. The plaintiff sued in the County Court for $375 for wages and then applied under section 3 of the Attachment of Debts Act and obtained from the district registrar at Vancouver a garnishee order on the Royal Bank of Canada. The garnishee was set aside on the application of the defendant, by an order of GRANT, Co.J. from which order this appeal is taken. The question at issue was whether the powers given the district registrar by section 3 of the Act is so curtailed by sections 20, 21 and 22 that he has not the power to issue a garnishee order against a bank.

The appeal was argued at Victoria on the 17th of June, 1915, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

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

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appeal should be allowed. In my opinion section 20 does not take away the power which is expressly given to the registrar by section 3.

MARTIN, J.A.

MARTIN, J.A.: I agree. I express no opinion on sections 20, 21 and 22, other than to say they are supplementary and complementary in their nature.

GALLIHER, J.A.

GALLIHER, J.A.: I agree.

McPHILLIPS, J.A.: I would allow the appeal on the ground that section 3 gives complete jurisdiction to the registrar. "Person" in the Interpretation Act would include a corporate body, which the bank is, under the Bank Act (R.S.C. 1906, Cap. 29). I am not enlarging on the effect of sections 20, 21 and 22, because they have relation to a company, and a company is not a bank, nor is a bank a company.

Appeal allowed.

Solicitors for appellant: *Hamilton Read & Mather.*
Solicitor for respondent: *C. S. Arnold.*

HARRIS v. MISSION LAND COMPANY, LIMITED.

Practice—Motion to discharge notice of appeal—Notice given for Vancouver sittings without date of hearing—Next sittings at Vancouver out of time—No further action taken by appellant—Marginal Rules 867 and 879.

Where notice of appeal was given for the Vancouver sittings and the date of hearing the appeal was omitted from the notice, but the following Vancouver sittings of the Court were out of time, and no steps were taken to set the case down for hearing at the previous sittings of the Court in Victoria, at which sittings the hearing of the appeal would have been in time, the notice of appeal will on motion be discharged.

MOTION by the respondent (defendant) to the Court of Appeal for an order discharging the notice of appeal. Judgment was given in the action by McINNES, Co.J. on the 5th of January, 1915. Notice of appeal was served on the 1st of April for the Court of Appeal at Vancouver but no date was filled in as to when the appeal was to be heard. An order for the security of the costs of appeal was made on the 16th of April, but the appellant did not furnish any security. On the

Statement

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1915

June 29.

HARRIS v. MISSION LAND CO.

29th of May the respondent's solicitors wrote the appellant's solicitors demanding the costs of the abandoned appeal, in answer to which the appellant's solicitors replied that they intended going on with the appeal and would deposit the security in due course. No further steps were taken by the appellant to bring on the appeal.

The motion was argued at Victoria on the 29th of June, 1915, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

J. Sutherland Mackay, for the motion: If it was a clerical error in the notice of appeal that it was to be heard at Vancouver, Victoria was evidently meant. The appeal book has not been filed or served and the appeal has not been entered for the June sittings at Victoria, so the notice of appeal should be discharged. If it is not a mistake and Vancouver was meant the next sittings would be November; that is too late: see marginal rules 867 and 879. After notice of appeal was given no further steps were taken to perfect the appeal, nor was an application made to extend the time. As to costs, we wrote the appellant's solicitors in compliance with the rule laid down in *MacBeth* v. *Vandall* (1910), 15 B.C. 377.

Argument

Mayers, contra: The original notice had the date inserted and was for the November sittings in Vancouver. Section 23 of the Court of Appeal Act is a curative section and we should be granted an extension: see *Cowan* v. *Macaulay* (1897), 5 B.C. 495; *Traders National Bank of Spokane* v. *Ingram* (1904), 10 B.C. 442. The notice of appeal was given in time and that is the chief matter: see *Sung* v. *Lung* (1901), 8 B.C. 423.

Per curiam: We all think that the appeal should be dismissed, that is to say, that this application should be granted, which is an application, as we understand it, to dismiss the appeal on the ground of want of prosecution, and it should be dismissed with costs.

Judgment

Motion granted.

REX v. ROBERTSON.

MORRISON, J.

1915

June 11.

REX v. ROBERTSON

Criminal law—Keeper of disorderly house—Conviction by magistrate—Right of appeal to County Court judge—Criminal Code, Secs. 228, 771, 773, 774, 797.

There is no appeal under section 797 of the Criminal Code from a conviction by a police magistrate sitting as a magistrate under Part XVI. of the Criminal Code.

APPLICATION for a writ prohibiting the County judge at Victoria from hearing an appeal from a conviction by the police magistrate of the City of Victoria sitting as a magistrate under Part XVI. of the Criminal Code. The accused was charged with being the keeper of a disorderly house under section 228 of the Criminal Code. Heard by MORRISON, J. at Victoria on the 11th of June, 1915.

Statement

C. L. Harrison, for the Crown, contended there was no appeal. Part XVI. of the Code, relating to summary trial of indictable offences, provides by section 773 (*f.*) that the keeping of a disorderly house (covered by section 228) is triable by a "magistrate," subject to the provisions of said Part XVI., by which, *inter alia,* it is provided (section 774) that the magistrate has absolute jurisdiction without the consent of the person charged. Prior to the statute of 1913 (Cap. 13, Sec. 28) there was a right of appeal as provided by section 797, but as the offence in question and the conviction were both after the passing of the 1913 amendment, the latter governs. The first part of the new section is identical with the old section, except that in the new section the words "from two justices of the peace sitting together" are inserted, and the proviso relating to there being no appeal in Saskatchewan and Alberta, where a conviction was made by a judge of a Superior Court is left out, the second part of the new section not affecting the matter but applying to the whole of Part XVI. I contend that although the word "magistrate" is defined as

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meaning two justices of the peace sitting together, as well as a tribunal having the power of two justices (section 771 (*a*) (iii)), nevertheless section 797, as amended, was meant to be *persona designata,* and an appeal does not lie from a police magistrate but only from two justices of the peace sitting together. It should be pointed out that section 797, as re-enacted, left out the proviso that "in the Province of Saskatchewan or Alberta there shall be no appeal if the conviction is made by a judge of a Superior Court (by sub-section (*a*) (iv.) of section 771, apparently Supreme Court judges are magistrates for the purpose of Part XVI.), and if the words "two justices of the peace sitting together" were intended to mean "magistrate" and was not *persona designata,*

Argument

the statute would have said "magistrate," and so covered every person having the authority of a magistrate under Part XVI. as defined by section 771.

Aikman, for accused: If two justices of the peace sitting together in British Columbia have the same power as a magistrate and a magistrate in British Columbia has the same power as two justices of the peace, they are precisely the same, and the words "two justices of the peace sitting together" in section 797 of the Criminal Code must be held to include "magistrate."

MORRISON, J.: I am of opinion that the words "two justices of the peace sitting together" in section 797 of the Code (as re-enacted by section 28, Cap. 13, Can. Stats. 1913) should be construed as *persona designata,* and were not intended to include "magistrate." There is therefore no appeal from a

Judgment

conviction by a police magistrate sitting as a magistrate under Part XVI. of the Criminal Code to the County Court judge, and a writ of prohibition will be granted prohibiting the County Court judge from further proceeding with the hearing.

Application granted.

IN RE MACKENZIE, MANN & COMPANY, LIMITED ASSESSMENT.

COURT OF APPEAL

1915

June 23.

IN RE MACKENZIE, MANN & CO. ASSESSMENT

Assessment—Court of Revision—Appeal from—Court of Appeal—Grounds for interference by—Fresh evidence—Taxation Act, R.S.B.C. 1911, Cap. 222, Secs. 34, 40.

Where an assessor has acted honestly and has arrived at a valuation of property without any mistake in principle or law the valuation will be given great weight by a Court of Appeal.

Per MARTIN, J.A.: An appeal from the decision of a Court of Revision under the Taxation Act is a rehearing and fresh evidence may be adduced.

APPEAL by the owners of lots 2, 26, 109 and 120, Sayward District, from the decision of the Court of Revision and Appeal for the Comox District of the 29th of April, 1915, whereby the assessment of the said lots was confirmed. The property had been assessed at $102,000 for the year 1915, whereas the assessment for the year 1913 was $41,000. The main ground of appeal was that there was no evidence before the Court of Revision to shew that said lots had increased in value from the amount at which they had been assessed in the year 1913.

Statement

The appeal was argued at Victoria on the 22nd and 23rd of June, 1915, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Mayers, for appellant: The Court of Revision assessed the four lots in question too high; one was assessed double; one three times, and a third at four times of what they were assessed in 1913. The question of the value of the harbour does not arise, as it was always there, and as to its being a townsite, it is only a townsite in name and on paper.

Argument

Maclean, K.C., for the Crown: On the question of this being a hearing *de novo* see *In re Charleson Assessment* (1915), 21 B.C. 281. The sworn statements put in under section 147 of the Land Registry Act are to the effect that the assessments

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are not excessive. If the assessor has acted honestly, he should not be interfered with. There is no suggestion that a wrong principle had been applied by the assessor.

Mayers, in reply.

IN RE MACKENZIE, MANN & CO. ASSESSMENT

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal. I think the evidence is not such as to entitle me to reverse the valuations put upon this property by both the assessor and the Court of Revision. The assessor is in a much better position than a judge of the Court of Appeal to come to a conclusion as to the value of land. In the first place, if the assessor has acted honestly, and there is no suggestion here that he has not, without any mistake in principle or law, great weight ought to be given to his valuation. Then again, the Court of Revision is in a very good position indeed to review and rehear the case on an appeal from the assessment. It has come to the conclusion that the assessor was right in the valuation he put upon these lots, and I think he has done so on the right principle and without any mistake, either of the law, or in respect to the standard which he should apply.

MARTIN, J.A.

MARTIN, J.A.: I also think the decision of the Court of Revision should be maintained. There is no more evidence before us than there was before it, although, of course, this is a rehearing and fresh evidence could be adduced. But, in the case of property of this very peculiar description, I shrink from interfering with an assessment which, I think, has been made in a difficult matter, and which is as satisfactory as would be possible in the circumstances.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would dismiss the appeal. I think in acting in all these matters of appeal from assessors and Courts of Revision that too much reliance cannot be placed upon what may be the exact language in the statutes. The statutes are always supposed to be speaking, and must be applied to the conditions involved.

If we had to look at cash value as being the concrete statement, or the language could be taken without paying attention to conditions, we might get into the anomalous position

of not being able to say there was any value, but such is not the way to apply the statute law, which has to be applied according to the varying conditions.

In this case Mr. Boggs seems to have gone upon the premise that it is only agricultural land. I think the evidence absolutely disproves that. If we were to look at it as agricultural land it might have very little value. There it is on a good bay or harbour, but it is very far away, and there is no near by market. On the other hand, we have evidence that this land is looked upon as of a character suitable for a townsite—for a proposed terminus of a railway—and everything points to it that the purchasers have looked upon it as that. Then we have the express evidence of Mr. Smith that he put this valuation upon the land from inspection on the ground, and his evidence, to my mind, well supports it. On the whole, then, I would not think the Court of Revision erred at all in the matter.

Appeal dismissed.

Solicitors for appellants: *Bodwell & Lawson.*
Solicitor for respondent: *H. A. Maclean.*

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GALE v. POWLEY

GALE AND GALE v. POWLEY.

Sale of land—Payments by instalment—Default in payment—Order for payment and in default cancellation of agreement and forfeiture of payment made—Assignee of purchaser—Want of parties.

Suit against soldier—Army Act, 1881 (44 & 45 Vict., Cap. 58), Sec. 144 (4) (Imperial)—Militia Act, R.S.C. 1906, Cap. 41, Sec. 74.

Section 144 (4) of the Army Act, 1881 (44 & 45 Vict., c. 58), as brought into force by the Militia Act, R.S.C. 1906, Cap. 41, Sec. 74, with relation to the issue of process against a soldier upon affidavit, applies only where it is proposed to take the person of a soldier, or to compel him to appear in person, and does not apply to such procedure as an action for the recovery of money for forfeiture under an agreement for sale.

In an action by the assignee of a vendor's agreement for sale of land against the purchaser, the assignee to whom the purchaser has assigned his interest under the agreement is a necessary party when said assignment was made to the knowledge of the vendor and his assignee (IRVING, J.A. dissenting).

APPEAL from the decision of LAMPMAN, Co. J. in an action tried by him at Victoria on the 15th of January, 1915. The action arose through an agreement for sale of the 8th of February, 1913, whereby Angus W. Kenning agreed to sell to the defendant lot 9 in block O, being part of section 74 in the Victoria District, for the sum of $1,700 payable as follows: $650 on the execution of the agreement; $100 on the 8th of April, 1913; $316 on the 8th of August, 1913; $317 on the 8th of February, 1914; and $317 on the 8th of August, 1914, with interest at 7 per cent. per annum on all outstanding payments. On the 26th of February, 1913, Kenning assigned his interest in the agreement for sale to the plaintiff, the defendant being made a party to the assignment and covenanting to pay to the plaintiff all moneys still due under the original agreement for sale. The articles provided that time was to be considered as of the essence of the agreement and upon default in payments for cancellation of the agreement and forfeiture to the vendor of payments already made on the purchase price. On the

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16th of December, 1914, there being a balance of $589.18 still due on the purchase price, the plaintiff brought action for this amount and in default of payment for an order or decree declaring the said agreement for sale cancelled, that the defendant be debarred from all interest in the land, and that the moneys paid under the agreement be forfeited. The defendant did not file a dispute note but on the return of a notice of motion for an order for cancellation of the agreement, etc., he filed an affidavit setting out that he had assigned all his interest in the said agreement to one Lenore Nicol in writing and that he was an officer in a battalion of the Canadian Expeditionary Force and about to leave for the front. Judgment was given for the amount claimed and that in default of payment within 90 days the agreement be declared cancelled and the moneys paid under the agreement be forfeited. The defendant appealed.

Statement

The appeal was argued at Vancouver on the 8th of April, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Mayers, for appellant: We should succeed because (1) the defendant is on military duty; (2) the judgment was wrong in ordering foreclosure instead of sale; and (3) the action should be dismissed for want of parties. The Army Act, 1881, 44-45 Vict., Cap. 58 (Imperial), Sec. 144, Subsec. (4), is in force under section 74 of Cap. 41, R.S.C. 1906, and we are entitled to the relief afforded by that Act. On the second point, there is no case of a vendor's lien being enforced by foreclosure; the proper remedy is by sale: see *Canadian Pacific R.W. Co.* v. *McAnnany* (1909), 10 W.L.R. 47; *Tennant* v. *Trenchard* (1869), 4 Chy. App. 537; *Munns* v. *Isle of Wight Railway Co.* (1870), 5 Chy. App. 414; *Clough* v. *The London and North Western Railway* (1871), 41 L.J., Ex. 17; *March Brothers & Wells* v. *Banton* (1911), 45 S.C.R. 338; *Verma* v. *Donahue* (1913), 18 B.C. 468; *Vancouver Land and Improvement Co.* v. *Pillsbury Milling Co.* (1914), 19 B.C. 40. The function of the Court is to relieve against forfeiture: see *Kilmer* v. *British Columbia Orchard Lands, Limited* (1913), A.C. 319. The assignment by the defendant was signed to the

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knowledge of the present plaintiff and his assignee should be made a party to the action: see *Adams* v. *Paynter* (1844), 1 Coll. C.C. 530; *Vankleek* v. *Tyrrell* (1860), 8 Gr. 321. Before the close of final foreclosure is made all the parties must be before the Court: see *Attorney-General* v. *Sittingbourne and Sheerness Railway Co.* (1866), L.R. 1 Eq. 636.

Argument

F. J. McDougal, for respondent: Those on military duty are answerable to the civil law: see Halsbury's Laws of England, Vol. 25, pp. 91-4. The defendant has no status as he has not entered a dispute note and in his affidavit he does not say he has a good defence on the merits. He gave no notice of the assignment of the agreement.

Mayers, in reply: The affidavit says the plaintiff knew of the assignment and this is not denied by the plaintiff: see *Shaw* v. *Foster* (1872), L.R. 5 H.L. 321.

Cur. adv. vult.

10th August, 1915.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I concur with MARTIN, J.A. in allowing this appeal.

IRVING, J.A.

IRVING, J.A.: The defendant on the 8th of February, 1913, purchased under an agreement for sale the property in question from one Kenning, and has filed an affidavit saying that on the same day he assigned all his right, title and interest therein to one Lenore Nicol.

The plaintiff on the 26th of February, 1913, obtained from Kenning, the vendor, an assignment of all his right, title and interest in the agreement, and in the property in question, and all moneys then owing, accruing due and unpaid under the said agreement. The defendant was a party to the assignment of the 26th of February, 1913, and therein covenanted to pay to the plaintiffs said moneys and perform all covenants in the agreement of the 6th of February, 1913, contained. In the agreement of the 8th of February the defendant covenanted to pay $650 down and four instalments, of which the first two have been paid and the other two, *viz.*: two sums of $317, payable on the 8th of February, 1914, and the 8th of August, 1914, respectively, have not been paid.

On the 16th of December, 1914, the plaintiff brought this action for $589.18—an action for cancellation of the contract, as it is sometimes called in England: see *Lysaght* v. *Edwards* (1876), 2 Ch. D. 499 at p. 506, seeking to recover the two instalments with interest, and in default of payment for an order declaring the agreement of sale cancelled, and foreclosing the defendant's right thereunder, and for possession and forfeiture of the moneys paid.

The defendant did not file a dispute note but on the return of a notice of motion for an order for cancellation and foreclosure, etc., counsel instructed by him did appear and took the ground that as the defendant was an officer in the 30th Battalion, C.E.F., and might at any time be called upon to leave for the front, the proceedings were void or ought to be set aside for non-compliance with section 144 (4) of the Army Act, 1881, 44 & 45 Vict., c. 58 (Imperial), brought into force by the Militia Act, R.S.C. 1906, Cap. 41, Sec. 74. In my opinion, that section applies only where it is proposed to take the person of the soldier, or to compel him to appear in person, and does not apply to the procedure such as is being invoked in this instance. His counsel also raised the objection that a judgment could not be given for want of proper parties, in that Lenore Nicol was not made a defendant and further, that the plaintiff's remedy in default of payment was by sale, and not by foreclosure.

IRVING, J.A.

This defendant has paid $650 down and $416 in instalments. *Prima facie* he would be entitled to relief from forfeiture of this $416, as the purchaser obtained in *Verma* v. *Donahue* (1913), 18 B.C. 468, but he has not counterclaimed for any such relief.

As to the non-joinder of the defendant's assignee, I do not see that this gives the defendant any ground for appealing. Further, it is not shewn that the assignment to Lenore Nicol was ever registered as required by section 75 of the Land Registry Act.

As to sale or foreclosure, the ordinary remedy of vendor, whether it is an action to recover his purchase-money or one for specific performance is, since the Judicature Act, practically

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an action for specific performance. This action, whatever its form is, is one in which the Court considers the equitable rights of the parties. One method is for the plaintiff to bring his action for specific performance, and insert a claim to enforce his vendor's lien and then obtain a declaration that the contract should be specifically performed, an account of what is due and a date for payment and completion, declaration that plaintiff is entitled to a lien on the land for amount due and costs, and also for future instalments as they fall due. Liberty to plaintiff to apply in case defendant shall not pay the amount certified to or for future instalments as they fall due. Having got such a decree he can apply to the Court on default being made on the day fixed, and get execution or rescission: see *Henty* v. *Schroder* (1879), 12 Ch. D. 666; *Olde* v. *Olde* (1904), 1 Ch. 35. If the sale cannot be carried out he can apply in the action for possession, which really amounts to foreclosure. As pointed out in *March Brothers & Wells* v. *Banton* (1911), 45 S.C.R. 338 at p. 344, a properly-framed judgment for specific performance when worked out leaves you with the money already paid and the land, if later default is made in the payment of the balance, the principle being that refusal to pay after judgment constitutes repudiation and rescission of the contract.

IRVING, J.A.

But as, unhappily, purchasers are too often insolvent, another way is that which has been adopted here. An action may be brought at once for the amount due, and in the plaint it is asked that in default of payment thereof for cancellation and foreclosure, and possession and forfeiture of moneys paid, and removal from the registry of the agreement for sale. On such a writ the judge would have the same power to mould the proceedings as he might think proper if it appears that the defendant is entitled to relief of some sort. The method adopted here saves numerous applications to the Court.

I would dismiss the appeal.

MARTIN, J.A.: With respect to the first point, that under section 144 of the Army Act, 1881, 44 & 45 Vict., c. 58 (Imperial), (applied to Canada by the Militia Act, Cap. 41, R.S.C. 1906, Sec. 74) no process can issue against a soldier

MARTIN, J.A.

without the filing of an affidavit under subsection (4) as a preliminary step and condition precedent, I am of the opinion that such requirement relates only to proceedings taken against the person of the soldier, and that the case at bar is governed by the proviso to said section, which only requires "due notice in writing" to be given to the soldier in causes of action where execution against his person is not sought.

Then as to the judgment that was pronounced. It is objected that the vendor's only remedy under this agreement is a sale of the property and a judgment against the purchaser for the balance, if any, due the vendor after the result of the sale is known (*cf. Robinson* v. *Starr* (1913), 26 W.L.R. 261) and that the practice that has existed for some time in this Province of granting foreclosure (see, *e.g., Bourne* v. *Phillips* (1913), 4 W.W.R. 1215; *Davis* v. *Von Alvensleben and Gibb* (1914), 20 B.C. 74) is unwarranted in law. But it is clear that there are other remedies, and one of them is a right to have the agreement cancelled in an action which in some, though not all respects, is in the nature of specific performance, and in others akin to one for foreclosure of a mortgage, and to possession of the property, retaining the sums already paid, pursuant to the stipulation for forfeiture thereof, for which the following cases are ample authority: *Hudson's Bay Co.* v. *Macdonald* (1887), 4 Man. L.R. 237, 480; *Jackson* v. *Scott* (1901), 1 O.L.R. 488, see English cases cited by Moss, J.A. on cancellation and possession, and by Maclennan, J.A. on forfeiture of payments; *West* v. *Lynch* (1888), 5 Man. L.R. 167; *Schurman* v. *Ewing and Moore* (1908), 7 W.L.R. 610; *Canadian Fairbanks Co., Ltd.* v. *Johnston* (1909), 18 Man. L.R. 589 at p. 601 (considered in *Whitla* v. *Riverview Realty Co.* (1910), 19 Man. L.R. 746 at pp. 772, 775, 777); *Pentland* v. *Mackissock* (1913), 22 W.L.R. 947; and the recent decision of the Manitoba Court of Appeal in *Tytler* v. *Genung* (1914), [24 Man. L.R. 148]; 27 W.L.R. 330. At the same time an opportunity will be given to the purchaser to redeem within the time to be fixed by the Court, Cameron, J. remarking in the *Canadian Fairbanks Co.* case, at p. 602:

MARTIN, J.A.

"I know that if this agreement were before me in an action to determine it, or to enforce specific performance of it, I would give the defendant an

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opportunity to remedy her default before her rights were foreclosed. If the action were only to have it declared that a notice of cancellation of the agreement, properly framed and served, was operative and effective and she left the action undefended, I believe the Court would give her an opportunity to redeem in that case also."

This view was followed in the same Court in *Pentland* v. *Mackissock, supra.* And, finally, it has lately been decided by this Court that where the purchaser has abandoned the contract it will be cancelled and his payments forfeited: *Vancouver Land and Improvement Co.* v. *Pillsbury Milling Co.* (1914), 19 B.C. 40.

But I am further of the opinion that there is sufficient authority to justify the making of an order for foreclosure herein based upon these cases: *Hudson's Bay Co.* v. *Macdonald* and *West* v. *Lynch,* above quoted; *Great West Lumber Co.* v. *Wilkins* (1907), 7 W.L.R. 166 at p. 175, a decision of the Supreme Court of Alberta, following the same; *Steele* v. *McCarthy* (1908), *ib.,* 902 at p. 911, a decision of the Full Court of Saskatchewan also following the same; *Tytler* v. *Genung* (1914), 27 W.L.R. 330 at pp. 333, 338, a decision of the Court of Appeal of Manitoba (wherein it is said that this "very common form of action . . . . is founded upon the analogy between the position of an unpaid vendor where the purchase-money is payable by instalments extending over a period of time and that of a mortgagee" though "the analogy is not in all respects complete," p. 338); *Landes* v. *Kusch* (1914), 28 W.L.R. 915; and, lastly, by the recent decision of the Full Court of Saskatchewan in *Hargreaves* v. *Security Investment Co.* (1914), 29 W.L.R. 317, wherein *Jackson* v. *Scott, supra,* was considered, and it was unanimously held that cancellation and foreclosure could be granted, but not an order for personal judgment as well, and that the plaintiff must make his election, and an order for foreclosure was made, to take effect in default of payment within six months, the agreement being declared void and at an end, possession to be given to the plaintiff, and the registration vacated.

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In *Attorney-General* v. *Sittingbourne and Sheerness Railway Co.* (1866), L.R. 1 Eq. 636, Lord Romilly, M.R. held that proper steps had not been taken in the Court to establish the

lien (p. 639) and (p. 640) "that if the Court is to go beyond that, he [petitioner] must file a bill in the usual way . . . . to enforce the lien and get the benefit of it," but at the same time he pointed out (p. 639) the remedy of a vendor for his lien thus:

"It is true that a purchaser [Note—Obviously meaning vendor], has a lien for his unpaid purchase-money, but he cannot, if he require the aid of the Court, act differently from a mortgagee or any other person claiming a lien; he must institute a suit, and get that lien declared against all the persons interested in the estate, or at least all those who are subsequent to him in date, and who are foreclosed by his decree."

I note that it was held by the Chancellor of Upper Canada in *McMaster* v. *Noble* (1858), 6 Gr. 581, that a judgment creditor was there entitled to a decree of foreclosure or a sale of the lands of his debtor to satisfy his registered judgment, under the Canadian statute, and that course had become an established practice—*Glass* v. *Freckelton* (1861), 8 Gr. 522. And *cf. Rolleston* v. *Morton* (1842), 1 Dr. & War. 171 at p. 195.

But it is further objected that the action fails for want of parties because the defendant, the purchaser, had by writing assigned all his interest in the property to one Leonore Nicol on the 8th of February, 1913, the same day upon which he entered into the agreement to purchase from Kenning, and Kenning and his assignees, the present plaintiffs, had notice of defendant's assignment to Nicol at the time Kenning assigned his agreement to the plaintiffs on the 26th of February, 1913, and yet notwithstanding this notice Nicol has not been made a party to the proceedings, nor has even any provision been made in the judgment for foreclosure to bring her before the Court in any way, or to give her an opportunity to protect her rights. Though, as has been seen, this case is not in all respects the same as one between mortgagor and mortgagee, yet as regards encumbrancers who are sought to be foreclosed, the principle is the same, and it is clear, to my mind, that this objection is well taken on the following authorities: *Rolleston* v. *Morton* (1842), 1 Dr. & War. 171 at p. 193; *Adams* v. *Paynter* (1884), 1 Coll. C.C. 530; *Burgess* v. *Sturges* (1851), 14 Beav. 440; *Vankleek* v. *Tyrrell* (1860), 8 Gr. 321; Fisher on Mortgages, 6th Ed., par. 1670. And I note that in *West*

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v. *Lynch, supra,* a case very like this, the assignee (Hoare) of the purchaser was a party.

If application has been made to the judge below under Order II., rr. 12, 13, this objection would have been met by amendment, but no application to amend was made before him or before us. And furthermore, and apart from other things, the form of the judgment is open to objection because it orders the recovery of possession of the lands and cancellation of the registration of the agreement for sale in the absence of any allegation in the plaint that possession was given to or taken by the purchaser or that the agreement for sale, or even the vendor's title had been registered; those remedies are asked for in the prayer of the plaint without any facts being alleged to support them.

MARTIN, J.A.

The appeal should be allowed and the judgment set aside, but as said rule 12 directs that "no cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties" I think we should give leave to amend, as we did in *King* v. *Wilson* (1904), 11 B.C. 109, and that the plaintiff be allowed to do so within one week, and that the costs of and consequent upon said amendment and of the motion and judgment below be allowed to the defendant in any event, otherwise the action will be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: I agree with MARTIN, J.A. in allowing the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: My opinion is that the defendant, being an officer, is not within the meaning of section 144 of the Army Act, 1881, 44 & 45 Vict., Cap. 58 (Imperial). An examination of the decisions proves this without a question of a doubt, therefore there was no necessity for the filing of an affidavit under subsection (4).

I am, however, of the opinion, that the judgment is wrong and cannot be supported. Firstly, because of want of parties, *i.e.,* the defendant had before action assigned the agreement of sale and the assignee thereof was a necessary party to the action. Secondly, the judgment is wrong in form, in my opinion, in that the allegations as contained in the plaint do

not support the judgment, and I agree with what my brother MARTIN states in this regard, but I do not wish to be understood as agreeing that foreclosure and forfeiture of instalments of purchase-money can be decreed, not that it is necessary in the present case to so decide, I am rather inclined, as at present advised, to hold to the contrary. The plaintiff cannot have the land and the instalments of purchase-money, the forfeiture should be relieved against, a power which the Court has, and in my opinion, one that should be exercised: see *Kilmer* v. *British Columbia Orchard Lands, Limited* (1913), A.C. 319; *Snell* v. *Brickles* (1914), 49 S.C.R. 360; *Bark Fong* v. *Cooper* (1913), *ib.* 14; *Vancouver Land and Improvement Co.* v. *Pillsbury Milling Co.* (1914), 19 B.C. 40. If the plaintiff should elect to accept a decree for sale then in the result the instalments would be eliminated unless the sale was at a profit, and if such should be the case the assignee of the agreement of sale would be entitled to such profit, the plaintiff will otherwise possibly only be entitled to the land, subject to the lien thereon in favour of the assignee of the agreement of sale for the instalments of purchase-money: see *Rose* v. *Watson* (1864), 33 L.J., Ch. 385; but see *Whitbread & Co.* v. *Watt* (1902), 71 L.J., Ch. 424 at p. 425, also the authorities previously referred to. However, these are questions which will no doubt have the careful consideration of the Court below, and the law will be applied to the particular facts as adduced at the trial—the judgment as entered cannot stand. In the result, in my opinion, the appeal should be allowed and the judgment set aside. This will admit of all proper parties being added and amendments made as may be advised.

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Appeal allowed, Irving, J.A. dissenting.

Solicitor for appellant: *H. Despard Twigg.*
Solicitors for respondents: *Martin & Lumsden.*

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APPLETON v. MOORE.

Discovery—Refusal to answer question—Action for rescission on ground of misrepresentation—Transfer of valuable property to another company —Question as to loan on property after its transfer—Disallowed.

APPLETON v. MOORE

A. brought action against M. for rescission of a contract for the sale of shares in a lumber company on the ground of fraudulent misrepresentation as to possession by the company of certain valuable timber limits, when in fact the company had already passed a resolution approving of an exchange of these limits for certain lands of a second company with which it had agreed to make the exchange. In order to establish a fraudulent conspiracy between M. and others to relieve the company of its assets by means of the exchange, M., on his examination for discovery, was asked, "You [*i.e.*, the second company in which he was also largely interested] still own them, yes, but first of all you raised $200,000 on them, didn't you?"

Held (MARTIN, J.A. dissenting), that upon the examination of M. for discovery he should not be asked questions as to what the purchasing company did with the alienated property, after alienation.

APPEAL from an order of MORRISON, J. of the 14th of June, 1915, made on an application by the plaintiff for a writ of attachment against the defendant on account of his refusal to answer a question on his examination for discovery, whereby the defendant was ordered to appear before the examiner and answer the following question: "You still own them, yes, but first of all you raised $200,000 on them, didn't you?" (referring to the timber limits that had been transferred to the Menzies Bay Timber Company). The action was for rescission of the sale by the defendant to the plaintiff of shares in the Canadian Puget Sound Lumber Company, Limited, on the ground of fraudulent misrepresentation. The plaintiff alleged that the defendant represented (1) that the said lumber company was in a flourishing condition; (2) that its assets were intact; and (3) that it held timber limits commonly known as the "Sayward Holdings," which were of great value. On or about the 10th of June, 1912, the defendant was indebted to the plaintiff for $61,720, balance of purchase price of some

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timber limits owned by the plaintiff. On the 13th of June, 1912, the defendant sold the plaintiff in satisfaction of $36,720 of such indebtedness, 7,344 shares in the capital stock of the Canadian Puget Sound Lumber Company at $5 a share. The plaintiff alleges that in March, 1912, a resolution was passed by the Canadian Puget Sound Lumber Company whereby an exchange was agreed to with the Jordan River Lumber Company (in which the defendant was a large shareholder) whereby the valuable portion of the Sayward Holdings (worth about $750,000) was exchanged for certain lands on the Jordan River, which the Jordan River Company had previously purchased for $60,000. On the 30th of October, 1912, the Menzies Bay Timber Company was incorporated (in which the defendant was a shareholder and director) for the purpose of taking over and did take over the Sayward Holdings that had been transferred to the Jordan River Company. The Menzies Bay Company then let a contract for logging said limits at $3 per thousand, which produced over $650,000. The Canadian Puget Sound Lumber Company was wound up in May, 1914.

Statement

The appeal was argued at Victoria on the 30th of June, 1915, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Harold B. Robertson, for appellant (defendant): This is an action for repayment of certain sums paid for shares in the Canadian Puget Sound Lumber Company on the ground that the plaintiff was induced to take the shares through the false and fraudulent representations of the defendant. The defendant is now asked a question as to whether a loan had been raised on the assets of another company that has no bearing on the action. [He referred to *McInnes* v. *B.C. Electric Ry. Co.* (1908), 13 B.C. 465.]

Argument

Maclean, K.C., for respondent (plaintiff): The defendant represented that the Canadian Puget Sound Company included in its assets the timber limits known as the "Sayward Holdings," when in fact a resolution had been passed by that company exchanging a portion of these holdings for certain tracts of land on Jordan River and subsequently the Menzies Bay

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Timber Company was incorporated to take up the said Sayward Holdings so transferred, the defendant being largely interested in the Menzies Bay Company. The Sayward Holdings so transferred were very valuable and the Jordan River lands received in exchange by the Canadian Puget Sound Company were of little or no value. We contend that the defendant being interested in all these companies, we are entitled to a fair amount of latitude in bringing out the whole transaction: see *Osram Lamp Works, Limited* v. *Gabriel Lamp Company* (1914), 2 Ch. 129 at p. 132.

Argument

Robertson, in reply.

Cur. adv. vult.

10th August, 1915.

MACDONALD, C.J.A.: The action is brought by the plaintiff (respondent) to rescind, on the ground of fraudulent misrepresentations, a sale to him by the appellant of certain shares in the Canadian Puget Sound Lumber Company, Limited. The representations complained of, as set out in the statement of claim, were that the assets of the company were intact and that the company held all the valuable timber known as the Sayward Holdings. There are other alleged misrepresentations, but they do not affect the point at issue in this appeal. It is alleged in the statement of claim that the representations above referred to were knowingly and fraudulently false. The alleged falsity consists in this, that before the sale the defendant and his co-directors of the said company had passed a resolution in favour of exchanging sections 1 and 9, part of the Sayward Holdings, with another company, the Menzies Bay Timber Company, Limited, for certain timber limits belonging to the latter company, and that subsequently to the sale, the exchange put in train by that resolution was actually carried out, and the Court will be asked on the trial to declare that the assets in the true sense were not at the time of the sale of the shares intact, and that the company did not at that time own all of the Sayward Holdings. Whether a good case in law is made out by the statement of claim is not a question which I have to consider, the point before me is one of evidence. On examination of the defendant for discovery he was asked this question:

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"You still own them, yes, but first of all you raised $200,000 on them, didn't you?" which, on advice of counsel, he declined to answer. The order appealed from orders him to answer it. I gather from the context that defendant was being questioned not as to what he personally did, but what the Menzies Bay Timber Company, Limited, in which he was largely interested, did in respect of said sections 1 and 9 after it acquired them pursuant to said resolution of exchange.

I think the question was irrelevant. It was doubtless proper, having regard to the issues aforesaid, to bring out the fact that said sections 1 and 9 were of appreciable value and that, therefore, the representations were not immaterial. The case which the plaintiff had to make out was that he had been induced to purchase the shares by false and fraudulent representations. If the assets were not intact and if the company did not hold all the Sayward Holdings, the plaintiff might be entitled to relief, but I am unable to see how his case could be aided by shewing what the purchaser did with the alienated lands after the alienation; whether the purchaser disposed of them or utilized them for profit, or raised money upon them, has nothing to do with the issue raised by his statement of claim. It seems to me that the question is the entering of the wedge in an attempt to do what this Court on a former appeal on a matter of pleading decided could not be done in this action, namely, to shew that there was a fraudulent conspiracy between the defendant and others to rob the said Canadian Puget Sound Lumber Company of its assets by means of the said exchange.

MACDONALD, C.J.A.

The appeal should be allowed and the question disallowed.

MARTIN, J.A.: This is an appeal from an order of MORRISON, J. directing the defendant to answer a certain question on his examination for discovery, the ground being taken that such question is irrelevant. In my opinion, we should not, on the issues here raised, interfere with the discretion of the learned judge, and I adopt the language of Lindley, L.J. in *Peek* v. *Ray* (1894), 3 Ch. 282 (an appeal from an order of North, J. allowing certain interrogatories) and "protest against our being asked to go into trumpery matters to consider whether an inter-

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rogatory is a little too wide or a little too narrow." Lord Justice Lopes said, p. 287:

"There is an appeal to this Court from that allowance by the judge, and it is said that some of these interrogatories are premature. I am unable to say that there is not a right of appeal, but I do most firmly say this, that I think an appeal of this kind is most improper. I think no appeal ought to be brought, and no appeal, I am certain, will be allowed by this Court in a case like this, unless there is some error on a question of principle involved, or some substantial injustice has been done."

And Lord Justice Kay said, p. 288:

"I say, speaking for myself, most emphatically, that where a judge has, under these new rules, had interrogatories brought before him, and has determined whether he will allow them or not, or which of them he will allow, or what part of them he will allow, if anyone chooses to appeal from that allowance, I hope he never will be allowed to succeed, unless he can shew some serious question of principle in which the judge in the leave he has given has made a material error. To say that this Court is to be asked to look through the interrogatories which the learned judge of first instance has allowed, and to see whether this, that, or the other part of an interrogatory has been properly allowed or not, is to my mind, a total mistake as to the functions of the Court of Appeal. That allowance of interrogatories is a matter very largely in the discretion of the learned judge before whom the interrogatories are brought, and from such discretion the rule is that although an appeal may be brought, no appeal shall be allowed to succeed unless it shall be shewn that in the exercise of that discretion a material mistake has been made."

MARTIN, J.A.

It is conceded that even if the question under discussion were answered before the examiner it would still be open to objection at the trial, so I think the case at bar is exactly covered by said observations. If a little too much latitude has been allowed, no principle has been violated nor will injustice result.

It follows that the appeal should be dismissed.

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

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

Appeal allowed, Martin, J.A. dissenting.

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

Solicitors for respondent: *Crease & Crease.*

BESELOFF v. THE WHITE ROCK RESORT DEVELOPMENT COMPANY, LIMITED, AND PHILLIPS.

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Mechanic's lien—Contract for clearing land—Subdivision—Work done on portion as designated—Intimation of inability to pay for work—Work stopped—Lien on whole property—Mechanics' Lien Act, R.S.B.C. 1911, Cap. 154, Secs. 3, 6, 9 and 31.

The plaintiff entered into a written agreement with the defendant Company to clear a certain subdivision of land in such manner as directed from time to time by the Company's representative. Certain portions were cleared as designated, when the Company intimated its inability to pay for the work. The plaintiff then ceased operations, filed a lien and brought action for the enforcement thereof.

Held, that the property must be viewed as a whole and that all of it had benefited by the work within the meaning of the Mechanics' Lien Act, and that the plaintiff is entitled to a lien upon all the lands except such portion as is excluded by section 3 of the Act.

APPEAL from the decision of HOWAY, Co. J. in an action tried at New Westminster on the 8th of October, 1914, to enforce a mechanic's lien filed in respect of work performed under an agreement between the plaintiff and the defendant Company. The agreement provided that the plaintiff was to clear a certain block of land in the Municipality of Surrey owned by the defendant Company, containing about 320 acres. The work was to be done subject to the direction of the Company's representative, who was to designate from time to time the portions of land to be cleared, and the work was to be done to his satisfaction. Estimates of the work done were to be made at the end of each month by the Company's representative, and the plaintiff was to be paid on or about the 10th of each month. A clause was included that the Company could terminate the contract at any time by giving 15 days' notice. After a certain portion of the work had been completed the Company intimated that it was unable to pay for the work. It took no steps to inspect the work or provide for the monthly payments. The plaintiff then quit work and filed a lien for the work

Statement

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performed. The defendant Phillips was the original owner of the property and sold to the defendant Company under an agreement for sale. The Company had the property subdivided into blocks and lots, and they were on the market for sale when the liens were filed. The defendant Phillips had not been paid for the property, and he claimed to be in the position of a mortgagee and entitled to the benefit of section 9 of the Mechanics' Lien Act. The trial judge dismissed the action on the ground that the contract was not completed, and the work done had not been approved by the Company's representative. The plaintiff appealed.

Statement

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

S. S. Taylor, K.C., for appellant: The learned trial judge held against us because the work had not been approved by the defendant Company's representative and because the contract was not completed. We contend the question of want of a certificate and failure to complete the work is not relevant to the issue, as the Company broke the contract. They failed to have a representative examine the work, they did not make any monthly payments as provided in the contract, and they intimated that they were unable to pay for the work.

Argument

McQuarrie, for respondents: The defendant Phillips is in the position of a mortgagee, and can ask for an issue as to whether the land has been benefited by the work done. We say the value of the property has not been increased by the work. The property was subdivided, and not one lot has been cleared according to contract. The work was only authorized for four blocks. A certificate from the Company's representative is required before the plaintiff can recover: see *Leroy* v. *Smith* (1901), 8 B.C. 293. No request was made for a certificate as to the work done.

Taylor, in reply: There is nothing in the contract referring to a subdivision of the property.

Cur. adv. vult.

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MACDONALD, C.J.A.: The appeal should be allowed. The contract bound the plaintiff to clear the whole tract of 320 acres, and while there were terms in the contract entitling defendant Company to terminate it, or, by withholding instructions, to reduce the area to be cleared, yet it was the whole tract, and not the lots or blocks into which it had been subdivided, which formed the subject-matter of the contract.

As there is no evidence to shew the interest, if any, of the public, or of purchasers of lots, if any, in the streets shewn on the plan, I am unable to say whether they should be excepted from the operation of the lien as being public highways. That question can be decided by the learned judge below when the case goes back to him. But in any event, the appellant has a lien on the rest of the property for the value of the work done on the streets.

The judgment below is based on two grounds: (1) that the character of the work done was not shewn to have been approved by the defendant Company, it being a term of the contract that the work should be done to the satisfaction of the Company or its representative; and (2) the work contracted for was not finished.

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It is undisputed that the work was discontinued because the Company had declared its inability to pay for it. It took no steps to inspect the work for approval, nor to provide the money stipulated to be paid monthly; it repudiated the contract by declaring that it could pay nothing. The plaintiff's claim is, therefore, for a *quantum meruit,* and is not a claim under the contract itself, though the contract furnishes a guide to the value of the work done. With deference to the learned judge, I think what I have just said disposes of both of the obstacles which he found to be in the plaintiff's way.

As the defendant Phillips is a mortgagee within the definition of that term in section 9 of the Mechanics' Lien Act, his rights, therefore, will have to be determined with reference to that section.

I would set aside the judgment and order a new trial.

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

IRVING, J.A.

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MARTIN, J.A.: During the hearing we expressed the opinion that on the facts there was a lien, but the question is, to what lands does it apply?

By the contract, dated 1st April, 1914, the plaintiff undertook "to clear the lands of the Company known and described as [two named quarter sections], containing 320 acres more or less, the portions thereof to be cleared under this contract to be designated from time to time by the Company's representative on the work as hereinafter mentioned." The "designation" clause is as follows:

"2. The said representative shall, from time to time, in writing, designate the portions of the land to be from time to time cleared hereunder by the contractor, and the contractor shall not proceed to clear any portion of the said lands of the Company until he has written instructions from the Company's representative to do so. Any designations or instructions given by the said representative may at any time before the work of clearing is actually commenced on any particular piece of land or on any portion thereof be changed, altered or cancelled by the said representative and new instructions given or not as the said representative sees fit."

Clause 6 provided that:

"This contract may be terminated by the Company at any time by giving the contractor fifteen days' notice . . . ."

On the same day the Company's representative designated in writing the portions to be cleared as follows:

"*Re* our contract of even date for clearing, we herewith instruct you to commence same in the following order:

MARTIN, J.A. "Block 11, which with portions of road allowances around same, contains about twenty (20) acres . . . . [and 3 other blocks of 20 acres] . . . . with portions of road allowances around same . . . . above being a portion of land described in our clearing contract."

In my opinion, this is a contract to clear the two quarter sections—"all the lands of the Company" subject to the right to terminate the contract on notice, and to change or cancel "designation or instructions" before work was begun on designated portions. The plan of subdivision in evidence, covering the whole of the adjoining quarter sections, shews that it was the clearing of a townsite—with lots and streets—as a whole that was contemplated and undertaken. In such circumstances, I am of the opinion that the subdivision must be viewed as a whole, and that all of it had "benefited" by the plaintiff's work within the meaning of section 6 (*c*), and, therefore, the lien

extends over both sections, except whatever may be excluded from it by section 3 as being "a public street or highway."

The trial has been had under section 31, at which the lien should have been declared, and Phillips's position and rights can be ascertained under section 9.

The appeal should be allowed.

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

MCPHILLIPS, J.A.: I am of the opinion that the appeal should be allowed. The facts establish the right to the enforcement of a lien under the Mechanics' Lien Act. The lien is enforceable as against all the land save that which is excepted by section 3, being all such portions thereof comprised in "a public street or highway." My brother MARTIN has indicated in what way Phillips may have his rights in the matter determined, with which I agree.

MCPHILLIPS, J.A.

Appeal allowed.

Solicitors for appellant: *Farris & Emerson.*

Solicitors for respondents: *McQuarrie, Martin & Cassady.*

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J. A. MCILWEE & SONS v. FOLEY BROS., WELCH & STEWART.

Contract—Driving tunnels—Contract annulled by defendants—Offer of defendants for plaintiffs to renew contract—Duty of plaintiffs in mitigation of damages—Measure of damages.

The plaintiffs contracted with the defendants to drive two tunnels, each about 25,000 feet in length. They were to do the work with their own workmen and with their own explosives at specified sums per lineal foot, supplemented by a bonus on completion of the whole work upon certain conditions. The defendants were to furnish air, water, light, ventilating plant, tools, track, and all other material and plant. The plaintiffs started work on the 2nd of April, 1914, but owing to a dispute over the ventilating system, the defendants, contending that the plaintiffs were wasting air, annulled the contract on the 20th of September, 1914, and the plaintiffs ceased their operations, the defendants continuing the work in the tunnels themselves. On October the 9th the defendants wrote the plaintiffs stating that "without admitting any liability they offered to renew the agreement and undertook to indemnify them for any loss owing to the cancellation of the agreement." This offer the plaintiffs refused and on the 10th of November the defendants' solicitors wrote to the plaintiffs' solicitors explaining "that the loss which the defendants undertook to pay was intended to cover all loss and damage of every sort caused by the cancellation of the contract, and that the offer contained in said letter still stands open," but the plaintiffs again refused to accept the offer, their organization for the work having in the meantime been dispersed and broken up. The plaintiffs then brought this action for breach of contract. It was held by the trial judge that the plaintiffs should have resumed work under the contract on the 10th of November, and they were entitled only to such damages as they suffered up to that date.

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Held, on appeal, varying the judgment of CLEMENT, J. (GALLIHER, J.A. dissenting), that the plaintiffs having elected to rescind the contract when the defendants refused to allow them to complete, they were entitled to damages for the defendants' breach, and were not bound to accept the defendants' offer to renew the contract upon the defendants paying the damages sustained. The plaintiffs are entitled in damages to what would have been earned under the contract had it been completed, the measure of damages being the difference between the cost of the work when fully performed and the contract price that the defendants agreed to pay, a fair deduction being made from the contract price in respect of the value of materials which had never

been supplied and wages which had never been paid, and included in such damages will be the bonus as a contingent part thereof.

Per IRVING, J.A.: The doctrine of duty to mitigate is applicable to two classes of cases: (1), where the plaintiff sues for dismissal from service before the expiration of the agreed period; (2), where the plaintiff is a vendor of goods and has a market available at which he can dispose of the goods and minimize his loss. But the doctrine cannot be applied in the case of undertaking to perform a contract where the element of exclusive personal attention is wanting in the first class, or of disposal of goods ordered, as in the second class. If the plaintiffs sue upon a special contract they are entitled to recover damages in respect of the profits which would have accrued had they been permitted to complete the work.

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APPEAL by plaintiffs and cross-appeal by defendants from the decision of CLEMENT, J. in an action tried by him at Vancouver on the 5th to the 21st of January, 1915. The defendants, who are railroad contractors, entered into a contract with the Canadian Pacific Railway for the construction of a double-track railway with sidings, etc., including a five-mile tunnel from mileage 91.5 of the Mountain subdivision of its British Columbia division to a point in the valley of the Beaver River, a distance of 8.8 miles in a north-easterly direction. The defendants then subcontracted the work of driving the pioneer heading and cross-cuts and centre heading of the tunnel to the plaintiffs. The contract was as follows:

Statement

"December 18, 1913.

"Messrs. J. A. McIlwee & Sons,
Gas & Electric Building,
Denver, Colorado.

"Gentlemen,—We make you the following proposition for driving seven by eight foot pioneer heading and cross-cuts, and centre heading eight by eleven for the solid rock portion of the Canadian Pacific Railway's Rogers Pass Tunnel, for an estimated distance of 25,000 feet; we to have the option of discontinuing the pioneer heading outside of the regular tunnel section and driving it as a centre heading for the last 4,000 feet.

"We will pay your monthly pay-rolls, including bonus to men, furnish comfortable and sanitary quarters for your men and good board at $1.00 per day, your men to conform to our sanitary and camp regulations.

"We will furnish small cars and mules for transporting muck from headings to our standard guage cars back of shovel, and handle at our expense after delivery into our standard guage cars. We will furnish air, water, light, ventilating plant, tools, track and all other material and plant necessary except explosives. Explosives will be furnished you at cost price to us on the work, and you will be given the same concessions as we receive from the C.P.R. as to freight and passenger rates.

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"We will pay you, on or before the 15th of each month, $20 per lineal foot for pioneer tunnel, $22.50 per lineal foot of cross-cut and centre heading and $30 per lineal foot for headings to dip where cars are handled by cable, driven the previous month, less pay-roll, explosives and other proper charges, and will on the completion of the work pay your bonus $1,000 per foot as bonus for each foot over 900 feet that you average per month for the entire pioneer heading. Should the pioneer be discontinued near the finish, and centre heading only driven, the centre heading rate of $22.50 and pioneer bonus, will then apply, provided however that the bonus in no case will exceed $250,000.

"We will turn the work over as a going concern, with headings in rock at both ends, and in case of shortage of power, tools, supplies or other items, will give your work preference. You to furnish foremen when requested, to be paid by us, to get headings started and work organized and plant installed, to conform to your methods previously to your taking over the work. On taking over the work you are to supply all labour and superintendence in connection with driving these headings, including drill repairers, blacksmiths, track and pipe work and labour of whatever nature you require.

"You are to be governed by our contract and the specifications of the Canadian Pacific Railway, and their contract with us is to form part of your agreement with us, except as to payments. You are to assume all of our obligations with respect to the part of the work covered by this proposition and to be granted all the privileges granted us in our contract. You agree to average 900 feet, or more, per month in the pioneer headings and to keep the centre heading as close as practicable behind the pioneer heading, but will be granted the same extension of time as we are entitled to under our contract with the C.P.R.

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"This proposition and your acceptance will be withdrawn and cancelled on the demand of the chief engineer of the C.P.R. if your work is not carried out to his satisfaction. In the event of your work being stopped by the C.P.R. you are to be paid the bonus of $1,000 per foot for each foot that you average in the pioneer heading, over 900 feet per month from the time of taking over the work until the time of such stoppage.

"Yours truly,

"Foley Bros., Welch & Stewart.

"J. A. McIlwee & Sons,
"*Per* J. A. McIlwee."

The plaintiffs commenced work under the contract on the 2nd of April, 1914, from the east portal of the pioneer tunnel; the west portal of the pioneer tunnel, and both portals of the centre heading not having been prepared by the defendants for the commencement of the work until later dates as shewn below. From the 2nd of April to the 24th of September, commencing at the east portal of the pioneer tunnel, 3,047 feet of tunnel

were driven at a cost of $43,213.28, being a cost per foot of $14.05, giving an average profit per foot of $5.94. From the 24th of July to the 24th of September from the west portal of the pioneer tunnel 1,272 feet of tunnel were driven at a cost of $13,587.60, being a cost per foot of $10.68, giving an average profit per foot of $9.32. From the 1st of May until the 24th of September from the east portal of the centre heading 1,899 feet of tunnel were driven at a cost of $32,723.88, being a cost per foot of $17.24, giving an average profit of $5.31 per foot. From the 1st of August until the 24th of September from the west portal of the centre heading 797 feet of tunnel were driven at a cost of $10,106.40, being a cost per foot of $12.68, giving an average profit of $9.57 per foot.

On the 20th of September the defendants refused to allow the plaintiffs to go on with the contract and work ceased. The defendants contended that in spite of their repeated remonstrances the plaintiffs wasted the air supplied them for the purpose of their work, to such an extent that it was impossible for the defendants to properly carry on the remainder of their works in connection with the tunnel, in that they allowed the ventilating pipe to get into and remain in a leaky condition and refused to fix it; that they allowed obstructions of various kinds to collect in the ventilating pipes and refused to clean them; that they unnecessarily blew large amounts of compressed air into the face of the tunnel for ventilation purposes and did not keep the ventilating pipes close up to the face of the tunnel as should have been done.

Statement

On the 9th of October, 1914, the defendants wrote the plaintiffs the following letter:

"*Re* Bear Creek Tunnel on C.P.R.

"Dear Sirs,—Without admitting any liability on our part, for the purpose of getting on with the work in this tunnel, we herewith offer to renew the Agreement dated December 18, 1913, cancelled September 24, 1914, and further undertake to indemnify you for any loss you may have suffered up to the present time by reason of the cancellation of such agreement.

"If this offer is satisfactory to you, we shall be pleased to have you go back to work at once.

"Kindly let us hear from you."

The plaintiffs refused to accept the offer contained in such

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letter, and subsequently, on the 10th of November, the solicitors for the defendants wrote the solicitors for the plaintiffs the following letter:

"*Re* McIlwee *vs.* Foley *et al.*

"Dear Sirs,—On the 9th of October Messrs. Foley Bros., Welch & Stewart wrote to your clients, J. A. McIlwee & Sons, the following letter: [already cited above.]

"'In case there may be any possibility of any misunderstanding in the mind of your clients as to the meaning of this letter, we beg to say that the loss for which the defendants herein undertook in that letter to indemnify your clients, was intended to cover and did cover all loss and damage of every sort and description caused to your clients by the cancellation of the said contract; and we further wish to say that the offer contained in that letter, as explained by us now, still stands open."

The plaintiffs refused to accept the said offer.

At the time of the cancellation of the contract there still remained 14,721 feet to be driven in the pioneer tunnel and 22,101 feet in the centre heading. If the plaintiffs in completing the work had continued on the same average of profit as they had when work was stopped, this profit would have been $112,321.23 on the remainder of the pioneer tunnel and $164,431.44 on the remainder of the centre heading. As to the bonus, the plaintiffs claimed that the total lineal feet driven in the pioneer tunnel subject to said bonus computation was 4,341 feet, which was done in 3.89 months, making a monthly average of 1,115 feet, being an excess over a monthly average under the contract of 215 lineal feet, entitling the plaintiffs to $215,000 for bonus; and that in the work incompleted in the pioneer tunnel they could have exceeded said monthly average, and the cancellation of the contract therefore prevented them from earning the maximum amount allowed as a bonus under the contract, *i.e.*, $250,000. The learned trial judge held that the plaintiffs were entitled to all damages suffered by them up to the 10th of November, when the defendants' solicitors wrote the letter already recited. The plaintiffs appealed mainly on the ground that they should have been allowed damages for the loss of profits and of bonus in respect of the whole contract calculated to the final completion thereof. The defendants cross-appealed on the ground that the plaintiffs acted unreasonably in refusing the offer made to

Statement

them on the 9th of October, and damages should have been assessed as of that date.

S. S. Taylor, K.C., for plaintiffs.
Davis, K.C., and *Bodwell, K.C.,* for defendants.

26th February, 1915.

CLEMENT, J.: This case is, to my mind, of a simplicity in inverse ratio to the time consumed in its hearing. The facts lie within a narrow compass and there is very little, if any, conflict of testimony upon those matters which are material, if my view upon the whole case be sound.

The breach of contract of which the plaintiffs complain is the defendants' alleged refusal to allow them to proceed with the work. The defendants did so refuse, and, in my opinion, such refusal was not justified. Mr. *Davis* did not see fit to contend the contrary, and, therefore, I do not enlarge upon this feature. That refusal gave the plaintiffs a cause of action which has in no way been released or satisfied. The damage, however, though it may be sued for at once, consists in a loss which, obviously, was not actually sustained at the moment of breach, but which, on the contrary, will accrue from day to day during the time the work would have continued under the contract. The plaintiffs are a firm of contractors whose specialty is tunnel driving, and they have gained, and I think deserve, a high reputation in that line; but, under this particular contract, their remuneration is nothing more than the wages of superintendence, computed at a certain rate per foot of tunnel driven, with the addition of a bonus to be paid upon the completion of their work if the average rate of progress over the whole length of tunnel to be driven under the contract exceeds a certain number of feet per month. In this aspect the case is in no essential respect different from the ordinary case of a workman who claims in respect of wages lost through wrongful dismissal. The dismissal, if absolute as in this case, not only gives an immediate cause of action but also releases the workman absolutely, so that he is not bound to go back to work should the employer afterward repent of his wrongful action and invite the workman to return to his employment upon the

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same terms as before. If upon such bare invitation the workman should return, he would not, merely by such return, release his already accrued right of action. His damage, however, would manifestly, in my opinion, be limited to the loss which had accrued up to the time of his return to his work. But what if he refused to return? It might be, of course, that he had acted upon the dismissal and engaged himself, as he would have a perfect right to do, to some other employer for the period covered by the earlier agreement. In such case his damage would manifestly be reduced or even entirely met by the wage received in the new employment. But what if he exercised his undoubted right to refuse to revive the old contract of employment and remained idle during the period covered by it? In such case (eliminating for a moment any special consideration attaching to the offer of the old employment on the old terms), if his employer could shew that he, the workman, could have obtained other employment but that for no good reason he chose to refuse it, the damage would be reduced by the amount the workman could have earned in such other employment; and the principle applied seems manifestly to be this, that the real cause of his loss in such case is his own unreasonable refusal to go to work: *Brace* v. *Calder* (1895), 2 Q.B. 253. And to my mind, the case is *a fortiori* where the workman could have had his old employment on the old terms. No question arises then as to a reduction of damages for the period following the date when resumption could have taken place. That damage, beyond all doubt, would be suffered in its entirety by the workman through his own act. He himself caused it. The original wrong had ceased to have operation as a cause of damage.

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The defendants contend that such is the position in this case; that on the 9th of October, 1914, such an offer was made to the plaintiffs and refused for no good reason, either in fact or law; that, if the offer of the 9th of October should be held to have had conditions attached to it which justified the plaintiffs in rejecting it, then on the 10th of November, 1914, an unconditional offer was made, which, in its turn and for no good reason, was refused. As to this last offer of the

10th of November, I may say at once that, in my opinion, it was unconditional, and should have been accepted by the plaintiffs. They were not asked to waive their claim for damages; on the contrary, the defendants, while not admitting liability, agreed to pay all damages resulting from the dismissal of the 24th of September, 1914. The old employment was offered on the old terms and no attempt was made to force upon the plaintiffs the defendants' interpretation of the old written contract. And it seems clear to me that the plaintiffs, on the other hand, had no right, nor was it reasonable, in fact, to insist upon all disputed questions of interpretation being settled, and the amount of damages, which defendants had agreed to pay, fixed as a condition precedent to resuming work. At the most, therefore, the damages should be computed to the date when, looking at actual conditions reasonably, the plaintiffs could have resumed work under the offer of the 10th of November.

Mr. *Davis,* however, contends that the earlier date (October 9th) should be taken; that the offer then made was as unconditional an offer to allow plaintiffs to resume work on the terms of the old contract as was the later offer. The difference in the amount which should be allowed as damages up to the respective dates is large, and for that reason I have given this aspect of the case careful consideration. On the whole, I conclude, with some hesitation, that the plaintiffs were not unreasonable in declining the offer. I agree with Mr. *Davis* that it was not an essential part of such an offer to allow a resumption of work that the defendants should couple with it an offer to pay damages or should admit liability to pay damages, so long as the plaintiffs were not asked to waive or in any way prejudice their claim to such damages (if any) as the actual position of affairs warranted; that position, in fact and law, being left to judicial determination in the ordinary way of litigation should the parties not come to any agreement. The defendants did choose to couple the invitation to resume work with an offer to "indemnify you for any loss you may have suffered up to the present time by reason of the cancellation." This offer was the subject of discussion following almost immediately

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upon its delivery to Mr. J. A. McIlwee, in which discussion Mr. Dennis (the defendants' engineer in charge), Mr. Welch (one of the defendants), and Mr. McIlwee took part. Mr. Welch was not called as a witness; and Mr. Dennis and Mr. McIlwee differ somewhat in their testimony as to what was said at this interview. Each, I think, stated truthfully his recollection of what had been said. One thing appears from the evidence of Mr. Dennis, namely, that Mr. Welch was trying to impress upon McIlwee that Mr. Dennis was in charge and that his orders, if reasonable, should be obeyed. That under the written contract was a very debatable point, and was, indeed, pretty much the rock upon which the parties had split. And Mr. McIlwee might well have thought that an acceptance by him of the defendants' offer would be tantamount to acquiescence in this view. However, that is not the main consideration which has influenced me in coming to the conclusion that the offer of the 9th of October was not one which the plaintiffs should have accepted. I do not lose sight of the fact that an offer to allow the plaintiffs to resume work, even upon less advantageous terms than before, might, in certain circumstances, be properly taken into account in reduction of damages, but that is not really a proposition in question here, except as leading me not to rely to any great degree upon Mr. Welch's attitude as to the extent of Mr. Dennis's authority over the

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plaintiffs as in itself sufficient to justify rejection of the defendants' offer. That was, however, a point seriously in dispute and, in my opinion, it would not be reasonable to insist that the plaintiffs should concede the point as a condition of being allowed to resume work from which they had been wrongfully expelled. The real difficulty, to my mind, lies in the phrase "up to the present time." Its presence in the letter, the meaning of which was the actual theme of discussion, leads me to the conclusion that Mr. Dennis did not say anything to Mr. McIlwee which would lead that gentleman to understand the offer so far as it was an offer of indemnity as extending further than its actual language went, and Mr. McIlwee was left with the impression, which the letter naturally conveyed, that only the damage actually suffered to that date

was covered. That manifestly was not all the damage the plaintiffs would be entitled to recover should it ultimately be determined that they had a good cause of action for wrongful dismissal. The expense of getting their organization back into its previous state of efficiency and the possible injurious effect of the stoppage upon the plaintiffs' claim at the conclusion of the work to a bonus, resting as that claim then would upon the average rate of progress over the whole period covered by the contract; these and possibly over elements of damage would have to be considered, and all these the plaintiffs would be taken as having agreed to forego. I should perhaps state more specifically that I do not think Mr. Dennis insisted or even stated that he was the person who would fix the damages; and, on the other hand, I do not think that he said anything as to "transportation" which would lead Mr. McIlwee to understand that the word covered the expense of getting back those of the plaintiffs' employees who had scattered to their homes or gone elsewhere when the plaintiffs were excluded from the tunnels on the 24th of September. Taken with the letter, such an expense would not naturally be covered by the word "transportation" alone; it would naturally refer to the transportation of the members of the plaintiffs' firm from the work to Vancouver and (possibly) return. Mr. Dennis, moreover, does not deny that he said that the bonus agreement was to apply to the work done at once upon resumption. This would, manifestly, if acquiesced in, wipe out a possible and most important head of damage on the subsisting cause of action. For these reasons, I hold that the plaintiffs acted reasonably in refusing the offer of the 9th of October, and that offer should not, therefore, be considered in reduction of damages. If I should be hereafter held wrong in this view, I would fix the plaintiffs' damages at $12,000.

Taking, as I do, the offer of the 10th of November as an unconditional offer to the plaintiffs to allow them to resume work on the same terms as before, and holding, as I do, that any damages suffered after the date when they could, acting reasonably, have resumed work upon acceptance of the offer, could not in fact be attributed to the defendants' earlier breach

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of contract, but would in fact be the result of the plaintiffs' own unreasonable conduct, the question is what should be the amount allowed? Resolving all doubts in plaintiffs' favour, I fix the morning of the 14th of November as the date upon which they should have been at work again. Any loss suffered by reason of having a less efficient organization and any injurious effect upon the bonus feature of the contract would be still open as a claim in any action which the plaintiffs might bring upon their still subsisting cause of action, and obviously cannot be now considered. What the plaintiffs actually lost up to the 14th of November was the profit or earnings upon the footage driven by the defendants up to that date. Taking their own estimate of the amount they would earn per foot in the different parts of the tunnel, the damage at the outside—*contra spoliatorem* I give the outside—would be $31,000. To this should be added the item claimed for blower excavation, $460, making a total of $31,460, for which amount the plaintiffs are entitled to judgment. The defendants, having refused to admit any liability, should pay the costs, including, of course, the allowance to the assessors.

In the view I have taken, it becomes unnecessary to express any further opinion upon the facts; but as I have had the great advantage of being able to confer with two assessors well qualified to speak upon the problems presented—A. R. Mackenzie, Esq., from the standpoint of an engineer, and Col. J. A. Macdonell, from the standpoint of an experienced tunnel contractor—it may be advisable to state that we all agree that there was fault on both sides; that the plaintiffs were somewhat careless in looking after the ventilating pipes, and that the defendants were inattentive in the matter of the supplies required by the plaintiffs for pipe repairs. The friction thus engendered was, however, no sufficient reason for the action of Mr. Dennis in "cancelling" the contract, and thus stopping the plaintiffs from going on with their work. We are also all agreed that there is nothing in the evidence of the geological experts to warrant any finding that the plaintiffs would have encountered in the future course of the work, had they continued it, any rock formation or conditions substantially differ-

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ent from or more difficult from a contractor's standpoint than the rock already tunnelled. These, I should add, are my own views, but, of course, I feel strengthened in them by the fact that the assessors associated with me have expressed to me their concurrence therein. We have all, I may further add, had the advantage of a view, having spent the better part of a day in and about each end of the tunnel.

The appeal was argued at Vancouver on the 10th, 11th, 12th and 13th of May, 1915, before MACDONALD, C.J.A., IRVING, GALLIHER and MCPHILLIPS, JJ.A.

S. S. Taylor, K.C., for appellants: The trouble arose over the ventilating of the tunnel. Defendants cancelled the contract on the 24th of September, and on the 9th of October they made a conditional offer that we resume work under the contract. That was refused, and they made a further offer on the 10th of November, the plaintiffs again refusing to go on. The trial judge held we should have gone back to work under the offer of the 10th of November, as the offer was a reasonable one. The trial judge was in error (1) in holding that we should have gone back; (2) in not allowing us our full damages when we were ready and willing to complete the contract; and (3) in any event we should have been allowed the bonus or, in the alternative, a reasonable portion thereof. Action can be brought to assess all damages notwithstanding that under the contract the work was not to be completed until two years after the action commenced: see Mayne on Damages, 8th Ed., 123, 126. We can treat the contract as broken, and sue for the breach at once: see *Frost* v. *Knight* (1872), L.R. 7 Ex. 111 at p. 115; *Roper* v. *Johnson* (1873), L.R. 8 C.P. 167; *Hochster* v. *De La Tour* (1853), 2 El. & Bl. 678; *Synge* v. *Synge* (1894), 1 Q.B. 466; *Johnstone* v. *Milling* (1886), 16 Q.B.D. 460; *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127 at pp. 132 and 144; *Macdougall* v. *Knight* (1890), 25 Q.B.D. 1 at p. 8; Halsbury's Laws of England, Vol. 10, pp. 309-10. On the question of mitigation of damages see *Nickoll & Knight* v. *Ashton, Edridge & Co.* (1900), 2 Q.B. 298; *Harries* v. *Edmonds* (1845), 1 Car. & K. 686; Leake on

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Contracts, 6th Ed., 771. When a man has been dismissed from the performance of his contract, his equipment and organization being thereby wrecked and destroyed, the other having wantonly broken the contract, it is not incumbent on him, on being asked to resume the contract, to go back into the arms of the man by whom he has been so ruthlessly treated. He had over 200 men working at an average of over $4 a day each, some of them being skilled labourers from the United States, and the number of men required increased as the work proceeded. They were scattered when the letter proposing the continuance of the contract was written. The question of obtaining employment elsewhere does not apply here. *Wilson* v. *Hicks* (1857), 26 L.J., Ex. 242, is an authority in our favour. We have *prima facie* the right to full measure of damages. The burden is on the defendants to shew that we have acted unreasonably. *Brace* v. *Calder* (1895), 2 Q.B. 253, referred to by the trial judge, does not apply here. We are entitled to anticipate being stopped again, and under the authorities are not compelled to go back in any event.

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Bodwell, K.C., for respondents: The principles which govern mitigation of damages should apply. Damages for breach of contract are not inflicted for punishment but as compensation. Even assuming we made a mistake, we ask the plaintiffs to come back, and under *Brace* v. *Calder* (1895), 2 Q.B. 253, they must come back. Whether they were wrongfully put off the work has nothing to do with the question of mitigation. When a party does not comply with a condition, the injured party can either sue for breach or rescind the contract, and it will then be at an end. The profits can only arise when the work is done: see *Johnstone* v. *Milling* (1886), 16 Q.B.D. 460. Plaintiffs' case is for breach of contract that commenced on the 24th of September and ended on the 10th of November. We contend the contract was cancelled by mutual consent on the 24th of September. The trouble arose over the air pipes laid in the tunnel. It was the duty of the plaintiffs to keep these pipes air tight; they leaked badly, thus causing waste of power, and plaintiffs neglected to repair them, notwithstanding repeated applications by us. With reference to the bonus,

they are not entitled to a *quantum meruit* as they were working in a class of rock that was easy to work. If they had continued they would have struck harder rock later. A fair inference from the evidence is that if they had gone on they would have earned the whole bonus and have mitigated in full, in which case they would not have suffered from the interruption. On the cross-appeal, the damages should have been confined to the 9th of October and not the 10th of November.

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Armour, on the same side: The time had not arrived when a bonus could be estimated; that can only be done on the completion of the work, the nature of the rock being continually subject to changes that cannot be anticipated.

Taylor, in reply: If defendants repudiate the contract, and we accept it, they cannot raise the question of mitigation of damages. We treat the contract as broken, and sue for the breach: see Mayne on Damages, 8th Ed., 126.

Argument

Cur. adv. vult.

10th August, 1915.

MACDONALD, C.J.A.: The facts upon which I rest my opinion are not in dispute, except for the suggestion that the contract was annulled by mutual consent. While this is alleged in the cross-appeal, it was not pressed in argument, and is contrary to all the evidence on the point.

MACDONALD, C.J.A.

The appellants entered into a contract with the respondents to drive certain tunnels in rock, approximating in length 25,000 feet. The appellants were to do the work with their own workmen and office staff and with their own explosives at specified sums per lineal foot, supplemented by a bonus on completion of the whole work of $1,000 for each foot driven above an average of 900 feet per month, but not to exceed in all $250,000. The respondents were to supply the appellants with the use of certain plant and appliances.

On the 24th of September, 1914, several months after the work had been commenced, the respondents committed a breach of the contract, and the appellants elected to treat it as a repudiation. The appellants thereupon discharged their workmen and prepared to take action for breach of the contract.

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Nevertheless, some negotiations took place between the parties looking to the resumption of the work by the appellants, and on the 9th of October the respondents wrote to appellants: [already set out in statement.]

That proposal was not accepted, and the appellants commenced this action on the 24th of October.

On the 10th of November respondents' solicitors wrote to appellants' solicitors: [already set out in statement.]

The appellants declined to take advantage of this offer, and the action proceeded.

The learned trial judge gave judgment for the amount of damages suffered by appellants up to the said 10th of November. He declined to give more because he thought the appellants should have minimized their loss by accepting the offer of the 10th of November and resuming the work. With great respect, I think the learned judge was in error in thinking that the contract was one for "nothing more than the wages of superintendance," and "in no essential respect different from the ordinary case of a workman who claims in respect of wages lost from wrongful dismissal."

The learned judge applied the doctrine applicable to breaches of contracts of service, and the real question in this appeal, as I see it, is whether such doctrine can be applied to cases of the character of this one, or at all events to the facts and circumstances of this particular case.

MACDONALD, C.J.A.

I have no hesitation in declaring my opinion to be that the appellants were not bound to seek other contracts, nor, if they obtained them, to apply the profits thereof (if any) in reduction of their loss for breach of this contract. But where, as here, the wronged party is offered the opportunity to resume and complete the work contracted for, saving his rights in respect of damages for the interruption, I am not without some doubt. The doctrine above referred to is based on the principle that the discharged servant should act reasonably in the matter of diminishing his loss. That principle appears to have been applied to a case of charter-party: *Wilson* v. *Hicks* (1857), 26 L.J., Ex. 242. But assuming it to have been well decided, there is at least this distinction, that there the contract had not been repudiated before the offer of a fresh cargo.

We have been referred to no case in which it has been held that even a discharged servant is bound to minimize his loss by going back into the service of the same master, if offered the opportunity. I do not think it necessary to express an opinion in respect to such a situation. I refer to it only as indicating, so far as reported cases go, that no one has attempted to carry the doctrine quite that far. In my opinion, it is not to be applied and cannot conveniently and justly be applied, except in cases of great simplicity. The cases in which it has been applied are of that nature. If a dismissed servant should obtain other employment, it is a simple matter to fix his net loss. There are no contingencies or difficulties involved in such a case. Again, if he make reasonable efforts to obtain other employment and fail, the adjustment of his rights is of extreme simplicity; and so in cases of breaches of contract for the sale of goods which can be obtained or sold elsewhere in the way of business. But in the case at bar, assuming that the appellants could not reasonably object merely because respondents had committed a previous breach of contract, to going back into contractual relationship with them, it would be no simple matter to ascertain the measure of the appellants' loss occasioned by the breach. Appellants' workmen were discharged and scattered. Their organization was broken up. Two weeks had elapsed between the breach of contract and the proposal of the 9th of October, and six weeks between the breach and the proposal of the 10th of November, which is the only one that offered a fair basis of resumption. In the meantime, the respondents had themselves been prosecuting the work. Could appellants have been reasonably required to re-organize their staff, take up the work not where they had left off, but where respondents would leave off; take the risk of their new organization and staff being less efficient than the old, where high efficiency was of great moment because of the manner in which the bonus would be earned; and take the risk of disputes and litigation over the measure of their damages? In my opinion, they did not act unreasonably in declining the offer.

There is, I think, a broad distinction between contracts of this character and contracts of service and for the sale and

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purchase of merchandise or other articles of commerce, where the measure of damages for the breach thereof is concerned. The risk of loss of capital and other resources, as well as of profits, would be seriously involved, in the former case by an attempt to minimize the loss, by proceeding with the work under changed conditions, while in the latter no such risks are involved.

The measure of the appellants' damages is the difference between the contract price, including the bonus as a contingent part of it, and what the whole work should have cost.

The action was tried in the Court below by the learned judge assisted by two assessors having expert knowledge of the cost of tunnel driving. As the learned judge came to the conclusion that no damages should be given other than for appellants' losses between the time of the breach and the said 10th of November, the principal and most difficult assessment has not been made, and the case should be sent back for an assessment of the damages on the basis above outlined.

MACDONALD, C.J.A.

It does not follow that because the appellants have shewn a profit on the work already done that that rate of profit could be maintained. The character of the rock yet to be driven through is a factor not to be overlooked. The same observations are pertinent to the bonus. Counsel for appellants spoke of $215,000 of the bonus being already earned because as they claimed 215 feet above an average of 900 feet per month had so far been accomplished, but if for any reason it should appear that that pace could not be maintained for some portion of the work, but that on the contrary the average should fall below 900 feet per month, the margin gained might ultimately be reduced or disappear altogether. These are matters to be taken into consideration when the assessment is made, and will be governed by the evidence.

IRVING, J.A.

IRVING, J.A.: The learned trial judge has found there were faults on both sides, but is of opinion that the defendants were not justified in cancelling the contract and thereby stopping the plaintiffs from going on with their work. I agree with him on that point. But I am not able to agree with him that

the plaintiffs were, on receipt of the letter of the 10th of November, 1914, bound to return to the work, and that their damages are to be limited by reason of such refusal.

The doctrine of duty to mitigate may be pressed too far. Without doubt there is a duty in all cases to be reasonable. The duty to mitigate is peculiarly applicable to two classes of cases, (1) where the plaintiff sues for dismissal from service before the expiration of the agreed period. These are all based on the idea that a man cannot serve two masters. The Courts held that in fixing the amount of damages, consideration must be given to the fact that he has been able to earn money in the *interim,* or could have earned it by reasonable efforts. (2) Where the plaintiff is a vendor of goods and has a market available at which he can dispose of the goods and so minimize his loss. But that doctrine cannot be applied, I think, to the case of an undertaking to perform some contract where the element of exclusive personal attention is wanting in the first class, or of disposal of goods ordered as in the second class.

This is a case not of employment or service. It is a contract for work and labour requiring the plaintiffs to produce a certain result, involving the hiring and training of an army of men and the getting together of stores, which, or the greater part of which, would be consumed in the operations expected to be undertaken.

IRVING, J.A.

In cases of this sort, if the plaintiffs sue upon the special contract, they are entitled to recover damages in respect of the lost price of the work undertaken, and the profits which would have accrued had they been permitted to complete the work.

The measure of damages applicable in this case seems to me to be in principle that laid down in *Inchbald* v. *Western Neilgherry Coffee Co.* (1864), 17 C.B.N.S. 733; 34 L.J., C.P. 15.

In my opinion, the plaintiffs have not recovered anything like the amount to which they are entitled, and on the other hand, the judgment appealed from would give the defendants something advantageous to them for which they have not paid. I would, therefore, allow the appeal, and direct a new trial for the assessment of damages.

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It is not possible to do more than indicate upon what basis the damages should be assessed. It is sufficient to say that the plaintiffs are entitled to what they have lost, that is, the agreed price, including the bonus, if the assessing tribunal should think the plaintiffs could earn it, less such sum as would be required to complete the whole work, with reasonable allowances for unconsumed stores, release from time and risks, having regard to the peculiar circumstances of the undertaking.

GALLIHER, J.A.: I think it must be taken that the respondents repudiated the contract, and that that repudiation was accepted and acted upon by the appellants before any offer to reinstate them which they could reasonably be required to accept was made.

It is laid down that "where one party before the time for performance arrives, absolutely and definitely repudiates the contract, the other party is entitled either to wait till the time arrives and then bring his action or to treat the contract as broken and sue for the breach at once."

In the latter event (which is the position taken here) he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, but "in assessing the damages a jury will, of course, take into account whatever the plaintiff has done or has had the means of doing (and as a prudent man ought in reason to have done), whereby his loss has been or should have been diminished": *per* Cockburn, C.J. in *Frost* v. *Knight* (1872), 41 L.J., Ex. 78, following *Hochster* v. *De La Tour* (1853), 22 L.J., Q.B. 455. The question here is whether this doctrine can be applied to a contract such as this.

GALLIHER, J.A.

The appellants are contractors on a large scale in the United States and Canada for the performance of the particular class of work specified in the contract. It was not contended, nor do I think it could successfully be, that this was a case where the appellants would be required to go out and endeavour to procure another contract of a similar kind with a view to mitigating damages, such as in a case of ordinary employment; and it does not come within the other class of contracts where the

doctrine has been applied, *viz.*: where the parties can go out and purchase or sell goods in the market. We have not been referred to any reported case, nor have I been able to find one, where the doctrine has been applied to a case on all fours with the case at bar. It does not, however, necessarily follow that it might not be so properly applied.

It is with diffidence, in view of the contrary opinion of all my learned brothers, that I venture to think the present case is one which, while the appellants could not be required to seek another contract for the purposes of mitigating damages, yet as they were requested to come back and complete the work, they should have done so, unless the circumstances were such as to excuse them from acting as a reasonable man otherwise would.

To test the question as to whether the doctrine should be applied to a contract of this nature at all, we will assume that the respondents on the 24th of September committed a breach of the contract, and that the appellants on the same day elected to treat the breach as a repudiation and issued their writ, and that on the 25th of September the respondents made an unconditional offer to reinstate the appellants in the work on the old terms and to pay damages, and we will assume that the men and appliances for carrying on the work were all there, and that there was no reason to suppose there would be further friction.

GALLIHER, J.A.

In such circumstances, I am of opinion that the appellants would not be acting reasonably, and would not be justified in refusing to come back, and that the principle of mitigation should apply. If this view is right, it then becomes a question whether the circumstances here justified a refusal. Before dealing with this, however, I just wish to remark that in all the cases to which we have been referred, the damages were easily ascertainable, and it may be that the intention is to limit the principle in its application, but as to that we have no direct expression of opinion.

Assuming then that I am right in my view that the doctrine can be applied to a case of contract of this nature, we will proceed to analyze the appellants' objections to going back to work. These are three in number: (1) That had they gone back to work and by some chance failed to make the footage

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to entitle them to the bonus, they might be placed in a difficult position in proving that such failure was due to the temporary stoppage of work by the respondents. (2) The dispersal of the men they had employed to carry on the work. (3) That they were being asked, as it were, to go back into the lion's mouth and subject themselves to the danger of the contract being again broken at any time.

Dealing with these *seriatum*: The learned trial judge who heard the case was assisted by two assessors, who sat with him during the entire trial—one an experienced engineer, the other an experienced tunnel contractor—and he had, as he says in his judgment, the benefit of their views and advice in coming to his conclusion.

The learned trial judge's judgment is, in effect, a finding that the appellants should have gone back to work, and were unreasonable in not doing so, and although it is not specifically so stated, I think it must be taken from what has been said that that also was the view of the assessors.

Now, while the assessors here are probably not acting in the capacity of jurors, they are so in a sense, and are, in my view, much more capable of judging of the value of expert testimony adduced, and hence of the reasonableness or otherwise of the refusal to go back, than either the Court below or this Court, so that when we have the judge below and the assessors in accord, this Court should hesitate before lightly interfering with their agreement on findings of fact. Moreover, in the light of modern scientific discoveries and appliances, what might have been difficult of ascertainment 30 or even 15 years ago is now comparatively simple.

GALLIHER, J.A.

I see no reason, therefore, why the appellants should have anticipated any difficulty as to proving damages had they gone on and suffered any, or of placing the responsibility any more than as the matter stands at present, and, in my opinion, the finding in that respect was right.

On the second objection: British Columbia, where this contract was being carried out, has large quartz-mining industries, and also has and for some years past has had extensive railway construction through its mountains, necessitating much tunnel

work, and there has been available for such work within the Province skilled rock drillers, a matter of common knowledge and well known to the appellants. Moreover, according to the evidence, their men, or a portion of them, scattered only a day or two before the appellants definitely refused to go on with the work. It is common ground that had the work gone on without interruption the appellants would have earned their bonus.

Important evidence was adduced by the respondents shewing that when the appellants refused to go back to work, the respondents took what they could get of the appellants' staff and others at hand, and actually made better progress than had theretofore been made. It seems to me that there is no merit in this objection.

As to the third objection, it is, I think, more fanciful than real. It is true the respondents were at fault—they afterwards acknowledged their fault and offered to reinstate appellants, paying all damages suffered by reason thereof.

My view would be, and I think the reasonable view is, that the friction from a small and not too sensible cause being removed, and the respondents recognizing their error, no alarm need have been felt as to any renewal—two men may act very obstinately, but when an understanding is arrived at the way is generally cleared of future misunderstandings.

GALLIHER, J.A.

Having dealt with the objections, it really resolves itself into this, if my views are correct: Were the appellants justified in the circumstances in refusing to go back and complete the work?

Very large sums of money are involved, for, in my view, there is no half-way house.

If the appellants' contention is right, they are entitled not only to the bonus, a large sum of money in itself, but also to any profits which they can shew they would have made had the contract continued to completion. Admitting that the respondents had themselves to blame for the condition of affairs, is it reasonable that the appellants, in all the circumstances here, should refuse to go back and as far as possible reduce the loss, if any? That has been passed upon by the trial judge and the assessors in respondents' favour, and even if we are not

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precluded from considering that phase, my own view is in agreement with theirs.

The cross-appeal, while not abandoned, was not strongly pressed upon us, and arises out of the difference in effect (if any) of the notices of the 9th of October and the 10th of November, 1914, given by the respondents to the appellants.

The learned trial judge has found that the appellants did not act unreasonably in refusing the offer of the 9th of October, and I am inclined to agree with him.

I would dismiss both the appeal and the cross-appeal.

McPHILLIPS, J.A.: This appeal comes before us in a voluminous form, it however, in my opinion, resolves itself into small compass, and can be properly stript of many considerations advanced by learned counsel on both sides.

The contract entered into by the respondents with the appellants was entered into after a contract had been entered into by the respondents with the Canadian Pacific Railway Company for the doing of work inclusive of that contracted to be done by the appellants for the respondents. The contract is contained in the following correspondence: [already set out in statement.]

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The tunnelling work is approximately five miles in length, and the tunnel will, when completed, form a part of the main transcontinental line of the Canadian Pacific Railway, and situate in the Mountain subdivision of the British Columbia division of the Canadian Pacific Railway.

The appellants would appear to be skilled and well-known contractors in the special class of work called for, and would also appear to have entered upon the work and prosecuted the same with all due and proper expedition and in accordance with the contract, and it cannot be said that the respondents have at all attempted to justify their action in putting the contract at an end and dismissing the appellants from the work. The respondents at the trial amended the statement of defence, setting up that the contract was cancelled by mutual consent, but would not appear to have attempted to support any such plea, and there is no evidence to support it.

Speaking generally, the work to be done was some 25,000 feet of tunnelling, of which some 16,000 feet still remained to be done when the respondents cancelled or repudiated the contract on their part. It would appear to be an admitted fact that the appellants were carrying on the work with a net profit to themselves of some $600 a day, and they contended that they had earned, up to the time of the stated annulment of the contract on the part of the respondents, $215,000 out of the possible bonus of $250,000, and the evidence would appear to support this contention. The learned trial judge, who was assisted by two assessors, found for the appellants, but assessed the damages at $31,460 only, holding that the appellants should have again taken up the work on the 10th of November, 1914, that being—as against the offer of the 9th of October, 1914—an unconditional offer to the appellants to resume work under the contract, and that work should have been resumed by the 14th of November, 1914.

The learned trial judge held that there was "no sufficient reason for the action of Mr. Dennis in 'cancelling' the contract, and thus stopping the plaintiffs [appellants] from going on with their work," and in this I entirely agree.

The learned trial judge further said in his reasons for judgment:

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"We are also all agreed that there is nothing in the evidence of the geological experts to warrant any finding that the plaintiffs would have encountered in the future course of the work, had they continued it, any rock formation or conditions substantially different from or more difficult from a contractor's standpoint than the rock already tunnelled. These, I should add, are my own views, but, of course, I feel strengthened in them by the fact that the assessors associated with me have expressed to me their concurrence therein. We have all, I may further add, had the advantage of a view, having spent the better part of a day in and about each end of the tunnel."

This finding meets a contention put forward by the respondents that the rock formation would, in the work still to be done, be found more difficult of working, and no certainty that the bonus would have been earned had the appellants proceeded with the work.

The letter of annulment of the contract, as it may be called, on the part of the respondents, reads as follows:

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"Your contract with respect to pioneer and centre heading at east portal is hereby annulled owing to your neglect to carry out your part of the contract with respect to ventilating pipe.

"We protest against the further employment of J. J. McIlwee on this work, on account of his refusal to obey instructions of our representative on this work.

"Air pressure will be shut off at 11 p.m. com. time today."

The respondents contended that it was the duty of the appellants to have again taken up work under the contract, following the letter of the 9th of October, 1914, thereby mitigating damages. The letter reads as follows: [already set out in statement.]

It would appear upon the evidence that Dennis, who was clothed with full authority to act for the respondents, having made the contract with the appellants and annulled it, took exception to the length of time the machinery was kept in operation furnishing air, the air ventilation, etc., having to be provided by the respondents, and generally so conducted himself that it may well be said that the appellants were well justified in treating the contract at the outset, *i.e.*, on the 24th of September, 1914, as rescinded, and that they were not further called upon to perform the same; to resume work would only be to have unwarranted interference, as the evidence, to my mind, reasonably discloses the determination upon the part of Dennis that the appellants should not be allowed to complete the work.

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The point that really has to be determined upon this appeal resolves itself into whether the appellants were called upon to return to the work and perform the contract, the respondents having upon their part undertaken to annul or cancel the contract without there being any provision therein admitting of that being done. The evidence establishes that the plaintiffs assembled at the work a complete staff and entered upon the work in a workmanlike manner, and when the request was made to resume work under the contract, all organization was at an end and complete disbandment had taken place.

The learned trial judge would appear to have treated the situation as one of master and servant. With great respect to the learned judge, I am entirely unable to accept that view.

The contract entered into between the appellants and respondents was one of great magnitude, and the work to be

performed, work that called for the exercise of great skill coupled with experience, and the appellants were, it would appear, contractors who were able to bring and did bring all this to bear upon the work. To classify the contract and view the relationship as one of master and servant cannot, in my opinion, be successfully maintained, but even were it so, is a servant bound to return to the master who has wrongfully dismissed him? The answer to this must be, No; but it may be said that he should have found similar employment. Is there a scintilla of evidence in the present case that a similar contract or like work was obtainable? The answer to this must also be in the negative. Contracts of the nature of the one in question in this action are not many in number, at one and the same time, and the work is being carried on in various parts of the continent long distances intervening, and entry into such contracts means long lapse of time, and involves careful calculation and the examination of plans and specifications, and all such work as a rule is let upon tenders called, with no certainty whatever of being the successful tenderer.

The respondents rely upon *Wilson* v. *Hicks* (1857), 26 L.J., Ex. 242. That case does not go the length of establishing that which is contended for by the respondents, that the appellants were compelled to resume work, *i.e.*, to mitigate damages in that way. That case admits the principle that upon a breach of contract *prima facie* the damages are the full measure of damages sustained, but that where the actual amount of damages has been in any degree affected by unreasonable conduct, that that is a legitimate element for consideration, and the damages may be diminished on that account. The Court in that case was composed of Pollock, C.B. and Martin, B. and being of the opinion that the damages were far too low, in the result, a new trial was granted. In a later case, *Smith* v. *McGuire* (1858), 27 L.J., Ex. 465, the Court being similarly constituted, Martin, B. at p. 472 said:

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"But it would be doubtful whether a party who breaks a contract has a right to say to a person with whom he breaks it—'I will not pay you the damages arising from my breach of contract, because you ought to have done something else for the purpose of relieving me from it.' I am not satisfied that the person who breaks a contract has a right to insist on

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that at all; but if the ship had earned anything the defendant would be entitled to a deduction in respect of that. I am not prepared to say the person with whom the contract is broken is bound to go and look for employment of his ship when the freight has been lost by reason of that breach of contract. It seems to me that matter ought to be dismissed entirely from consideration."

Elsewhere in his judgment on the same page Martin, B. said:

"The real damage was what was the amount of freight the ship would have earned under the existing contract. That is to be found by calculation and deduction of the expenses the shipowner would be put to in earning the freight."

It is true that in some cases it is clear that steps must be taken to mitigate damages, such as in cases coming within the Sale of Goods Act: see *Hammond* v. *Daykin & Jackson* (1914), 19 B.C. 550; 6 W.W.R. 1205; 28 W.L.R. 763; 18 D.L.R. 525, affirmed in principle upon appeal to the Supreme Court of Canada (see (1915), 8 W.W.R. 512), but whilst this is so, in my opinion, the present case is one quite within the exposition of the law as defined by Martin, B., nor do I know of any case which compelled the appellants in the circumstances here appearing to resume performance of the work when the respondents were the persons who broke the contract.

Now, proceeding to the measure of damages when completion of the contract is refused or prevented by the employer, in Emden's Building Contracts, 4th Ed., 113, we find it stated that:

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"It is a rule of law, which was established and well understood 200 years ago, and is laid down in Com. Dig., that 'the performance of a condition shall be excused by the obstruction of the obligee; as if a condition be to build a house, and he, or another by his order, hinders his coming upon the land, or says that it shall not be built, or interrupts the performance.' If, after part performance of the work, the completion be refused or prevented by the employer, the builder may insist upon his rights under the contract, or claim damages without completion, and he will be entitled to recover what he has lost by the act of the defendant,"

and the following cases are cited: *Planche* v. *Colburn* (1831), 8 Bing. 14; *Lawson* v. *Wallasey Local Board* (1882-3), 11 Q.B.D. 229; 52 L.J., Q.B. 302, 309 (n); *Arterial Drainage Company* v. *Rathangan Drainage Board* (1880), 6 L.R. Ir. 513, and *Mackay* v. *Dick* (1881), 6 App. Cas. 251.

Then at pp. 114-5 of the same work we have the following statement:

"The measure of damages, where performance is prevented by the employer, is the difference between what the performance would have cost the builder, and the price which the employer agreed to pay. A fair deduction must be made from the contract price in respect of the value of materials which have never been supplied, and wages which have never been paid,"

and the following cases are cited: *Masterton* v. *Mayor of Brooklyn* (1845), 7 Hill 61; [42 Am. Dec. 38]; Addison on Contracts, 10th Ed., 846; and *Drew-Bear* v. *St. Pancras Guardians* (1897), Emden's Building Contracts, 4th Ed., 681. See also *Insley* v. *Shepard* (1887), 31 Fed. 869; and *Watson* v. *Gray's Harbor Brick Co.* (1891), 28 Pac. 527.

In Addison on Contracts, 11th Ed., 914, we have the following statement:

"Where a contract has been entered into for the building of a house, and the owner refuses to permit the building to be completed, and prevents the workmen from earning the stipulated remuneration, the measure of damages in respect of so much of the contract as remains unperformed would seem to be the difference between what the performance would have cost the plaintiff and the price which the defendant agreed to pay,"

and *Masterton* v. *Mayor of Brooklyn, supra,* is cited.

In *General Bill-Posting Co., Lim.* v. *Atkinson* (1908), 77 L.J., Ch. 411, affirmed 78 L.J., Ch. 77, the servant was dismissed without notice and brought an action for wrongful dismissal, and he obtained a verdict for £350, being a year's salary and bonuses as provided by the agreement of service. Later on, action was brought for an injunction to restrain the one-time servant from acting contrary to a certain clause of the agreement of service. See the judgment of Cozens-Hardy, M.R. at p. 414.

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It will be seen that when once the contract has been repudiated, as it was in the present case, by the respondents, and the appellants electing, as they did, to treat the contract as rescinded, the appellants were no longer compelled to again take up the performance of the contract at the behest of the respondents.

And in the House of Lords upon the appeal thereto in *General Bill-Posting Co., Lim.* v. *Atkinson, supra,* Lord Collins, at pp. 79-80, said:

"I think the Court of Appeal had ample ground for drawing this infer-

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ence from the conduct of the employers here in dismissing the defendant in deliberate disregard of the terms of the contract, and that the latter was thereupon justified in rescinding the contract and treating himself as absolved from the further performance of it on his part."

In the present case, there is no question, in my mind, but what the appellants were justified, upon the facts, in rescinding the contract and considering themselves "as absolved from the further performance of it on their part."

It follows that, in my opinion, the appeal should succeed; the damages as allowed are much too low; the respondents chose to put the contract at an end; the appellants chose to treat the contract as rescinded, and did rescind it, which was a right the appellants had. In fact there has been no contest as to the rescinding of the contract, but the contention of the respondents has been that the appellants were compelled, at their request, to take it up again. With that contention I cannot agree. The measure of damages, in my opinion, is that which the appellants have lost by the repudiation of the contract—the wilful refusal of the respondents—constituting an actionable breach of contract, and in respect of so much of the contract as remains unperformed would seem to be the difference between what the performance would have cost the appellants and the price which the respondents agreed to pay, and will, of course, include the bonus, and it is to be remembered that upon the evidence $215,000 of this bonus had been already earned when the actionable breach of contract occurred.

The question now is, what course should be adopted to bring about the new assessment of damages? In Chitty on Contracts, 16th Ed., 888, it is stated:

> "In all cases where the damages may be ascertained by mere calculation, the Court will grant a new trial, or a new assessment of damages if the damages given appear to be excessive (see Mayne on Damages, 8th Ed. (1909), Ch. XX. Sect. 4, pp. 685 *et seq.*), except where the value on which the damages were calculated was assented to by both sides at the trial (*Hilton* v. *Fowler* (1836), 5 Dowl. 312). A similar course will be taken where the damages appear to be too low (see *Phillips* v. *London and South Western Rail. Co.* (1879), 49 L.J., C.P. 233; 5 C.P.D. 280)."

In my opinion, there should be a new trial for the assessment of the further damages to which the plaintiffs are entitled.

In the result, in my opinion, the appeal is allowed and the cross-appeal dismissed.

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Appeal allowed, Galliher, J.A. dissenting.

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

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

McPHEE v. THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

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McPHEE *v.* CANADIAN PACIFIC RY. CO.

Negligence—Volens a question for jury—Function of Court of Appeal on review—Railways—Order of Railway Board—Failure to publish in Gazette—Effect of.

In the absence of express consent or agreement to take the risk without precautions, the question of *volens* is peculiarly one for the jury, and the Court of Appeal should only interfere where the evidence is of such a character that only one view can reasonably be taken of the effect of the evidence (GALLIHER, J.A. dissenting).

McPhee v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43, followed.

Per IRVING, J.A.: The omission to publish in the Gazette an order of the Railway Board cannot invalidate it, but merely necessitates the proper proof of the order before the Court can act on it.

APPEAL from the decision of GREGORY, J. and the verdict of a jury on the second trial of this action for damages for injuries sustained by the plaintiff while in the employ of the defendant Company, or in the alternative, for damages under the Employers' Liability Act, tried at Vancouver on the 9th, 10th and 11th of December, 1914. The plaintiff had been engaged for six years on one of the defendant Company's steam-shovels, and for over two years as the engineer. The steam-shovel

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travelled by its own power on the track at about three miles an hour, a cab being in front for operating the engine and one behind for firing. The boiler was between the cabs, its back portion being between two water-tanks about seven inches from its outer bulge, which was four feet above the deck, the engine being below the boiler. A break-staff stood about fifteen inches in front of the tank to the right of the boiler, and about two feet out from a pinion connected with a gear-wheel in front, by which the steam-shovel was moved on the track. The lubricator was about three and one-half feet back of the pinion, between the boiler and the water-tank. In order to get to the lubricator from the front cab, the engineer had to pass between the gear-wheel and the break-staff and then between the boiler and the water-tank. The steam-shovel had been working in a pit about half a mile north of Duncan when the engineer was ordered by the roadmaster to take the steam-shovel over the main track to a siding at Duncan for certain structural changes. All possible speed was necessary, owing to the danger of collision with the regular traffic. When they had gone about half way the plaintiff went from the front cab to the lubricator, and, after adjusting it, was backing out when his jumper caught between the pinion and the gear-wheel, and his arm, being pulled in, was crushed between the wheels, necessitating amputation. It was the duty of the engineer to report what was necessary in the way of repairs or improvements to the steam-shovel, but the plaintiff had never requisitioned for a guard or other protection on the gear-wheel. The following were the questions, and answers given by the jury:

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"1. Was the plaintiff guilty of negligence? If yes, what was it? No.

"2. Was the defendant guilty of negligence? If yes, what was it? In leaving the gear unguarded.

"3. What was the proximate cause of the accident? We find the accident was caused by the plaintiff's jumper being drawn into the exposed gear while he was doing his duty.

"4. Did the plaintiff, knowing the nature and danger of the exposed cog-wheels and fully appreciating the risk of accident he ran by working there under the existing conditions, voluntarily assume to take upon himself such risk? No.

"5. The amount of damages, if any? $5,000."

On the plaintiff moving for judgment, a discussion arose

between counsel as to the effect of the answer to question three, and the Court (subject to the objection of counsel for the defendant) sent the jury back to answer the question: "What caused the coat to be drawn in?" The jury, on their return, replied: "The unguarded cog-wheels." Judgment was entered for the plaintiff. The defendant Company appealed.

The appeal was argued at Vancouver on the 20th of April, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Sir C. H. Tupper, K.C., for appellant: We say the plaintiff was illegally on the main track when the accident took place, and was there without consideration of the other trains on the road. This was the efficient cause of the accident, for which we are not responsible.

When the verdict of a jury has been recorded it is then too late to send them back; they are *functus officio* the moment counsel moves for judgment: see *Napier* v. *Daniel* (1836), 6 L.J., C.P. 62; 3 Bing. N.C. 77; *Reg.* v. *Yeadon* (1861), 31 L.J., M.C. 70. He was on the main road improperly, which was the proximate cause of the accident, and he knew the roadmaster had nothing to do with the running of trains: see Beven on Negligence, 3rd Ed., Vol. 2, p. 1089; MacMurchy & Denison's Railway Law of Canada, 2nd Ed., pp. 13, 413-4; *Robinson* v. *Smith* (1915), 31 T.L.R. 191. There was cramped space and danger, and he was in a hurry to get off the main track. On the judge's charge there should be a new trial on misdirection, in saying that there was nothing in the doctrine of *volens*. We submit the doctrine of *volens* is still open, notwithstanding the Supreme Court's judgment: see *Smith* v. *Baker & Sons* (1891), A.C. 325; *Clarke* v. *Holmes* (1862), 7 H. & N. 937; *Woodley* v. *Metropolitan District Railway Co.* (1877), 2 Ex. D. 384 at pp. 388-90; *Thomas* v. *Quatermaine* (1887), 18 Q.B.D. 685; *Yarmouth* v. *France* (1887), 19 Q.B.D. 647; Beven on Negligence, 3rd Ed., 635; *Membery* v. *Great Western Railway Co.* (1889), 14 App. Cas. 179. Argument

S. S. Taylor, K.C., for respondent: Being on the main line is a question of contributory negligence. They cannot raise

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this, as it is not pleaded. On the question of misdirection the point is the same as that in *Clark* v. *Canadian Pacific Ry. Co.* (1912), 17 B.C. 314. The rules of the Board of Railway Commissioners have not been proved. The work train could not take the shovel, with boom, on the main track: see *Victoria Corporation* v. *Patterson* (1899), A.C. 615 at pp. 618-9. The appellant is attempting to plead a statute without raising a general issue: see *Scott* v. *Fernie* (1904), 11 B.C. 91. The plaintiff had never been supplied with rules.

Argument

Tupper, in reply: The absence of the guard is not the cause of the accident; the cause is his being where he should not have been.

Cur. adv. vult.

10th August, 1915.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal.

IRVING, J.A.

IRVING, J.A.: After the first trial of this action, where the jury omitted to return an answer to a question on the defence of *volens,* this Court (18 B.C. 450), under Order LVIII., r. 4, directed judgment to be entered for the defendant on that defence, but the Supreme Court of Canada, with some doubting, I observe, on the part of two members of that Court, overruled our unanimous decision and directed that a new trial should be held.

The action having come on for trial, certain questions very nearly the same as those submitted at the first trial were submitted, and answered, and a motion made by plaintiff's counsel for judgment. After the defendant's counsel had suggested, in the argument on this motion, the insufficiency of one of the answers, the learned trial judge decided to send the jury back (reserving to the defendant any rights it might have) to reconsider the answer.

I would overrule the application for a new trial, as I do not think there is any substance in this point so far as it is concerned. Nor can I accede to the other points raised, *viz.*: that the damages were excessive: see *Houghton* v. *C.N.R.* (1915), [25 Man. L.R. 311]; 8 W.W.R. 254.

The real question is, was the verdict that the plaintiff was

not guilty of negligence against the weight of evidence? But there are two minor points to be first dealt with.

As to the construction to be put on section 31 of the Railway Act, I agree with the opinion of the Manitoba Court of Appeal in *Underhill* v. *C.N.R.* (1915), [25 Man. L.R. 254]; 8 W.W.R. 271. There is nothing in *Clark* v. *Canadian Pacific Ry. Co.* (1912), 17 B.C. 314, binding on this Court to the contrary, and the question was not argued there. Publication of the order gives it the effect of a statute, and courts would then be bound to take judicial notice of it. The omission to publish it cannot invalidate it. The omission merely necessitates the proper proof of the order before the Court can act on it. The general train and interlocking rules were, therefore, properly admitted in evidence as being in force, although not published in the Gazette.

The pleadings shew that the Esquimalt and Nanaimo Railway (now the only defendant by consent) admitted that the plaintiff was an engineer on their shovel, but denied that the plaintiff was "lawfully engaged in the performance of his duties as such engineer in the employ when he sustained the injuries." Paragraph 11 of the statement of defence is as follows:

"This defendant says that if the plaintiff was injured while in the employ of this defendant at the time and in the manner mentioned in the statement of claim such injuries were due to the plaintiff's own negligence."

The second paragraph of the reply was as follows:

"The plaintiff denies that the injuries sustained by the plaintiff were caused by the plaintiff's own negligence, and the plaintiff further denies that the plaintiff was negligent in any way whatsoever."

Particulars of paragraph 11 were demanded by the plaintiff, but when furnished, did not include the case of running on the main line, which expression is intended to convey the defence that the plaintiff was forbidden by the rules to travel on the main line under his own steam, the engine not being intended for that class of work. Having regard to the particulars, I do not think that point is open to defendant. The only matters are: (1) Was the plaintiff negligent in not exercising due care when working about a dangerous machine? (2) Was he negligent in working about the steam-shovel when in motion?

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On these points I cannot say that the finding is against the weight of evidence.

I would, therefore, dismiss the appeal.

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MARTIN, J.A.: First, as to the point that was raised about the additional answer the jury gave to the third question, I think it is immaterial how the jury's action is viewed, because the additional answer does not advance the matter and is in essence the same as the first, *viz.*: that the proximate cause was the "exposed gear," which is equivalent in the circumstances to "unguarded cog-wheels."

As to *volens*. I understand the judgment of the Supreme Court of Canada herein (49 S.C.R. 43) to mean that where the issue of *volens* has been fought out at the trial, and clearly presented to the jury in the form of a specific question, which they have not answered, then there has been no finding upon that question, and this Court has not the power to substitute itself for the jury and make such a finding.

That is far from saying that the Court has not the power in the case of *volens*, as well as in that of negligence or contributory negligence, to decide the question that in a given case "the acts from which it is argued consent ought to be inferred are reasonably capable of any other interpretation," or what is "the only reasonably possible inference from a given state of facts"—pp. 57 and 53-4-5 ; and see also the later remarks of Duff, J. in *Creveling* v. *Canadian Bridge Co.* (1915), 51 S.C.R. 216 at p. 229; 8 W.W.R. 619 at p. 627, where the matter is dealt with on this assumption. At the same time it would appear, if the view of Idington, J. in this case is to be accepted, that in the case of *volens* a very slight amount of evidence would prevent the Court from withdrawing the question from the jury, because he says, p. 48:

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> "I, therefore, conclude that it must be taken that the question is one for the jury in almost any conceivable case save the one of an express contract and one that must be submitted to the jury."

In the case at bar the jury has negatived *volens*, but it is submitted that there is no evidence to support that finding. I am, however, unable to take that view, and think the question

was properly left to the jury, and also that of contributory negligence.

Objection was taken to certain portions of the charge on the question of *volens,* but we must read it as a whole—*Jones* v. *Canadian Pacific Railway* (1913), 83 L.J., P.C. 13; 13 D.L.R. 900—and after so doing, I think the objection should not prevail.

A good deal was said about the alleged infraction of the rules by McPhee in taking the shovel on to the main line. I have grave doubt whether that issue was ever properly raised, especially seeing that it could only have come up, if at all, on the pleadings under the heading of contributory negligence and it was objected to as being excluded by the particulars, and the defendant counsel formally disclaimed setting it up under that issue. The learned judge shared this doubt, as expressed in his charge, but held that in any event it was open to the jury to exonerate the plaintiff because of the orders he had received from the roadmaster, Newman.

MARTIN, J.A.

The appeal, I think, should be dismissed.

GALLIHER, J.A.: There is really only one point on which I think the defendant can succeed in this appeal.

After reading the evidence carefully, I am just as strongly of the opinion as I was in the former appeal in this case that there is not evidence upon which the jury's finding on the question of *volens* can reasonably be supported.

I do not feel it necessary to elaborate the point. To my mind, upon the evidence, it is clearly a case of *volens,* and a jury could not reasonably find otherwise.

GALLIHER, J.A.

As I read the judgment of the Supreme Court of Canada herein, this Court is not precluded from deliberating and deciding upon the question as to whether the jury's finding as to *volens* was such as no reasonable body of men could bring in.

McPHILLIPS, J.A.: This appeal is one which may be said to be on the border line, and is one of exceeding great nicety. Were it not for the judgments of the Supreme Court of Canada in *Canada Foundry Co.* v. *Mitchell* (1904), 35 S.C.R. 452, and the judgment of the same Court on the appeal in this action

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following the first trial (49 S.C.R. 43), reversing the judgment of this Court, which had held (18 B.C. 450) that the maxim *volenti non fit injuria* applied, I would have been disposed, notwithstanding the verdict of the jury on the second trial negativing *volens,* to come to the conclusion that the plaintiff is not entitled to recover, in that, upon the facts of the present case, the plaintiff, who was not in a subordinate position, but in a position of control, and who could have easily procured the necessary guard for the gear, apparently chose to pursue a dangerous course, and that he was really the author of his own injury. And I might further say that I am rather of the opinion that it was a duty incumbent upon the plaintiff to have seen to it that the proper guard was provided for the gear. That being the position of matters, it might be deemed unreasonable for the jury to negative the plea of the defendant of *volenti non fit injuria.* However, in view of the judgment of the Supreme Court of Canada, which I trust I rightly apprehend (49 S.C.R. 43), the question of *volens* is peculiarly one for the jury when, as in the language of Duff, J. at p. 52, there is "no evidence of express consent or agreement on the part of the plaintiff." It may be further said that the Supreme Court of Canada plainly indicates that in the absence of express consent or agreement to take the risk without precautions, it is for the jury to say, in the language of Duff, J. (49 S.C.R. 43), at p. 52, "whether in all the circumstances the conduct of the plaintiff amounted to such consent." In view of this very explanatory judgment of the Supreme Court of Canada, I cannot refrain from remarking that the questions, as put upon the second trial, admitted of much improvement, to really and effectually discern the true intent and meaning of the jury. As it is, although this Court has plenary powers, and may enter judgment for either party with or without a finding of the jury, and against the finding of the jury, yet it is a power not to be lightly exercised. Now, although the power resides in this Court to enter judgment for the defendant upon the plea of *volenti non fit injuria,* notwithstanding the answer of the jury, in what cases is this permissible? In this case, on appeal to the Supreme Court of Canada (49 S.C.R. 43), Duff, J. said at p. 53:

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"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."

It would, therefore, appear to be necessary for this Court, if disagreement with the answer of the jury is to be found, to be of the opinion that only one view can reasonably be taken of the effect of the evidence, having relation to the plaintiff's conduct in continuing in his employment without a proper guard being provided for the gear, and that is that he took upon himself that risk without precautions, and that he was really the author of his own injury. It is with some considerable hesitation that I come to the conclusion that the present case is not one for the exercise of that power of overruling the answer of the jury, in that I cannot say unqualifiedly that "only one view can reasonably be taken of the effect of the evidence" upon the question of *volenti non fit injuria*. Lord Justice Romer, in *Williams* v. *Birmingham Battery and Metal Co., Lim.* (1899), 68 L.J., Q.B. 918, said at pp. 920, 921:

"Many authorities bearing on the question we have to decide have been cited and discussed. I do not purpose to review them. They appear to me to establish the following propositions as to liability at common law of an employer of labour. If the employment is of a dangerous nature, a duty lies on the employer to use all reasonable precautions for the protection of the servant. If, by reason of breach of that duty, a servant suffers injury the employer is *prima facie* liable. And it is no sufficient answer to the *prima facie* liability of the employer to shew merely that the servant was aware of the risk and of the non-existence of the precautions which should have been taken by the employer, and which, if taken, would or might have prevented the injury. In order to escape liability the employer must establish that the servant has taken upon himself the risk without the precautions. Whether the servant has taken that upon himself is a question of fact to be decided on the circumstances of each case. In considering such a question the circumstance that the servant has entered into or continued his employment with knowledge of the risk and of the absence of precautions is important, but not necessarily conclusive against him."

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It would seem to me that in view of these propositions of law, approved by the Supreme Court of Canada in this case upon appeal, and in view of the further propositions as laid down by the Supreme Court of Canada, that the only permissible conclusion is that the defendant has not established that the

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plaintiff took upon himself the risk without the precautions, and being constrained so to hold, it follows that the defendant cannot escape upon its plea of *volenti non fit injuria.*

I would dismiss the appeal.

Appeal dismissed, Galliher, J.A. dissenting.

Solicitor for appellant: *J. E. McMullen.*

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

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Railway—Defective culvert—Water and watercourses—Continuing cause of action—Water Clauses Consolidation Act, R.S.B.C. 1897, Cap. 190, Sec. 124.

The Vancouver Power Company under statutory authority purchased land for a railway, through which flowed a natural watercourse. During construction of the railway a culvert was built over the watercourse, but through defective construction it caved in from the weight of the gravel placed on top. In lieu thereof a second culvert was built, but so improperly that it failed to carry away the water, which flooded and injured the plaintiff's lands.

Held, that the cause of action was the negligent construction or inefficient working of the second culvert which was a continuing cause of action, arising from time to time as damage was done, and the period of limitation of action dated from the cessor of such damage.

Statement

APPEAL by defendant Company from the decision of MACDONALD, J. in an action for damages arising from the negligent construction of a culvert on their railway whereby the natural flow of a stream passing through the lands was obstructed, thereby causing an overflow and damage to the plaintiff's lands; tried by him at Vancouver on the 2nd of Sep-

tember, 1914. The facts are set out fully in the judgment of the learned trial judge.

Whiteside, K.C., for plaintiff.
McPhillips, K.C., for defendant.

23rd September, 1914.

MACDONALD, J.: Plaintiff is the owner of the north-west quarter section 22, Township 16, in the District of New Westminster, and seeks to recover damages from the defendant Company for trespass upon her land and removal therefrom of a quantity of gravel and timber; also for the closing up of a gazetted road and the flooding of her land from the negligent construction of a culvert under its railway. It appears that in the construction of the railway about 800 cubic yards of gravel were taken from the plaintiff's land and used for railway purposes. This is not denied, and the sum of $120 was paid into Court as full satisfaction. There was no general demand for gravel in that particular locality, and a market could only be obtained by transporting it some distance at considerable cost. The only customer for this gravel was the railway Company, and when the question of price came up for discussion it was agreed that a fair price should be paid. I find that the amount paid into Court answers this agreement, being at the rate of 15 cents per cubic yard. The plaintiff is thus entitled to the amount paid into Court, but on this issue should bear any additional costs incurred subsequently to payment in of the money.

As to plaintiff's claim for breaking down and removing fences and damage to ditches, I find her claim is not sustained.

Regarding the timber alleged to have been cut and carried away, defendant Company is not liable therefor. The husband of the plaintiff admitted that this matter was dealt with by the contractor engaged in constructing the railway, and payment was sought to be obtained from him.

As to the closing up of the gazetted road, the documents filed, and the plaintiff's actions therewith, in my opinion, debar her from having any right of action.

The most important cause of complaint on the part of the plaintiff is that, while a right may have existed for the construction of the railway across her land, in the course of such

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work a culvert, inserted in the embankment forming the road-bed of the railway, was constructed in such a negligent manner as to flood her land and depreciate its value and usefulness. I find that, notwithstanding criticism at the time of the placing of this culvert, and objection made to the engineer in charge, it was so negligently constructed as not to answer the purpose intended. The culvert was not deep enough to carry off the water. It did not drain the land of the plaintiff on the east side of the railway. Before the construction of the railway it had been drained by the natural fall of the land and a natural watercourse. The embankment of such culvert is so negligently constructed as to block the flow of water, and 20 to 30 acres of the plaintiff's property became injured thereby. The railway was being constructed under statutory powers, and if there was a negligent user thereof and damage results, a cause of action arises. "Powers granted by a statute are to be exercised reasonably and with due care so as not, by negligence, to cause danger to others": *Manley* v. *St. Helen's Canal and Railway Co.* (1858), 27 L.J., Ex. 159 at p. 164.

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It is contended, however, that the defendant Company is not liable for what might be termed the nuisance thus created, as the plaintiff's right of action is barred by statute; also that plaintiff should have sought redress through expropriation proceedings, and not by action at law. It was stated by counsel for the defendant that the railway was constructed by the Vancouver Power Company, but, except for the protection which might be thus afforded, the question of liability was not to be affected; or, in other words, the plaintiff, if entitled to succeed against the Vancouver Power Company, should also be entitled to succeed in this action. A writing shewing this agreement between counsel was not filed at the trial, but the fact that, subsequently to the trial, both counsel filed a memorandum referring to the Water Clauses Act (which governs the Vancouver Power Company), would indicate that I am correct as to the understanding between the parties.

Section 130 of the Water Clauses Consolidation Act, R.S.B.C. 1897, Cap. 190, provides that the procedure for the expropriation and acquisition of land by an incorporated company in the

exercise of its powers shall be governed by the provisions of the Land Clauses Consolidation Act, and that the rules and procedure therein laid down shall apply to such an incorporated company. I do not think that the procedure thus afforded an incorporated company to acquire land in any way controls the plaintiff in the present action. It is not suggested that at the time when the right of way was obtained for the railway across her property she waived any right that might accrue to her in the future from the negligent construction of such railway.

"By the construction of the defendants' railway without sufficient openings, those floodwaters could not spread themselves as formerly, and were penned up, and flowed over the bank on the plaintiff's land. *Prima facie* this would give the plaintiff a cause of action: and the question is whether the Company are protected by their Act. . . . . The Company may have been at liberty under the Act to construct their railway across the low lands in the manner they have done: but it does not follow that, in case an unforeseen injury arises to anyone from the mode in which it is constructed, they are not liable to an action":

Lawrence v. *Great Northern Railway Co.* (1851), 16 Q.B. 643 at pp. 653-54.

"The declaration is for wrongfully, that is, without lawful excuse, causing the water to flow on the plaintiff's land and against his house by means of an embankment, and so injuring his premises. . . . . The distinction is now clearly established between damage from works authorized by statute (where the party generally is to have compensation, and the authority is a bar to an action), and damage by reason of the work being negligently done, as to which the owner's remedy by action remains":

Brine v. *Great Western Railway Co.* (1862), 31 L.J., Q.B. 101 at pp. 104-5.

It is contended, however, that, in any event, plaintiff's right of action is barred by statute. Section 124 of the Water Clauses Consolidation Act provides that:

"All actions or suits for indemnity for any damage or injury sustained by reason of the tramway, or the works or operations of the power company, shall be commenced within twelve months next after the time when such supposed damage is sustained, or if there is continuance of damage, within twelve months next after the doing or committing of such damage ceases, and not afterwards, and the power company and any other defendant may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of, and by authority of this Act."

Section 126 of the Act states that in the absence of any provision in this Part of the Act relating expressly to the subject-matter of any such clause, the British Columbia Railway Act

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shall, as to certain clauses, be incorporated with this Part of the Act, and apply to any power company formed hereunder which includes among its objects of incorporation the construction or operation of tramways, when and so soon as the power company, in exercise thereof, proceeds to construct or operate a tramway. Amongst the clauses so incorporated is section 42, which provides that:

"All actions for indemnity for damage or injury sustained by reason of the railway shall be instituted within one year next after the time of the supposed damage sustained, or if there be continuation of damage, then, within one year next after the doing or committing such damage ceases, and not afterwards; and the defendants may plead not guilty by statute, and give this Act and the special Act, and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by authority of this Act and the special Act."

I do not think either of these sections prevents the plaintiff recovering in this action. I consider that the damage sustained through the negligent construction of the culvert still continues. As to the amount of damage to be allowed the plaintiff. The estimate of damage given by the witnesses, as usual, differs in a great measure. It would appear that some 20 or 30 acres are shut off completely from drainage and thus, for the time being, rendered useless to the plaintiff. If the Railway Company gives an undertaking to improve the culvert within a limited period by lowering it four feet at least, I will only allow damages up to the trial for the loss that the plaintiff has suffered during the past four years, at $200. If such undertaking is not arranged, then the plaintiff may apply to me for an injunction or to award damages on the basis of a permanent injury to plaintiff's land. The whole question of damages is thus reserved. Plaintiff is entitled to costs.

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The appeal was argued at Vancouver on the 15th of April, 1915, before MACDONALD, C.J.A., IRVING and MCPHILLIPS, J.J.A.

Argument

McPhillips, K.C., for appellant: It is complained that a culvert was improperly constructed, thereby blocking the natural flow of the water, and the plaintiff's property was flooded. The culvert was built in 1908, and the action was commenced in 1911. Under the Act the action must be commenced within a

year from construction unless it is a continuing cause of action. They are two years late: see *Lafond* v. *Ruddock* (1853), 13 C.B. 813 at p. 818; *Ryckman* v. *Hamilton, Grimsby and Beamsville Electric R.W. Co.* (1905), 10 O.L.R. 419 at p. 427; and it is not a continuing cause of action: see *Chaudiere Machine & Foundry Co.* v. *Canada Atlantic Rway. Co.* (1902), 33 S.C.R. 11; *Anctil* v. *City of Quebec* (1903), *ib.* 347; *Kerr* v. *The Atlantic and North-west Railway Company* (1895), 25 S.C.R. 197; *Croft* v. *The London and North-Western Railway Company* (1863), 32 L.J., Q.B. 113; *Knapp* v. *The Great Western Railway Co.* (1856), 6 U.C.C.P. 187. The right is barred for the reasons given in the *Chaudiere* case, *supra*. As to seepage, there is no legal liability. There is nothing but a slough there, and there is no right of action against a person stopping drainage or seepage: see *Ostrom* v. *Sills* (1898), 28 S.C.R. 485; *McBryan* v. *The Canadian Pacific Railway Company* (1899), 29 S.C.R. 359; *Hornby* v. *New Westminster Southern Railway Company* (1899), 6 B.C. 588; *L'Esperance* v. *Great Western R.W. Co.* (1856), 14 U.C.Q.B. 173. Underground seepage is discussed in *Chasemore* v. *Richards* (1859), 7 H.L. Cas. 349. The course of the stream was changed to the culvert: see *Nichol* v. *The Canada Southern R.W. Co.* (1877), 40 U.C.Q.B. 583; *Wallace* v. *The Grand Trunk Railway Co.* (1858), 16 U.C.Q.B. 551. There is no duty imposed by our Act or the Railway Act or Land Clauses Act as to stoppage of drainage.

Argument

Whiteside, K.C., for respondent: The natural flow of the stream would be at the lowest or central part of the slough. The culvert was put at the side, thus diverting the natural course of the stream. If the culvert had been placed in the centre, where the ground is soft, the natural seepage would have gone through, but the ground is hard below the present culvert, and it should have been much deeper. The fact is, the culvert is not sufficient to take the water away. There is a duty cast on them to do their work so as not to interfere with the waterway. This is a continuing damage, and we are not affected by the one-year limitation as to bringing our action: see *Lawrence* v. *Great Northern Railway Co.* (1851), 16 Q.B. 643;

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Whitehouse v. *Fellowes* (1861), 10 C.B.N.S. 765; *Harrington (Earl of)* v. *Derby Corporation* (1905), 1 Ch. 205 at p. 226. In a case of this nature damages may not result for a long time after the work is completed: see *Clothier* v. *Webster* (1862), 31 L.J., C.P. 316.

McPhillips, in reply.

Cur. adv. vult.

10th August, 1915.

MACDONALD, C.J.A.: I concur with my brother IRVING in dismissing this appeal.

IRVING, J.A.: The defendant, who is identified with the Vancouver Power Company, defends this action under the powers given to the latter Company. The Power Company was incorporated under the Water Clauses Consolidation Act, R.S.B.C. 1897, Cap. 190, which provided for the incorporation of power companies by charter (Part IV.) instead of by private bill, and authorizes the Company (section 96) to construct and operate a tramway, and for that purpose expropriate lands (section 100). By section 94 the privileges and powers granted are subject to certain restrictions, in particular, the company "shall not do any unnecessary damage."

By section 124 a limitation clause is given. By section 125 the powers granted are subject to future legislation. By section 126 certain clauses of the British Columbia Railway Act are made applicable to power companies incorporated for the purpose of constructing and operating railways; none of these applied sections deal with watercourses.

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The Power Company constructed its road-bed in 1908-9, through the plaintiff's farm, and before doing so bought the right of way from the plaintiff. In 1912 she brought this action against it for trespassing, claiming damages and an injunction. There is no allegation of negligence.

The statement of claim sets forth several matters which were all, with one exception, disposed of by the trial judge to the satisfaction of the parties, but as to one an appeal has been taken.

The complaint in paragraph 8 is that, in the course of construction of the road-bed, the Power Company—

"constructed a culvert on the plaintiff's land, and constructed said culvert in such a negligent manner that the plaintiff's lands were flooded by reason of such negligence, the culvert being constructed too high, thereby causing an overflow and serious damage to the plaintiff's said lands."

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In respect of this the learned trial judge gave judgment for the plaintiff, and the defendant now appeals.

The road-bed, in going through what was the plaintiff's and is now the defendant's land, passes from one gravel ridge to another, and between these two ridges the ground is soft and wet. To carry the railway across this soft land it became necessary to build up an embankment of gravel, and this embankment contained a culvert, but as the embankment grew in height and weight it crushed the culvert out of shape, and a new one had to be substituted and a new culvert put in some 58 feet to the north, to which point the stream was diverted. It is in respect of the inefficiency of this new culvert that this action is brought. The complaint is that it fails to carry the water which is on the east side of the embankment to the west side, where it would make its escape down a ditch which the Power Company built, and then into a creek which runs off to the west. The result is some 20 or 30 acres on the east side of the railway remains wet and sodden. Witnesses speak of it as muck land. The defendant's contention fails when once it is settled that this is a natural watercourse. Purchase by the Company of the strip of land would not give it the right to close that, and, therefore, the argument that the plaintiff should have stipulated for its being kept open when she sold goes for nothing. The Company, in making the first culvert, did what was their duty, but they did it badly, negligently, and the second culvert, which was put in some time after the first culvert was built, was also a negligent piece of work, in that it was not as deep as it ought to be to carry off the waters. As to the contention that the second culvert would be valueless unless the ditch connecting it with the creek bed was lowered, it seems to me that when the Company undertake to change the bed of the natural watercourse from one place to another, they must make it complete. The defendant's duty in substituting one watercourse for another was to make the substituted course as good as the other,

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both in the matter of depth of the culvert itself, and in the matter of providing a full and sufficient drain to carry off the water from the new culvert to the old creek bed. A municipal road runs on the east of and parallel to the railway, but that is carried on a bridge over the wet part. The plaintiff's husband says this piece was not flooded before the railway went there, that there used to be a creek there, and the first culvert was about where the old creek outlet was. The new culvert, which is further to the north, is not on the sold land, but in the northerly ridge of gravel, and as it is not sufficiently low to take care of the water, the complaint seems to be that they have really closed a natural watercourse and not provided a new outlet.

The case of *L'Esperance* v. *Great Western R.W. Co.* (1856), 14 U.C.Q.B. 173, was a case of an artificial drain, not a natural watercourse. Otherwise it is a very like case to this.

I do not think we can draw an inference different from that found by the learned trial judge—that there was negligence in the construction of the two culverts. The first was placed on insufficient foundations; the second was not deep enough.

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As to the Statute of Limitations, it is not very clear when this new culvert was substituted—in 1909, I think. The action was not commenced until October, 1911. The statute under which the Company was incorporated, 1897, Cap. 190, section 124, allowed 12 months. By Cap. 44 of 1911, the British Columbia Railway Act, section 267, the same period is given. In both sections provision is made if "there is a continuance of damage," or if there is "a continuation of damage," by which the action may be brought within one year next after the doing or committing of such damage ceases. Continuance of damage means continuance of legal injury, and not merely continuance of the injurious effects of the legal injury: Halsbury's Laws of England, Vol. 19, p. 178. The question arises, what was the cause of action? From the case of *McGillivray* v. *The Great Western R.W. Co.* (1865), 25 U.C.Q.B. 69, where the facts of the construction of a second culvert to cure the defects in the first are very like the present case, it would appear that the cause of action is not the construction of the embankment, but the negligent construction, or the inefficient working, of the

second culvert, as shewn by the injury done from time to time—in fine, a continuing cause of action, arising from time to time as damage is done.

The provisions of section 166 of the British Columbia Railway Act (Cap. 44 of 1911) authorize the minister of railways to make orders in case of defective drainage, but do not, in my opinion, as at present advised, deprive this Court of its jurisdiction, in a proper case, to grant an injunction, but as no authorities were cited on this point, I shall not express a final opinion. The notice of appeal is silent as to this objection.

I would dismiss the appeal.

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McPHILLIPS, J.A.: The statement of claim in the action would appear to have alleged that the cause of action was the construction of a culvert in a negligent manner, thereby giving rise to the flooding of the land. The evidence, however, would appear to disclose that the appellant interfered with a natural watercourse and constructed this culvert to carry off the water that previously flowed in the natural watercourse, as well as other water which might accumulate, and the trial would appear to have proceeded with this being the evidence. If there was negligence upon the part of the appellant in the construction of its undertaking as authorized by statute, there arises a cause of action in favour of anyone whose land is damnified in the construction of the works. Upon the question of fact the learned trial judge has found negligence, and there was evidence upon which he could reasonably so find. Therefore, it is not a case for interference by the Court of Appeal. It is, though, with some considerable hesitation that I have arrived at the conclusion that the special period of limitation for the bringing of actions against the appellant is not effective. In arriving at the conclusion that the plea is ineffective, I have relied upon the following authorities, dealing with, when the cause of action arises, and what constitutes "continuance of damage": *Backhouse* v. *Bonomi* (1861), 34 L.J., Q.B. 181; *Hole* v. *Chard Union* (1893), 63 L.J., Ch. 469 at p. 470; *Harrington (Earl of)* v. *Derby Corporation* (1905), 74 L.J., Ch. 219 at p. 230; *Hague* v. *Doncaster Rural District Council* (1908), 100

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L.T.N.S. 121. It may be said that the cause of action continues so long as the culvert is maintained in its present held to be negligent condition, and means a new damage at each time that the overflow takes place consequent upon the negligence in interfering with the watercourse and improper and insufficient culvert provided, *i.e.*, the channel thereof not carried to a sufficient depth, which is understandable when the peculiar formation of the ground at the *locus in quo* is considered.

However, my hesitation does not carry me to the length of disagreeing with my brothers, who are satisfied that upon the facts of the present case it is one of "continuance of damage." I, therefore, agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *McPhillips & Wood.*
Solicitors for respondent: *Whiteside, Edmonds & Whiteside.*

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Negligence—Hauling wire cable on curved line—Blocks to hold cable in place insufficient—Cable flying straight injures plaintiff—Use of trail —Trespasser.

The defendant having purchased a wire cable that laid along an inclined tramway three miles long and had been used to haul cars, proceeded to remove it by hauling it down the hill with a donkey-engine at the lower end, winding it on a drum. The tramway was curved, and it was attempted to hold the cable in place by wooden blocks; they proved ineffective and the cable flew from the curve into a straight line, striking and injuring the plaintiff when on a trail about fifty feet from the tramway. The trail had been used to some extent by the public for about six years.

Held (MARTIN and MCPHILLIPS, JJ.A. dissenting), that the trial judge having found that the plaintiff was a trespasser and that the defendant had not conducted its operations negligently, there must be grave reasons for interfering with his finding, and they do not arise in this case.

Sharp v. *Powell* (1872), L.R. 7 C.P. 253, followed.

APPEAL from the decision of MACDONALD, J. in an action for damages for injuries sustained by the plaintiff owing to the alleged negligence of the defendant Company, tried at Vancouver on the 16th of September, 1914. The circumstances under which the action arose were that the defendant Company had purchased a wire cable about six miles long that had been used in hauling cars up and down a logging railway, and extended along the road-bed of the railway for about three miles. The railway was built on an incline in a curved direction, and the cable, when in use, had been kept in place along the road-bed by wooden blocks placed for the purpose. At the time of the accident the defendant was removing the cable by hauling it down the railway track with a donkey-engine at the lower end, where it was wound around a drum. The wooden blocks placed for the purpose of keeping the cable in place along the track proved insufficient to withstand the pressure when the cable itself was being hauled down the track, and it swung

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off the curved track into a straight line, striking the plaintiff, who was on a path about 50 feet from the track and about half way up the cable length. The plaintiff sustained a fractured leg, some fractured ribs, and other injuries. Shortly before the accident the plaintiff went from his house (situated about 300 yards behind the spot where the accident took place) up the hill to get some wood for making a rustic chair, and was on his way back on the path referred to when he was struck by the cable. The path was on the property of a third party, and had been used for about six years previously to the accident but was not a place where people were inclined to frequent to any extent. The trial judge concluded that the defendant could not reasonably expect any person to be where the plaintiff was, and found there was not any act of negligence on the part of the Company's manager, who conducted the operation of removing the cable. The plaintiff appealed.

The appeal was argued at Vancouver on the 22nd of April, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

S. S. Taylor, K.C., for appellant: The learned trial judge did not find negligence and dismissed the action. We contend, as there was a double curve in the log-way, the cable should have been protected in such a way that it would not swing: see *Lowery* v. *Walker* (1911), A.C. 10; *Grand Trunk Railway of Canada* v. *Barnett, ib.* 361 at pp. 369-70; *Latham* v. *Johnson & Nephew, Lim.* (1912), 82 L.J., K.B. 258; (1913), 1 K.B. 398; *Dominion Natural Gas Company, Limited* v. *Collins and Perkins* (1909), A.C. 640; *Royal Electric Co.* v. *Heve* (1902), 32 S.C.R. 462; Halsbury's Laws of England, Vol. 21, pp. 365 and 435; *The Andalusian* (1877), 2 P.D. 231; *Holliday* v. *National Telephone Company* (1899), 2 Q.B. 392; *Heaven* v. *Pender* (1883), 11 Q.B.D. 503. The plaintiff was on a private road when injured but the public had used the road for six years; it ran through an unused lumber yard. Those who hauled down the cable knew it would jump from the road-bed: see *Andrews* v. *B.C. Electric Ry. Co.* (1913), 18 B.C. 25. Whether the plaintiff had a licence to be on the

road does not affect the case if there was reason to believe that persons were liable to be on the road. There were six houses beyond the spot and the occupants used this road.

C. W. Craig, for respondent: The evidence shews that where the plaintiff was hurt was not a roadway but a space 50 feet wide, where they had piled lumber that was cleared away three weeks previously to the accident. It was not a road in any sense of the term. The plaintiff's house was 300 yards below where the accident took place. The whole circumstances are such that there was no reason for us to suppose that any one was there, and we were, therefore, not negligent: see *Lowery* v. *Walker* (1911), A.C. 10. We contend (1) that on the facts the learned judge found there was no negligence, and (2) there was no duty on us as he was a trespasser, or at least a licensee.

Argument

Cur. adv. vult.

10th August, 1915.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal.

IRVING, J.A.

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

The learned trial judge has found that under all the circumstances it was not an act of negligence on the part of the Company to conduct its operations in the way it did. Further, he came to the conclusion that the plaintiff was a trespasser on the premises over which the defendant had a right to exercise its operations.

There must be grave reasons for interfering with the inferences drawn by the trial judge, and the reasons which have been advanced on the appellant's behalf do not, in my opinion, justify us in interfering.

The case of *Lowery* v. *Walker* (1909), 79 L.J., K.B. 297; (1910), 1 K.B. 173, as dealt with by the Court of Appeal was the case of trespasser. In the judgment of Buckley, L.J. we are told that this class of case does not fall within *Bird* v. *Holbrook* (1828), 4 Bing. 628; 6 L.J. (o.s.) C.P. 146, and those cases where there was an intent to injure.

There is a class of case which may, I think, be properly referred to as applicable to this case: *Sharp* v. *Powell* (1872),

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L.R. 7 C.P. 253; 41 L.J., C.P. 95, is the leading case. It could hardly be expected that a man would be on the (apparently) only open space when the cable "flew." Nevertheless, it is to be observed that this was the case of a person using a dangerous instrument and requiring consummate caution. Had the learned judge found the other way I should have followed his decision.

MARTIN, J.A.: While in other respects I agree with the conclusions reached by the learned trial judge, I am unable, after a careful review of the evidence, and with all due deference, to agree with him that the defendant Company exhibited a reasonable amount of care in the dangerous operation of hauling this long wire cable, which, we were informed, was upwards of three miles in length, down to the sea in that locality. It is with some reluctance, if I may so say, that I reach this conclusion, as I hesitate to differ from a finding of fact, but there is very little conflict here of testimony, and it is more a question of inferences to be drawn from facts than the credibility of witnesses.

MARTIN, J.A.

The appeal, therefore, should be allowed, and the matter referred back to the learned judge to assess damages, which I note he says he would have fixed at $2,500, if he thought he could have done so.

GALLIHER, J.A.

GALLIHER, J.A.: I agree with the learned trial judge and would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal of the plaintiff should be allowed. The evidence being carefully perused and weighed overwhelmingly establishes, to my mind, the case of the plaintiff that the accident occurred at a point upon a road or more properly as described in this country—trail—which had been for years—six years at least—used by the public. The fact that at the particular point of accident the trail had been planked over, being used at one time as a place for piling lumber, matters not, in my opinion, the planked way forming part of the travelled way. That the public generally and the residents in the neighbourhood in particular

were accustomed to and did use this trail was amply proved and to the knowledge of the respondents. It is true that there is some evidence that when the lumber was piled on the planked way it must necessarily have impeded travel, yet the evidence is that the travel was continuous and along the tramway which ended at the planked way. The lumber which had been piled on the planked way had been removed sometime previously to the accident and the rails taken up from off the right of way of the tramway, which right of way also would appear to have been in use by the public as a travelled way. That which gave rise to the accident was the mode adopted by the respondent in taking possession of the wire cable they had purchased from Trites & Co., who had been engaged in logging and lumbering operations at and about the scene of the accident, and Trites & Co. were the owners of the land at the point where the accident took place. The respondent proceeded to wind the wire cable upon a drum situate at the water's edge, the power used being a donkey-engine. The cable had to be drawn over a distance of three miles, the cable being some six miles in length, and in so doing the cable had to cross roads, trails and path-ways in general use by the public. The cable was an inch wire cable doubled lying alongside of the tramway track, and it was separated at the upper end previously to being hauled down, thus dividing it into two cables, and it was when the second cable was being hauled down that the accident to the plaintiff took place. There is some evidence that pegs were used to in some way control the cable, *i.e.*, prevent it flying up, but it is evident upon the evidence that this was insufficient, it being even admitted that it was inevitable that the cable would fly off the road-bed when being hauled down. The respondent in no way satisfactorily met the evidence as led by the plaintiff and, with the greatest of deference, I cannot at all agree with the learned trial judge's view of the evidence. Everything points to the grossest carelessness upon the part of the respondent, and the respondent could only escape liability by the stretching of the law to a degree which is not permissible upon the plea that the plaintiff was a trespasser and the respondent owed no duty to him to take reasonable or proper care. The

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argument as addressed to us by counsel for the respondent was that the plaintiff, upon the facts, was a trespasser and no duty was imposed upon them to take care for his protection. It was further strongly urged by counsel for the respondent that the facts of the present case were such as entitled effect being given to the decision of the Court of Appeal in *Lowery* v. *Walker* (1910), 1 K.B. 173, and no liability existed, the plaintiff being a trespasser, that although the House of Lords reversed the Court of Appeal ((1911), A.C. 10), it was only because of the fact that it was held that the appellant was in the field with the permission of the respondent, which is not the case here. I cannot agree with this contention, nor can I view the facts in the way they are attempted to be looked at to support the argument advanced. Upon the facts, in my opinion, the plaintiff was not a trespasser, and if it can be said that the place of accident was not a highway established by the Province or by the municipality upon which the plaintiff was proceeding, and I will concede that it was not proved to be such, yet the land was not that of the respondent, and upon the facts the respondent was merely in temporary occupation thereof, and the evidence is clear enough that to the knowledge of the owners of the land, Trites & Co., and to the knowledge of the respondent, the public used the trail and passed over the land at the point where the accident occurred, that it was an habitual user, and no steps were taken to prevent this user and permission can well be inferred. Further, when the conditions existent in so many parts of this Province are considered and in particular in the neighbourhood and point in question, the land being heavily timbered, it may be said that trails passing along where lumbering operations have taken place are the only rights of way available in passing to and from the seashore, and judicial notice may be taken of this, and it is the custom and practice for the public to go to and fro as the plaintiff did. Now, the question arises, did the respondent owe to the public any duty to take care for their protection from the risk of being injured during the course of the operation in hauling over a distance of three miles some six miles of wire cable? In my opinion the respondent was in law under an obligation to take

MCPHILLIPS, J.A.

care, and it is patent that the hauling down of the wire cable in the manner in which it was done was the grossest kind of negligence and done with the knowledge of the attendant danger yet apparently recklessly pursued. The following evidence of Mr. Buck, one of the directors of the Company, is worthy of careful study. [His Lordship read the evidence and continued.]

In my opinion this evidence establishes the absence of the exercise of due and proper care and no proper precaution to persons crossing over the ground throughout a distance of three miles. Apparently precautions were taken beyond at some points where roads crossed, but not at the point where the accident took place or upon the trail the plaintiff was proceeding over. The duty that rested upon the respondent was to, at least, have adopted some method of hauling down the cable which would have prevented its flying up as it did and which they knew it would, because with this peril always present there was no time at which the public were safe. It meant that during the whole time of the operation in hauling down the cable the public could not with safety be in the neighbourhood of the cable or go to and fro in accordance with previous custom and no doubt necessity, and there is no evidence whatever that any notice was given of this class of danger. The public were entitled to assume, even with the notice given, that there would be the exercise of reasonable and proper care, and not constitute the wire cable into even a greater danger than a boa constrictor would be. I would refer to what Vaughan Williams, L.J. said in *Lowery* v. *Walker, supra,* at p. 186:

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"I do not say that they take upon themselves the risk of finding a tiger in the field, but they take upon themselves, in my opinion, the risk of any danger there may be in the field, if used in the way in which such a field is ordinarily used."

It cannot be that the respondent is to be admitted to say that it was entitled to haul down the cable in a manner wholly careless of life apart from the fact that it was known that the public were passing and repassing. The danger to animal life was extreme and that injury should ensue and not be compensated for under the circumstances, in my opinion, would

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be the denial of natural justice. In *Latham* v. *Johnson & Nephew, Lim.* (1912), 82 L.J., K.B. 258, Hamilton, L.J. (now Lord Sumner) at p. 264, said:

"The rule as to trespassers is most recently indicated in *Lowery* v. *Walker* [(1910)], 80 L.J., K.B. 138 at p. 140; (1911), A.C. 10 at pp. 13, 14, *per* Lord Halsbury, and is stated and discussed in *Grand Trunk Railway of Canada* v. *Barnett* (1911), A.C. 361; 80 L.J., P.C. 117, 121. The owner of the property is under a duty not to injure the trespassers wilfully, 'not to do' a wilful act of reckless disregard of ordinary humanity towards him, but otherwise a man 'trespasses at his own risk.'"

In the present case the facts demonstrate such recklessness that it must be held to be actionable negligence and liability must follow, and I am of the opinion that, even if it can be said upon the evidence that the plaintiff was a trespasser, yet there is liability upon the respondent upon the particular facts.

In *Cooke* v. *Midland Great Western Railway of Ireland* (1909), 78 L.J., P.C. 76, the Lord Chancellor (Lord Loreburn) at p. 83, was moved to say:

"I am content to act upon the opinion of my noble friend Lord Macnaghten, having regard to the peculiar circumstances—namely, that this place on which the defendants had a machine, dangerous unless protected, was to the defendants' knowledge an habitual resort of children, accessible from the high road near thereto, as well as attractive to the youthful mind; and that the defendants took no steps either to prevent the children's presence, or to prevent their playing on the machine, or to lock the machine so as to avoid accidents though such locking was usual. I must add that I think this case is near the line. The evidence is very weak, though I cannot say there was none. It is the combination of the circumstances to which I have referred which alone enables me to acquiesce in the judgment proposed by Lord Macnaghten."

MCPHILLIPS, J.A.

It may be said in the language of the Lord Chancellor that the present case "is near the line," yet the "peculiar circumstances" are most striking and exhibit such want of care and recklessness that it would seem to be incontrovertible that in law there is here proved that which constitutes actionable negligence. It is true that Lord Atkinson in *Cooke* v. *Midland Great Western Railway of Ireland, supra,* had particularly children in mind in the language he used at p. 81, but I consider that it is a general exposition of the law which is apposite here.

Now, upon the facts of the present case it might well be said that the appellant could not say that he was unaware that the

cable was being removed from off the land, but can it be reasonably said that he was or should have been aware of the fact that it was being removed in such a way that at no time and at no place throughout the whole distance of three miles would it be safe to pass over the cable? It cannot reasonably be said that the appellant must be imputed to have had any such knowledge, rather that he was ignorant of any such danger and was entitled to rely upon it that the cable would be withdrawn in a manner which would give reasonable safety and proper protection to the public, and the fact was that the respondent upon its part knew of the danger and quite expected the cable to fly up—a menace and danger terrible in its possible results—and the respondent owed to the plaintiff a duty to take reasonable precautions against accident and the flying up of the cable, a duty plainly left undischarged and knowingly left undischarged, and the omission to discharge that duty was the *causa causans* of the accident. There can be no question upon the evidence that the respondent ought reasonably to have anticipated such an occurrence as that which did happen.

The Lord Chancellor in *Coffee* v. *McEvoy* (1912), 2 I.R. 290 at p. 302, said:

"I am fully aware that the law cannot be regarded as settled in a full sense on the question of the owner's liability for injuries received by mere trespassers upon his property. The subject was expressly reserved by the learned Lords who made the decision in *Lowery* v. *Walker* (1911), A.C. 10. Lord Atkinson, in his judgment in *Cooke's Case* (1909), A.C. 229, on p. 239, also reserved the question in relation to trespassers, in particular circumstances stated by him in the passage to which I refer. In the case of *The Grand Trunk Railway of Canada* v. *Barnett* (1911), A.C. 361, Lord Robson delivering the judgment of the Privy Council, on p. 639, dealing with the plaintiff on the footing that he was a trespasser, dismissed the question of what his rights were in the circumstances against the appellant Company. In the course of the passage in his judgment he says: 'The railway company was undoubtedly under a duty to the plaintiff not wilfully to injure him; they were not entitled unnecessarily and knowingly to increase the normal risk by placing unexpected dangers in his way . . . .'" "Also he added on p. 370: 'Again, if he be a trespasser, a question may arise as to whether or not the injury was due to some wilful act of the owner of the land involving something worse than the absence of reasonable care.' After mentioning *Lowery* v. *Walker* (1911), A.C. 10, he said: 'In cases of that character there is a wilful, reckless disregard of ordinary humanity rather than mere absence of reasonable care.'"

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In my opinion the evidence in the present case demonstrates

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in the language of Lord Robson "a wilful, reckless disregard of ordinary humanity rather than mere absence of reasonable care," and whether the plaintiff be licensee or trespasser, in my opinion, the appellant has established actionable negligence against the respondent.

I would, therefore, allow the appeal and enter judgment for the plaintiff for $2,500, the amount the learned trial judge would have allowed if of the opinion that liability rested upon the defendant or, if thought necessary, the action may again be remitted to the learned trial judge for the assessment of damages.

Appeal dismissed,
Martin and McPhillips, JJ.A. dissenting.

Solicitors for appellant: *McLellan, Savage & White.*
Solicitors for respondent: *Martin, Craig, Parkes & Anderson.*

BRITISH AMERICA PAINT COMPANY, LIMITED v. FOGH.

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Contract—Sale of goods—Work and labour—Warranty—Test of plant—Breach of warranty—Damages—Sale of Goods Act, R.S.B.C. 1911, Cap. 203, Secs. 50 and 67.

The defendant entered into an agreement with the plaintiff to supply and install a new oil-burning plant in place of one that burnt wood, it being a condition that the new plant could be operated at a saving of expense. The plaintiff expended certain sums for material in connection with the work and the defendant took out the old plant and installed the new. After a test it was found the new plant was more expensive than the old. In an action for the recovery of the money spent, damages for injury to the old plant, and cost of reinstalling it, the trial judge gave judgment for the plaintiff for $500 in damages.

Held (GALLIHER, J.A. dissenting), that the appeal should be dismissed.

Per IRVING, J.A.: The action was one for work and labour rather than for goods sold and delivered, and the use of the oil plant by the plaintiff Company for the purpose of trial could not justify an inference that it had dispensed with the condition, and in an action for the agreed price the plaintiff might shew the plant was of no value.

Per MARTIN and MCPHILLIPS, JJ.A.: There had been an acceptance of specific goods and a consequent sinking of the condition into a warranty which could be set up in extinction of the price, and also as giving a right to damages for materials supplied, injury to old machinery and cost of reinstalling same.

APPEAL from the decision of LAMPMAN, Co. J. in an action tried at Victoria on the 18th and 19th of November, 1914. The plaintiff Company operated a heating plant for generating steam. For some years they had burnt wood and coal. In 1914 the defendant proposed that they should install an oil plant, and figured that by burning oil there would be a saving of $120 a month. They entered into an agreement whereby the defendant would install the plant for $950. After its installation the plant was tested for three months and was found to be more expensive to operate than wood. The plaintiff brought action for the return of all moneys expended for materials and work done in the construction of the plant, for the use of the plaintiff's machinery, and for damages for injury

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done the machinery by the defendant and damages for the cost and loss in connection with reinstalling the former system. The defendant counterclaimed for $950, the contract price for installation of the plant in question. The learned trial judge allowed the plaintiff $500 in damages and dismissed the counterclaim. The defendant appealed.

The appeal was argued at Vancouver on the 13th and 14th of April, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Carter, for appellant: We contend the whole contract is set out in a letter of the 19th of March, 1914, from the defendant to the plaintiff, in which there is no undertaking as to the cost of oil fuel. Oral evidence of a warranty on our part should not be allowed. The rule is that no oral or verbal statement can be added to the contract: *Hotson* v. *Browne* (1860), 9 C.B.N.S. 442; *Ellis* v. *Abell* (1884), 10 A.R. 226; Wigmore on Evidence, Vol. 4, p. 2425; *Kain* v. *Old* (1824), 2 B. & C. 627; *Northey Manufacturing Co.* v. *Sanders* (1899), 31 Ont. 475; *Henderson* v. *Cotter* (1857), 15 U.C.Q.B. 345; *Hamilton et al.* v. *Myles* (1874), 24 U.C.C.P. 309; *McNeeley* v. *McWilliams* (1886), 13 A.R. 324. The plaintiff, having accepted delivery of the plant and used and operated it, cannot now reject it. As to when a purchaser is deemed to have accepted the goods, see *Victoria and Saanich Motor Transportation Co.* v. *Wood Motor Co.* (1915), 21 B.C. 515; *New Hamburg Manufacturing Co.* v. *Weisbrod* (1908), 7 W.L.R. 894; *Dominion Bag Co.* v. *The Charles A. Bull Produce Co.,* 5 Que. P.R. 175. They supplied a tank, but we supplied and installed the machinery and equipment: see *Hamilton Manufacturing Co.* v. *Knight Bros.* (1897), 5 B.C. 391; *Munro* v. *Butt* (1858), 8 El. & Bl. 738; *Lawrence* v. *Corporation of Lucknow* (1887), 13 Ont. 421. Even if the evidence were admissible, it does not amount to a warranty.

Maclean, K.C., for respondent: We used the tank in order to test the oil fuel. The trial judge had a right to infer that the representation was that the oil plant would be cheaper: see *Heilbut, Symons & Co.* v. *Buckleton* (1913), A.C. 30. The letter referred to makes reference to two offers that require oral

evidence; it is, therefore, a formal contract: *Malpas* v. *The London and South Western Railway Co.* (1866), L.R. 1 C.P. 336. The question is whether both parties intended it to be a warranty: see *Morgan* v. *Griffith* (1871), L.R. 6 Ex. 70; *Rogers* v. *Hadley* (1863), 2 H. & C. 227; *Harris* v. *Rickett* (1859), 4 H. & N. 1; *Jeffery* v. *Walton* (1816), 1 Stark. 267; *Dunsmuir* v. *Lowenberg, Harris & Co.* (1903), 34 S.C.R. 228; *Azemar* v. *Casella* (1867), L.R. 2 C.P. 677.

Carter, in reply.

Cur. adv. vult.

10th August, 1915.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal.

IRVING, J.A.

IRVING, J.A.: The plaintiff Company (respondents in this appeal), being minded to change their wood-burning plant into an oil-burning plant, entered, on the 16th of March, 1914, into a verbal contract with the defendant for the installation by him on their premises of an oil-burning plant for the sum of $950. The work involved ripping out some of the old plant and affixing to the freehold some of the substituted equipment.

When it was finished in April, and tested during May, June and July, it proved to be more expensive in operation by $4 odd per day than the wood-burning plant which it had superseded.

In August, 1914, the plaintiff Company brought an action for a return of all moneys ($1,500) expended by the plaintiff at the request of the defendant for materials, etc., supplied in connection with the construction of the new plant, and for damages for injury caused by defendant to the old machinery, and for damages to cover the expense of re-installing the old system. The plaintiff Company alleged that the change was made on a warranty by the defendant that the oil-burning plant would be more economical to operate than the old. It was an undertaking of saving.

The defence was that it was a good oil-burning plant and well installed, and that the contract was in writing, set out in his letter of the 19th of March; that there was no warranty of more economical operation, and he counterclaimed for $950, the agreed price.

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The learned County Court judge gave judgment for $500 in favour of the plaintiff, for damages, and dismissed the counterclaim. There was evidence from which the learned judge was justified in coming to the conclusion that there was an oral contract agreed to, before the defendant went to Vancouver. His letter of the 19th of April, written from that place, cannot control the agreement already entered into. The evidence will support the finding that there was a warranty that the new plant could be operated at a saving of expense to the Paint Company. And there was evidence which would support a finding that the new plant would not fulfil the purpose for which it was intended. It is really impossible to upset these findings, having regard to the correspondence and the learned judge's note shewing his doubt of the reliability of the defendant's testimony.

The simplest way to deal with the appeal is to take the appellant's argument and point out where it fails.

Ever since 1806, when *Basten* v. *Butter,* 7 East 479, was decided, a practice—not based on any principle of law—has been generally followed; and that is, where an action is brought for an agreed price of a specific article sold with a warranty, or of work which was to be performed according to contract, the defendant is permitted to shew in defence that the chattel, by reason of the non-compliance with the warranty in the one case, and the work in consequence of the non-performance of the contract in the other, are of no value or diminished in value.

IRVING, J.A.

This was acted on in the case of *Mondel* v. *Steel* (1841), 8 M. & W. 858, and in *Church* v. *Abell* (1877), 1 S.C.R. 442, where, in an action for the price of a water-wheel, defendant was held entitled to shew the article was valueless, or of a less value than the agreed price.

The same matter was discussed in *Bow, McLachlan & Co.* v. *Ship "Camosun"* (1909), A.C. 597 at p. 610 and following pages.

The learned County Court judge, acting on this principle, was right in dismissing the counterclaim. The work when completed was not the work stipulated for in the contract: *Forman & Co. Proprietary* v. *The Ship "Liddesdale"* (1900), A.C. 190; 69 L.J., P.C. 44. Nothing is gained by the defendant

in shewing that the work was completed in April and used during the following months. The Company was entitled to a reasonable opportunity of testing the plant to see whether it would satisfactorily do the work: *Hughes* v. *Lenney* (1839), 8 L.J., Ex. 177; 5 M. & W. 183. The fact that the Paint Company had possession of the oil plant in their building does not justify an inference that they had dispensed with the conditions of the special agreement: *Munro* v. *Butt* (1858), 8 El. & Bl. 738 at p. 752; *Sumpter* v. *Hedges* (1898), 1 Q.B. 673; 67 L.J., Q.B. 545. In *Lawrence* v. *Corporation of Lucknow* (1887), 13 Ont. 421, cited by Mr. *Carter,* there was, after the substantial completion of the contract, a dealing between the parties, by which the corporation recognized its liability to pay for the work. So again in *Hamilton et al.* v. *Myles* (1874), 24 U.C.C.P. 309, there was evidence to go to the jury of acceptance of the portable machinery, and the jury found (generally) for the plaintiffs. It was not a case within *Munro* v. *Butt, supra. Dominion Bag Co.* v. *The Charles A. Bull Produce Co.* is a Quebec case (5 Que. P.R. 175), and I have not been able to get a report of it. The other authorities cited by Mr. *Carter* are of no assistance on the facts of this case as found by the learned County Court judge.

It must be remembered that the Paint Company was, while carrying on tests of the new plant's efficiency, complaining to the defendant. This was a contract for work and labour rather than for goods sold and delivered: *Lee* v. *Griffin* (1861), 1 B. & S. 272, and I do not think we are concerned with the sections of the Sales of Goods Act to which we were referred.

IRVING, J.A.

Hamilton Manufacturing Co. v. *Knight Bros.* (1897), 5 B.C. 391, was a sale of an engine, which the defendants accepted and gave notes for the price, and the sole question involved was, has the judge jurisdiction to order the defendants to return the property to the plaintiffs, an order he made, as I understand it, to reduce as much as possible the defendant's losses?

The argument of hardship no doubt was pressed upon the learned trial judge in that case, with disastrous results, as a new assessment of damages was ordered.

The allowance of damages, I think, was most moderate.

I would dismiss the appeal.

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MARTIN, J.A.: I do not doubt that this must be regarded as a verbal agreement. The defendant's letter of the 19th of March, 1914, is clearly not the contract, so no question of parol variation arises, nor do I doubt that the oil-burning plant which was installed in the plaintiff's works did not answer the all-important representation which was a condition precedent to the defendant being permitted to install it, and so far from being in accordance with that representation, it has caused loss to the plaintiff, and is worse than useless to them as being a detriment to their business and property.

I first take up the question of the counterclaim for the agreed price of the plant, $950, which was dismissed. That, I think, was the only thing the learned judge could have done in the face of the clear evidence that it "was worth nothing," as was said by the King's Bench in Term in *Poulton* v. *Lattimore* (1829), 9 B. & C. 259 at p. 266. The circumstances prevented the return of the goods, and the buyer was entitled to test them and even use them, according to the circumstances of the case, *e.g.*, as in *Poulton's* case, wherein the buyer was supplied with inferior seed, and yet it was held, p. 264:

"He was at liberty to try the seed and to sow it. Probably without sowing it, the fact could not be ascertained whether it would ultimately produce a good crop. From the nature of the article, and of the contract of warranty, I think the vendee was not bound to return the seed without using it; that by keeping it, he has not precluded himself either from bringing an action for breach of the warranty, or from insisting on such breach in this action, in order to shew that the seed was of less value than the seller represented it to be."

MARTIN, J.A.

While definite notice of the result of the test hereinafter referred to might better have been given promptly, yet it was also said in the same case, p. 265, after referring to one where a horse, warranted sound, had been kept for three months after the discovery of the unsoundness without giving notice thereof:

"The not giving notice indeed, raises a strong presumption that the article at the time of the sale corresponded with the warranty, and calls for strict proof of breach of the warranty. But if that be clearly established, the seller will be liable in an action brought for breach of his contract, notwithstanding any length of time which may have elapsed since the sale. And if that be so, it is reasonable and just, when an action is brought by the seller to recover the price or value of the goods, that the buyer should be at liberty to shew the breach of the warranty in defence to the action."

On the evidence, above referred to, the necessary facts have been "clearly established" herein, and it follows, therefore, that there has been an "extinction of the price" under section (1*a*) of the Sale of Goods Act as hereinafter mentioned.

Then, as to the plaintiff's claim for the return of the moneys it has expended at defendant's request in the course of installing the new plant, apart from the contract price, and for the cost of removing the useless machinery and of replacing the old wood-burning plant. For this the learned trial judge has allowed $500, and that is a moderate allowance on the evidence, if the plaintiff is entitled to anything, which is disputed on the ground that it must be deemed, on the facts, to have accepted the goods under section 50 of the Sale of Goods Act, as more than a reasonable time for rejection elapsed after the letter of the 1st of August, saying that a test was being conducted and the defendant would be notified of the result, with a promise of definite decision, but nothing was done, despite a written request by the defendant on the 12th of August for information, so the action was begun on the 28th of August. I think it must be considered that the plaintiff did accept the goods, so the breach of condition (as it was here, and which originally gave the plaintiff the higher right to repudiate) must now, in view of this acceptance, and that these are "specific goods," be treated as a breach of warranty under section 19, and the goods cannot be rejected and the contract treated "as repudiated under (3) unless there be a term of the contract, express or implied, to that effect." There is no such term or implication here, and, therefore, the buyer (plaintiff) has to resort to section 67 (which is the English section 53) as one "compelled to treat [the] breach of a condition . . . as a breach of warranty" (1), and may set it up not only in extinction or diminution of the price (*a*), but also for damages (*d*), and "further damages" suffered thereby, under subsection (4). Here the damages claimed do, beyond question, "directly and naturally result in the ordinary course of events from the breach" (2), so no difficulty arises, on the evidence before us, from sustaining the assessment of them made in the Court below, and they constitute the "further damages" that the plaintiff may recover in addition to extinguishing the

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price under the counterclaim, as already disposed of. See the principle set out and change in practice noted in *Mondel* v. *Steel* (1841), 10 L.J., Ex. 426; 8 M. & W. 858, as explained in *Bow, McLachlan & Co.* v. *Ship "Camosun"* (1909), 79 L.J., P.C. 17; and of Addison on Contracts, 11th Ed., 629 (n).

While this case can be determined solely on the statute, I draw attention to the recent decision of the House of Lords in *Wallis, Son & Wells* v. *Pratt & Haynes* (1911), A.C. 394 (adopting the opinion of Fletcher Moulton, L.J. in (1910), 2 K.B. 1003), pointing out the difference between "condition" and "warranty," considering some of the sections I have referred to, and explaining the way in which a condition which has now by statute to be treated as a warranty is to be regarded (though it has not really been "degraded or converted into a warranty") as applied to a case where goods of a different kind from those contracted for had been supplied and wherein the buyer sued to recover from the seller damages he had to pay on a resale thereof (*viz.*: giant sainfoin seed instead of common English sainfoin). The Lord Chief Justice observed at p. 397:

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> "It is impossible for the respondents to contend that when the sellers said they gave no warranty they meant to say they would not be responsible for any breaches of condition."

And at pp. 398-9:

> "My Lords, I thought it right to add these few words, because I think it is very important to bear in mind that the rights of people in regard to these matters depend now upon statute. To a large extent the old law, I will not say has been swept away, but it has become unnecessary to refer to it. Within the four corners of this statute applicable to this contract we see this plain distinction between 'condition' and 'warranty,' which has, I venture to think, been rather overlooked in this case by the majority of the judges in the Court of Appeal."

It follows that the appeal should be dismissed.

GALLIHER, J.A.: Assuming that the contract was a verbal one, the judgment, in my opinion, cannot be supported.

GALLIHER, J.A.

There is no complaint that the plant installed is not an efficient plant or is not properly installed, the sole complaint being that it does not effect the saving in fuel contemplated by the parties. The plaintiff's plant was wood-burning, and it was for the purpose of effecting a saving in fuel that the change

to oil burning was made. It does not appear quite clear on the evidence that the defendant solicited the order, but, assuming that he did, what took place was this: Fogh came to the works at Victoria, and in arriving at whether a saving could be effected, two barrels of oil were taken as the equivalent of one cord of wood. Fogh estimated this, and two of plaintiff's witnesses support him. Love says "Two barrels equal one cord, roughly speaking," and Bianco, "I have read in books that two barrels equal one cord." So that we must assume that the basis for starting from was honestly fixed. J. C. Pendray says, "I told Fogh it cost us about four cords a day." Oil at $1.25 per barrel; wood at $2.50 per cord. Now, both parties, with these figures before them, and proceeding on that basis, sat down and figured out how a saving could be effected, the plaintiff as well as the defendant, and the conclusion arrived at was, in my view, a joint conclusion, and not an undertaking by Fogh. Assuming the basis to be correct, and I do so, the plaintiffs satisfied themselves, and it is reasonable to suppose they must have done so, otherwise before they went to the expense of installing new plant, they would naturally have obtained some definite guarantee from Fogh, which they did not. Whether rightly or wrongly, both parties honestly entered into the calculation, and honestly concluded that a saving would be effected, and the work was done under those circumstances. Under such circumstances, how can it be said that there was an undertaking by Fogh, or a direct representation for which he should be held responsible? Nor do I think, under such circumstances, that the statute aids the plaintiff.

GALLIHER, J.A.

It is true H. J. Pendray says, "It was an undertaking of saving," but that bald statement must be read in the light of the whole facts. I am, moreover, of opinion that the letters, when properly read and understood in connection with the proceedings preceding them, do not turn the scale in plaintiff's favour.

I would allow the appeal, with costs, dismiss the action below, with costs, and give judgment upon the counterclaim for $950 and costs, less the amount of $118.76, which I think should be deducted, in view of the defendant's letter.

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McPHILLIPS, J.A. agreed with the reasons for judgment of MARTIN, J.A.

Appeal dismissed, Galliher, J.A. dissenting.

Solicitors for appellant: *Matheson & Carter.*
Solicitor for respondent: *H. H. Shandley.*

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REX v. EDWARD JIM.

Criminal law—Indian reservation—Killing of game by Indian—Game Protection Act, R.S.B.C. 1911, Cap. 95—Application of.

The provisions of the Game Protection Act do not apply to Indians when killing game on Indian reservations.

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APPEAL by way of case stated from the conviction by the police magistrate of Victoria on the 2nd of July, 1914, of one Edward Jim, an Indian, on the charge that he unlawfully had in his possession a portion of a deer contrary to the provisions of the Game Protection Act. The case submitted by the magistrate was as follows:

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"It was admitted and proved upon the hearing that: (1) The defendant is chief of the North Saanich Tribe of Indians, who have a reserve at Union Bay on the Saanich Peninsula, and another on Saturna Island, both in the Province of British Columbia. (2) The defendant killed a two-year-old buck deer upon the Saturna Island reserve for his household use, and had a portion of such deer in his possession at the time and place alleged in the information. (3) The defendant at no time made any attempt to conceal the said deer or any part thereof from the game warden or any person whatsoever. (4) The defendant had not obtained a permit pursuant to the provisions of the Game Protection Act. (5) The said reserve on Saturna Island is not occupied except by the Indians of the North Saanich tribe at short intervals for hunting and fishing purposes.

"The defendant submitted that by virtue of the treaty of 1852, the statutes of British Columbia in force at the time of confederation, the Terms of Union, the provisions of the British North America Act, and the Indian Act, the Province had no authority or jurisdiction to create

the acts in question an offence so far as concerns the Indian in question. I determined that the Game Protection Act is *intra vires* of the Provincial Legislature, and that the matters hereinbefore stated afforded no ground of answer or defence to the said information. The question for the opinion of the Court is whether my said determination was erroneous in point of law?"

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The appeal was argued before HUNTER, C.J.B.C. at Victoria on the 27th of April, 1915.

W. J. Taylor, K.C., for the accused.
Maclean, K.C., for the Crown.

HUNTER, C.J.B.C.: In my opinion, this conviction must be quashed. The facts are not in dispute, the central fact being that the defendant charged with an infraction of the Game Protection Act was an Indian who killed a two-year-old buck upon a reserve upon which he was entitled to live, and was using the meat for his household use. The question at once arises as to whether the Indian is within the scope of the prohibitions of the Provincial Game Protection Act. In my opinion, he is not. By the British North America Act, 1867, that is to say, by subsection (24) of section 91, Indians and lands reserved for the Indians are reserved for the exclusive jurisdiction of the Dominion Parliament. The Dominion Parliament has enacted a lengthy Act known as the Indian Act. Many provisions are there to be found in connection with the management of Indians upon their reserve; in fact, by section 51 it is expressly enacted "that all Indian lands . . . . shall be managed, leased and sold as the Governor in Council directs." Now, I cannot conceive it possible how any wider term can be used than the word "management" in connection with the Indians as to what shall or shall not be done upon an Indian reserve. I would say that the word "management" would, at all events, include the question of regulation and prohibition in connection with fishing and hunting upon the reserves. Then, also, special provisions have been made in connection with the subject of shooting and fishing. We find in another section that special provision has been made with regard to the subject of game in certain reserves in certain other Provinces. Undoubtedly if there was jurisdiction in the Dominion Parliament to make

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that regulation, there certainly would be, in my opinion, jurisdiction to make similar regulations with regard to reserves in British Columbia, and possibly, as Mr. *Taylor* suggests, it has not done so out of respect to the early treaties with the Indians in the Province. Then laws regarding the question of bringing in intoxicants on the reserves have been passed, and as I understand no question has ever been raised as to the right of the Dominion Parliament to pass those laws, and one would say that if the matter of bringing in intoxicants on to reserves was within the purview of the Dominion Parliament, that the question of what should be done with the game and fish within the reserves would *a fortiori* fall within their jurisdiction.

Moreover, I think that the question is in reality concluded by the case of *Madden* v. *Nelson and Fort Sheppard Ry. Co.* (1897), 5 B.C. 541; (1899), A.C. 626; 68 L.J., P.C. 148. It was there contended that because the Dominion did not choose to enact certain legislation regarding the fencing of railways which the Provincial Legislature thought was desirable, that the Legislature could, in the absence of such legislation on the part of the Dominion, temporarily, at all events, pass such laws under its power over civic rights. It was held that it would be impossible to maintain the authority of the Dominion Parliament if the Legislature was to be permitted to enter into the former's field of legislation.

Judgment

I am unable to distinguish this case in principle from that case. Obviously the proper course for the local authorities is not to attempt to pass legislation affecting the hunting by Indians on their reserves or to apply general legislation regarding game to such Indians, but if necessary to apply to the proper law-making authority and make any representations that they may see fit.

Conviction quashed.

ATKINSON v. THE PACIFIC STEVEDORING AND CONTRACTING COMPANY, LIMITED: UNITED STATES STEEL PRODUCTS COMPANY, THIRD PARTY.

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Negligence—Action at common law and under Employers' Liability Act—Third party—Action dismissed—Assessment under Workmen's Compensation Act—Admission by junior counsel against which senior counsel protests—R.S.B.C. 1911, Cap. 244, Secs. 10 and 11—Order XVI., r. 48.

In an action for damages at common law and under the Employers' Liability Act, the defendant brought in a third party. The action was dismissed upon the jury's answers to questions. The plaintiff then applied for compensation under the Workmen's Compensation Act. Counsel for the defendant admitted that the Act applied to the case, and paid into Court $1,500 as sufficient to satisfy the plaintiff's claim. Senior counsel for the third party declined to make any admission as to the applicability of the Act, but his junior counsel insisted on making the admission. The trial judge awarded $1,500 as compensation, and ordered the third party to indemnify the defendant.

Held, on appeal, that the trial judge had no jurisdiction to make the order against the third party.

Per MACDONALD, C.J.A.: The attitude of the leading counsel must be taken as representing the true attitude of the client.

APPEAL by the United States Steel Products Company, made a third party under Order XVI., r. 48, from the decision of GREGORY, J. of the 25th of January, 1915, in an action tried by him at Vancouver, with a jury, on the 18th and 19th of January, 1915, for damages sustained by the plaintiff while employed as a stevedore by The Pacific Stevedoring and Contracting Company, Limited. The defendant Company was under contract with the third party (who were charterers of the ship "Anna") to lighter the ship, and the plaintiff who is not a party to this appeal was employed by the defendant on the work of unloading structural steel for which they used the hoisting derrick, winch and tackle of the ship. While hoisting a load from the hold with the derrick the iron shackle

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at the furthermost end of the boom broke and the derrick fell, crushing the plaintiff's arm, the severity of which necessitated amputation. The jury answered questions and on the answers the trial judge dismissed the action, but on being requested by counsel for the plaintiff to award compensation under the Workmen's Compensation Act, counsel for the defence admitted that the Act applied to the case and paid into Court $1,500 and pleaded that the sum was sufficient to satisfy any claim which the plaintiff might have. The third party was represented by two counsel, and the senior counsel protested that he would not admit anything in regard to its applicability, but the junior counsel insisted on stating that they would raise no objection to the defendant's contention that the Act does apply. The judge then proceeded under the Act and ordered that the defendant pay the plaintiff $1,500, less the costs of the action, and further ordered that the defendant was entitled to be reimbursed by third party for said sum. The formal judgment taken out subsequently, recited that counsel for the defendant and for the third party admitted that the plaintiff was entitled to compensation under the Act.

The appeal was argued at Vancouver on the 14th of April, 1915, before MACDONALD, C.J.A., IRVING, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Cassidy, K.C. (*O'Brian,* with him), for appellant: The charterers of the ship employed the Stevedoring Company to unload the cargo. The plaintiff was employed as a workman by the Stevedoring Company, and on being made defendant they brought in the charterers of the ship as a third party. The plaintiff failed in his action at common law and proceedings immediately followed under the Workmen's Compensation Act. The defendant Company paid into Court $1,500, to cover any liability made and claimed over against us. Judgment was then given against us for that amount. A third party can only be brought in in respect of an indemnity or contribution, and when the case failed against the defendant it failed against us, and that ended the action as far as we are concerned. The defendant's action under the Workmen's Compensation Act has nothing to do with negligence and the third party cannot be

affected: see *Montforts* v. *Marsden* (1895), 1 Ch. 11. The cases of *Eade* v. *Winser* (1878), 47 L.J., Q.B. 584, and *Harris* v. *Harris* (1901), 8 B.C. 307, do not apply as we did not consent to the proceeding. The action against the defendant was on general issues, but we are only concerned with the question of the shackle, and the point here is whether on the facts adduced in the evidence and the findings of the jury we could be held liable: see *Newberry* v. *Bristol Tramway and Carriage Company (Limited)* (1912), 29 T.L.R. 177; *In re Salmon* (1889), 42 Ch.D. 351 at p. 360. In the defendant's pleadings there is no charge that we were responsible for the particular mode in which the rigging was fixed or that there was improper rigging or improper management; they just said the equipment and machinery were defective, and the only possible point on which they can make a case against us is on the shackle, and if there was any defect there it was a latent defect: see *Edwards* v. *Godfrey* (1899), 2 Q.B. 333; *Francis* v. *Cockrell* (1870), L.R. 5 Q.B. 501; *Marney* v. *Scott* (1899), 1 Q.B. 986. On third-party practice generally see *Benecke* v. *Frost* (1876), 1 Q.B.D. 419. As to the disposition of the costs under marginal rule 176, see *Dawson* v. *Shepherd* (1880), 49 L.J., Ex. 529; *In re Salmon, supra.*

Argument

Mayers, for respondent (defendant): It is a general principle of law when an act is done by one person at the request of another, which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done. In this case the work was done by the defendant Company at the direction and request of the third party: *Sheffield Corporation* v. *Barclay* (1905), A.C. 392; *Dugdale* v. *Lovering* (1875), L.R. 10 C.P. 196; *Waugh-Milburn Construction Co.* v. *Slater* (1913), 48 S.C.R. 609; *Western Canada Power Co.* v. *Velasky* (1914), 49 S.C.R. 423. We are not suing in tort, our claim arises entirely in contract. We have to pay under the Act and not at common law. The question of negligence does not arise: see *Dugdale* v. *Lovering, supra*; *Betts* v. *Gibbins* (1834), 2 A. & E. 57; *Adamson* v. *Jarvis*

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(1827), 4 Bing. 66; *Toplis* v. *Grane* (1839), 5 Bing. N.C. 636; *Victoria School Trustees* v. *Muirhead & Mann et al.* (1895), 4 B.C. 148. It might easily be contended we were agents as we had no contract over the means of doing the work: See Pollock on Torts, 9th Ed., p. 81. We contend the case is entirely covered by *Mowbray* v. *Merryweather* (1895), 2 Q.B. 640. The third party supplied us with machinery in which there was a latent defect, but it was their duty to test the machinery before it was handed over to us. They undertook to indemnify: see *Moel Tryvan Ship Company* v. *Kruger & Co.* (1907), 1 K.B. 809; (1907), A.C. 272 at p. 276. When something breaks that should not break the onus is on them and the fault is apparent; *res ipsa loquitur* applies: see *Scott* v. *London Dock Co.* (1865), 3 H. & C. 596 at p. 600.

Argument

Cassidy, in reply: *Mowbray* v. *Merryweather* does not apply as the defect in that case was patent.

Cur. adv. vult.

10th August, 1915.

MACDONALD, C.J.A.: The defendant (respondent) was under contract with the third party (appellant) to lighter the appellant's ship and the plaintiff, who is not a party to this appeal, was employed by the respondent in the work of lightering the ship. The plaintiff was injured in the said work and brought this action against the respondent, and the respondent brought in the third party by notice and claimed indemnity under the contract aforesaid, one of the terms of which was that the appellant was to give the respondent the use of the ship's gear, which included a derrick, in the use of which the accident to the plaintiff happened.

MACDONALD, C.J.A.

The jury answered questions, and on these answers the learned judge dismissed the action, but on being requested to award compensation under the provisions of the Workmen's Compensation Act, he proceeded to do so.

There is a good deal of confusion in what was then done. The appellant was represented by senior and junior counsel. Senior counsel very properly, I think, declined to make any admission concerning the applicability of the Workmen's Compensation Act to the employment in which the plaintiff had

been injured. His junior, however, insisted upon making that admission and as respondent had brought $1,500 into Court and pleaded that that sum was sufficient to satisfy any claim which plaintiff might have under the Workmen's Compensation Act, the learned judge awarded that sum as compensation and ordered the appellant to indemnify respondent against that liability.

I am bound to say that, in my opinion, the course pursued was irregular, and one not to be encouraged. The proceedings under the Workmen's Compensation Act are no part of the action. To begin with, it was improper to plead the bringing into Court of the $1,500. The paying into Court of a sum of money in satisfaction of the cause of action is quite proper, but it is not so to pay in and plead it in satisfaction of a right or claim not sued for.

Now, the defendant was sued at common law and under the Employers' Liability Act. These were the causes of action with which he had to do in his pleadings.

Then again, the learned judge had no jurisdiction under the Workmen's Compensation Act unless the employment was within the purview of that Act, and he seems to have been of the opinion that the Act did not apply to the plaintiff's employment, and without finally adopting that opinion I am inclined to agree with it.

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If that view be the right one, the award of compensation was not made pursuant to the Act, but was the voluntary submission of the parties founded on the agreement of the plaintiff, the respondent's counsel and that of the appellant's junior counsel, but against the protest of his leader.

In such a situation I must accept the attitude of the leader as representing the true attitude of the client, and hold that the third party did not acquiesce in and hence is not bound by the award if that award depends for its sanction upon the agreement aforesaid and not upon the Act.

If, on the other hand, the employment was within the scope of the Workmen's Compensation Act, the question is, had the learned judge power to make an award against the third party, the appellant, that it should indemnify the respondent against

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the payment of compensation? It is to be noted, first, that the learned judge could not award a lump sum of $1,500 without the consent of the parties. The Act provides for an award of weekly payments and not for a lump sum, and hence without the consent of the third party to that character of compensation, assuming for the moment power to make an order against it at all, the award of $1,500 could not stand. But the objection to the judgment as entered against the appellant goes deeper even than that. I find only one section in the Act which enables a judge to make an order under the Act against a third party, *viz.*, section 10. That section deals with a case where the employer being bankrupt is entitled to a sum from insurers; the section has no possible application to the case at bar.

Section 11 was referred to by Mr. *Cassidy* as indicating that there was no authority given the learned judge to make the order against the appellant, and I agree with his submis-

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sion in respect to this section. It has nothing to do with indemnity but provides simply for a case where the injured workman is entitled to sue a third person for damages as well as to claim compensation from his employer. In such case he may elect to sue the third person for damages or to proceed against the employer for compensation.

The appeal should therefore be allowed and the judgment appealed from varied by striking out paragraph 4 thereof. Costs here and below will follow the event as provided by statute.

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

After the plaintiff failed at the trial the learned judge, in my opinion, should have dismissed the case against the third party with costs. The third party was brought in to have

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their liability determined in the event of the plaintiff succeeding against the defendant. Note the recital contained in the third-party notice. That recital, in my opinion, controls the whole of the notice of claim for indemnity. Had the third party not appeared they would have been in no different position.

I do not think the third party's conduct in appearing at the arbitration and consenting (as I think, having regard to the recital in the order of the 25th of January, 1915, we must hold that they did consent notwithstanding the attitude of the leading counsel at the argument) that the injured man was entitled to recover under the statute and that $1,500 would be a fair settlement in lieu of the allowance contemplated by the statute, is a bar to this appeal. That consent might preclude them in an action properly framed on the indemnity, but not from appealing in this action.

GALLIHER, J.A.: I agree with the Chief Justice in allowing the appeal.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I agree with the Chief Justice in allowing this appeal. I merely wish to add that as the judgment entered by the learned trial judge upon the answers of the jury was a judgment that the defendant was not guilty of negligence, *i.e.*, whatever neglect of duty there was was not the *causa causans* accounting for the accident (and I may observe that upon the answers as made by the jury it was quite arguable that negligence was sufficiently found) and that judgment not being appealed against it is hopeless, quite apart from all the other insuperable difficulties in the way, for the judgment as entered under the Workmen's Compensation Act against the appellant, the third party, to stand. In this appeal it has to be admitted that no negligence was found as against the respondent; that being so, it involves this, that the shackle was good and sufficient for the purposes intended and the use to which it was put and this would satisfy any warranty, express or implied. That being so, in what way can liability be fixed upon the appellant? It would seem to me that the mere statement of this concludes the matter. The liability under the Workmen's Compensation Act arises apart from negligence; it arises in cases of "personal injury by accident arising out of and in the course of the employment" (section 6 (1), R.S.B.C. 1911, Cap. 244), in fact the workman may be contravening orders and doing his work in the wrong way, still if he was not doing something beyond the sphere of his employ-

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ment there is the right to compensation: see *Blair and Co. (Limited)* v. *Chilton* (1915), 31 T.L.R. 437.

The respondent could only succeed upon a claim for indemnity against the appellant, in my opinion, for any damages paid by reason of the Workmen's Compensation Act if they could invoke an express contract entered into by the appellant to be liable therefor. The evidence not establishing that, the recovery under the Workmen's Compensation Act was because of any fault of the ship's officers, crew or equipment, nor by reason of any defective tackle supplied or by reason of any act or default of the appellant, the injury by accident to the plaintiff arose out of the employment, and that alone constituted statutory liability upon the respondent—the employer—but not upon the appellant.

Appeal allowed.

Solicitors for appellant: *McKay & O'Brian.*
Solicitors for respondent: *Bodwell & Lawson.*

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IN RE LAND REGISTRY ACT AND SHAW.

Land Acts—Power of attorney for sale—Trustee selling to himself—Duty of registrar—Prima facie title—Land Registry Act, R.S.B.C. 1911, Cap. 127, Secs. 2, 14, 16, 29.

IN RE LAND REGISTRY ACT AND SHAW

A district registrar can refuse registration of a transfer when it is apparent from the documents presented to him that the transfer was made by an attorney for sale to himself (IRVING, J.A. dissenting).

A person authorized by power of attorney to sell or assign a certain piece of land cannot sell to himself (apart from the sanction of the owner) unless the instrument expressly confers such right.

Per MARTIN and MCPHILLIPS, JJ.A.: A district registrar acting under section 29, of the Land Registry Act, has a judicial duty to examine documentary and other evidence produced to him, and to act on the facts disclosed by such evidence.

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IN RE LAND REGISTRY ACT AND SHAW

APPEAL by the district registrar of titles for Vancouver from the decision of GREGORY, J. of the 23rd of February, 1915, allowing the petition of Guy M. Shaw under section 108 of the Land Registry Act and directing that the registrar accept for registration, and duly register, an assignment of mortgage in accordance with the terms of the application. The petitioner's father had given his son a power of attorney to sell and dispose of his property, and the petitioner applied to register an assignment of a mortgage from his father to himself, which was executed by himself as attorney in fact for his father. The district registrar refused to register the assignment until notified by the father.

Statement

The appeal was argued at Vancouver on the 9th of April, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

H. C. Hanington, for appellant: One Shaw had a registered mortgage. He gave his son a power of attorney for sale, and the son transferred the mortgage to himself. The registrar refused to register the transfer until the father knew and approved of the transaction. There is a fiduciary relationship. The son is entrusted by the father and it is incompetent for him to convey his principal's property to himself without his sanction. On the face of it there is not a safe-holding title, as the principal can set it aside at any time. It has been held that it is the registrar's duty to look into the jurisdiction of a judge who makes an order. On the question of how far the registrar can go see *In re Ryan* (1914), 19 B.C. 165. A *prima facie* case has not been made out: see *Gray* v. *Bell* (1882), 30 W.R. 606; Wright on Principal and Agent, 2nd Ed., 195; White & Tudor's Leading Cases, 8th Ed., Vol. 2, pp. 752, 833. A trustee for sale cannot purchase the trust property from himself, either directly or indirectly: see Williams on Vendor and Purchaser, 2nd Ed., Vol. 2, p. 983; Prideaux's Precedents in Conveyancing, 20th Ed., p. 245. In this case it is more than "voidable"; it is inoperative until the father has given his consent: Halsbury's Laws of England, Vol. 1, p. 173, par. 377. The registrar has to determine points

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of law and the validity of documents: see *Nicholson* v. *Drew & Norton* (1912), 2 W.W.R. 295; *In re Shotbolt* (1888), 1 B.C. (Pt. 2) 337 at p. 342; *Manning* v. *Commissioner of Titles* (1890), 15 App. Cas. 195 at p. 200; Hunter on Torrens System, pp. 25, 27, 253.

Mayers, for respondent: There are two classes of contracts. They are either void or voidable. There is no central contract, and we say this is voidable: see *Fox* v. *Mackreth* (1789), 3 Bro. C.C. 45; White & Tudor, 8th Ed., p. 722; *Coles* v. *Trecothick* (1804), 9 Ves. 234 at p. 246; *Low* v. *Bouverie* (1891), 3 Ch. 82. A trustee can sell to himself: see *Campbell* v. *Walker* (1800), 5 Ves. 678. All the registrar has to do is to examine documents not transactions: *Howard* v. *Miller* (1915), A.C. 318 at p. 326; *Furnivall* v. *Hudson* (1893), 1 Ch. 335.

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Hanington, in reply, referred to *Arnold* v. *Drew* (1913), 4 W.W.R. 435; *Williams* v. *Scott* (1900), A.C. 499 at p. 503; *Dunne* v. *English* (1874), L.R. 18 Eq. 524 at p. 532.

Cur. adv. vult.

10th August, 1915.

MACDONALD, C.J.A.: In my opinion it cannot be said that the registrar was wrong in refusing to register the instrument in question without proof of the acquiescence of the donor in the transfer of the mortgage to himself by the donee of the power of attorney.

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The registrar has to be "satisfied after examination of the title deeds produced that a *prima facie* title has been established by the applicant": R.S.B.C. 1911, Cap. 127, Sec. 29. Now, one of such title deeds is the power of attorney in question. It empowers the donee to sell and assign the mortgage in question but not to himself, that is to say, it contains no term authorizing him to sell to himself.

It would have to be conceded that if the power of attorney had in express terms prohibited the donee from selling and transferring the mortgage to himself, the registrar ought to refuse registration of the transfer. Now, though the power of attorney contains no such express prohibition the law supplies

it: Williams on Vendor and Purchaser, 2nd Ed., p. 986; and in equity such a transfer could not be upheld except by evidence of full disclosure, fair consideration and good faith on the part of the donee, the burden of proving which would be upon him: *Dunne* v. *English* (1874), L.R. 18 Eq. 524. Without such proof the presumption must be against the validity of the transfer.

The judgment below, however, is founded on the view that it is not for the registrar to try the question whether the act of the agent was valid or not. That view, I think, would be quite right if it were not for the fact that the invalidity of the transfer, or perhaps more correctly, the voidability of the transfer, appears on the face of the documents.

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As was pointed out by their Lordships in *Manning* v. *Commissioner of Titles* (1890), 15 App. Cas. 195, an officer in a position corresponding to that of the district registrar is not to be deemed a mere machine for making registration, even though the strict literal construction of the statute in the case before them would appear if strictly construed to make him such.

I would allow the appeal.

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IRVING, J.: I would dismiss this appeal.

In my opinion the registrar was not justified in refusing to register the deed because the donee in the power of attorney mentioned was also the grantee in the deed of assignment.

The registrar is not constituted a Court, and in my opinion until the deed is questioned in a Court of competent jurisdiction a deed executed as this was is *prima facie* validly executed.

The books quote precedents of letters of attorney granted to the donee for his own use. An instance of such a grant as old as the time of Richard I., is on record. The practice of giving the donee a power of attorney for his own use seems to have been borrowed from the similar *procuratio in rem suam* of the Roman law. The letters of attorney were used as a means of transfer, and it was at one time thought the practice of granting them had the effect of unduly stimulating litigation, and therefore to fall within the statutory prohibition of maintenance, unless the power was executed for the benefit of a creditor of the

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transferor. In consequence power executed for the benefit of a purchaser or donee was treated as void from the beginning of the 15th century, if not earlier, till near the close of the 17th century.

With all respect to the registrar, it seems to me that he is not concerned with the disposition of the property. The donor, in the absence of any suggestion from him to the contrary, I think we ought to presume, has approved of what the donee is doing. Fraud should not be presumed.

MARTIN, J.A.: Under section 29 of the Land Registry Act the respondent applied for registration of a title to a charge, *viz.*: the assignment to himself of a registered mortgage for $2,300 given by one Annie McKay to his father, Harry T. Shaw. Though in this case the title which is sought to be registered relates only to the question of the validity of the assignment of this encumbrance on the property, yet it must be borne in mind that a question of general and far-reaching importance respecting titles to land is thus raised as appears by the following definition of "charge" given in section 2:

"'Charge' means and shall include any less estate than an absolute fee, or any equitable interest whatever in real estate; and shall include any incumbrance, Crown debt, judgment, mortgage, or claim to or upon any real estate."

The class of title that an applicant for a charge must establish before the title thereto can be registered is a *prima facie* title and the duty of the registrar is, after receiving the application in Form D, thus set out (section 29):

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"The registrar shall, upon being satisfied after examination of the title deeds or other evidence (if any) produced that a *prima facie* title has been established by the applicant, register the title of such applicant by making a memorandum thereof in the register," etc.

I pause here to note that this requirement is the same as it was in the corresponding section 20 of the original Land Registry Ordinance, 1870, with the exception that the registrar must now not only in "satisfying" himself take cognizance of the title deeds produced by the applicant, but also the "other evidence if any" produced to him, which is an amplification of the original section 20. And it is also to be noted that by that original section the same standard of *prima facie* title was

required both as to charges and fees simple (under section 19). At present in applications for titles to fees absolute and indefeasible (as defined by the interpretation section 2) under sections 14 and 16, the registrar is to satisfy himself "that a good safe-holding and marketable title" has been established, which indeed is the definition given of an "indefeasible fee" in an estate in fee simple so held. But strangely enough in neither of these sections is there a reference to the production of "other evidence" than that which would appear from the "deposit with the registrar [of] all title deeds in his [applicant's] custody, possession, or power." Whatever may be thought to be the difference (if any) theoretically between a *prima facie* title and a "good safe-holding and marketable one" in the investigation under sections 14 and 29, there is none in the final result and in practice because under 23—

"The registered owner of an absolute fee shall be deemed *prima facie* to be the owner of the land described or referred to in the register for such an estate of freehold as he legally possesses therein, subject only to such registered charges as appear existing thereon and to the rights of the Crown."

And by section 25 the certificate of title that he gets is "received as *prima facie* evidence in all Courts of Justice in the Province of the particulars therein set forth," etc. The effect of a certificate of indefeasible title is set out in section 22. So it follows, as shewn by the test of sufficiency when the title to an absolute fee is challenged in Court, that there is no real or practical distinction in the class of title that is acquired under the one section (29) or the other (14), whatever, if any, there may be in the words describing them, and it is therefore the duty of the registrar to be as careful in "satisfying" himself "after examination" that the title has been well "established" in the one case as in the other. I have used the words "after examination" as though they occurred in this dual relation, but in fact, and strangely, they occur only in section 29 and not in 14 or 16, which accentuates the obvious fact that the "satisfaction" under section 29 is no mere casual one, but that there is a judicial as well as a ministerial duty imposed on him to "examine" both the documentary and "other evidence produced" to him—*cf. In re "Transfer of Land Statute," Ex parte Bond* (1880), 6

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V.L.R. 458; 1 Hunter's Torrens Title Cases, 257; *Johnson* v. *Kirk* (1900), 30 S.C.R. 344 at p. 350. So the same care should be exercised and the same standard required by the examiner in passing upon the title to a charge, say a mortgage for $500, or a lease for one hundred years, under section 29, as the title to a fee under section 14.

There have been some judicial expressions on the term *prima facie* title in our Courts and others. Thus CREASE, J. in *In re Shotbolt* (1888), 1 B.C. (Pt. 2), 337, in an instructive judgment on the origin and operation of the statute, points out at p. 341, that "clearly the intention of the Act [is] in gradually perfecting titles by registration" and says, p. 341:

"The ordinary certificate merely shews that the person registered under it is the *prima facie* owner of the land, subject to be defeated or otherwise disturbed in the possession of it by any claimant who can shew a somewhat better title, or in any of the ways in which such an ownership may be legally devested in favour of some other person, such as informality, error or omission in registration, conflicting estate or interest. Both kinds of certificates are subject to all registered charges and the rights of the Crown, but these do not affect the title itself."

In *Hudson's Bay Co.* v. *Kearns & Rowling* (1894), 3 B.C. 330, MCCREIGHT, J. said, p. 343:

"A *prima facie* title can only mean a good title till there is evidence to displace it."

And DRAKE, J. said, p. 345:

"The registrar, even when a charge is intended to be registered, must satisfy himself, after examination of the title deeds produced, of a *prima facie* title. If there are no deeds produced, the registrar has to satisfy himself of the reasons of the non-production."

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And *cf. In re Trimble* (1885), 1 B.C. (Pt. 2) 321, and *Re Vancouver Improvement Co.* (1893), 3 B.C. 601.

In *Kirk* v. *Kirkland et al.* (1899), 7 B.C. 12, a conflict between two certificates of title for absolute fees to the same property, the latter being derived under a tax-sale deed, WALKEM, J. said, p. 17:

"As might be expected, counsel are agreed as to the proper meaning of the term '*prima facie*' as used in the above sections; but it may not be amiss to quote the following from Starkie (Ev. Vol. 1, 544): '*Prima facie* evidence is evidence, which not being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favour that it must prevail if it be accredited, unless it be rebutted or the contrary proved.'"

And DRAKE, J. said, p. 23:

"The certificate of title is not a title deed, but it is evidence of a *prima facie* title existing, and the alleged owner may be called upon to establish his title in proceedings properly instituted."

And at p. 27 he gave certain extracts on the point from judgments therein mentioned.

In the same case the Supreme Court of Canada *sub nom. Johnson* v. *Kirk, supra,* considered the point at pp. 351 and 356, and held that the second certificate, issued during the existence of the first, was null and void, saying, p. 356:

"In fine the whole proceeding in the present case presents so many features of the utter absence of *bona fides* as to remove all *prima facie* evidence of title which the certificate given by the registrar afforded if it afforded any."

Later, in *Carroll* v. *Vancouver* (1903), 10 B.C. 179, it was held that the holder of a certificate of title derived under a tax-sale deed had "a good *prima facie* case as against the defendant (the former owner) until the latter shews a better title," which he had failed to do either by production of his prior certificate or otherwise.

Recently, in *Howard* v. *Miller* (1914), 84 L.J., P.C. 49; (1915), A.C. 318, their Lordships of the Privy Council, at pp. 324-5, considered the question in relation to a certain deed which was not, and to certain admissions which were held "sufficient to rebut the *prima facie* title conferred by registration."

In *Pritchard* v. *Hanover* (1884), 1 Man. L.R. 72 at p. 79, it was decided that a patent from the Crown establishes a *prima facie* title which will prevail unless displaced, and *Stevenson* v. *Traynor* (1886), 12 Ont. 804, is to the same effect.

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In proceeding to apply the foregoing observations to the case at bar we find that the regular documentary evidence discloses on its face the fact that the applicant had under a power of attorney from his father (who resided in England) to himself assigned to himself the mortgage that his father held from Annie McKay. The question, therefore, is was the registrar right in holding that a title depending merely upon such an act and instrument could be deemed to be a judicial "establishment" of a *prima facie* title?

I shall cite some authorities on the subject in general and

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then apply them to the particular case. First, there is the apt citation from Bythewood & Jarman given by the learned registrar in support of his ruling, and alternative requisition for ratification, and in *Crowe* v. *Ballard* (1790), 3 Bro. C.C. 117, therein referred to, Thurlow, L.C. at pp. 119-20, said:

"Ballard undertakes to sell the legacy . . . . then he buys it himself. That is alone sufficient to set aside the transaction. It is impossible, at any rate, that the person employed to sell can be permitted to buy."

The matter is very clearly put in Williams on Vendor and Purchaser, 2nd Ed., Vol. 2, pp. 983-4, dealing with the capacity to exercise powers, which is the specific question in this case, and is the third class the author is there considering, *viz.*:

"Where a man's title to sell or buy some particular piece of land is derived, not from his own beneficial ownership of the land or the money to be employed in the purchase, but from an authority in that behalf given to him, either by the act of the beneficial owner of the land or money or by statute on such owner's behalf, then he cannot well exercise the authority by selling to or buying from himself, either directly or indirectly; unless the instrument or statute conferring the authority otherwise provide. And if such instrument or statute allow of no exception in his favour, and in the transaction in which he purports to exercise such an authority to sell or buy he be himself the purchaser or the vendor, either directly or through the mediation of an agent, trustee or nominee for himself, or even (in the case of sale) by sub-purchase from a stranger, the sale or purchase is voidable in equity at the instance of the beneficial owner of the land sold or money paid in purchase. The transaction is, moreover, so voidable on the mere proof that the vendor or purchaser was acting in exercise of such an authority and in effect sold to or bought from himself; and it is immaterial whether the terms of the bargain so purported to be made were otherwise fair or were actually advantageous to the parties who seek to set it aside."

The special point about that statement of the general rule as applied to this case is contained in the latter portion of it respecting the "mere proof" and the "immateriality" of fair terms which otherwise would sustain the transaction: in other words, it turns upon the defective way in which the authority is exercised, as, in the case at bar, a personal incapacity or disqualification *ad hoc*.

The same author goes on, at pp. 985-6, to explain the rule, thus:

"It appears to rest at bottom on the principle that an authority given must be strictly pursued. Where a man is invested with an authority to sell or buy, the mandate is that he shall enter into a contract of sale or purchase; that is, a transaction implying a bargain between the person

authorized and some other person acting independently of him, the result of which is, that each incurs obligations to the other. Now, at law, a man cannot make a contract with himself, either alone or jointly with others; if he purport to do so, the transaction is absolutely void as regards him. It is impossible, therefore, for a man to sell or purchase from himself at law."

And he proceeds to point out that while he may at law evade the consequences by employing another as his trustee, yet:

"In equity, however, the substance of the transaction is regarded; and if a man exercising an authority to sell or purchase, in effect sell to or buy from himself, the transaction is not considered to be a sale at all, and is therefore an improper exercise of the authority."

And again at p. 988:

"A trustee for sale is no more competent to purchase the trust property as agent for a stranger to the trust than he is to buy it for himself. For to act as agent on behalf of a purchaser would obviously be in direct conflict with his duty as a trustee for sale; and, as we have seen, an authority to sell is not well exercised unless the vendor contract with some other person acting independently of him."

And at p. 991:

"The rules governing the case of a trustee for sale or purchase are equally applicable in every instance in which a person exercising an authority to sell or purchase stands in a fiduciary relation to the person by or on whose behalf the authority was conferred; although the former may not be a trustee under a formally constituted trust. Thus an agent employed to sell or purchase land, such as an auctioneer, an estate agent, or a solicitor, cannot buy the principal's land from himself for his own use or purchase his own land from himself for the principal."

And at p. 992:

"Even in these cases, however, the rule appears to rest, at bottom, on the ground that a sale or purchase by the authorized person to or from himself is no contract at all, and is therefore no proper exercise of the authority. Expressed in this form, the rule is equally applicable where the person exercising the authority does not stand in a fiduciary relation to those by whom or on whose behalf the authority was conferred."

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And after remarking on p. 993 that where an authority cannot be well exercised in favour of the person possessing it, "so also he cannot well exercise it in favour of any agent employed by him to conduct or act in the sale," and illustrating the case of a solicitor or auctioneer employed to conduct a sale of land, who "cannot become the purchaser thereof," he refers on p. 995 to the exception to the rule:

"If the instrument creating an authority to sell or purchase expressly or impliedly permit the person, to whom the authority is given, to be himself the purchaser or vendor, the case is taken out of the general rule; and he may well sell to or buy from himself in exercise of the power . . . ."

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"But, of course, in every case in which a person invested with an authority to sell or purchase is specially empowered to be himself the purchaser or vendor, the terms of the special power must be strictly observed; if not, the general rule will prevail."

The consequences are thus treated at p. 997:

"Where one invested with an authority to sell or purchase in effect sells to or buys from himself, the persons by or on whose behalf the authority was conferred have the option of affirming or avoiding the transaction; and if they elect to affirm it, the person authorized is firmly bound and cannot maintain, as against them, that the purported exercise of his authority was void."

And after pointing out that there can be no election without notice or knowledge of the facts giving that right, he proceeds to discuss and illustrate the different remedies open to the injured party in case of avoidance.

The practical result and effect of such transactions upon an investigation of title and the duty of a solicitor thereon are thus stated on pp. 1006-7:

"Where on a sale of land the purchaser has notice from the abstract or otherwise, that the vendor derives title through a sale or other conveyance made in favour of one occupying a position, from which undue influence would be implied, or made of a *cestui-que-trust's* interest in the trust property to his trustee, the purchaser's advisers should point out the consequent objection to the title and require the vendor to furnish evidence that the circumstances and terms of the apparently objectionable transaction were such as to render it perfectly valid. If the vendor can produce such evidence, the purchaser will have to accept the title on that point; for, when such an objection has been so removed, the Court does not consider the title too doubtful to be forced upon an unwilling purchaser, notwithstanding that the evidence offered do not include any testimony given by or conclusively binding the person, who would be entitled to set the transaction aside."

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And then a case like the present is dealt with:

"If, however, a vendor's title be derived through a sale made by a person, exercising an authority to sell, in his own favour, the nature of the objection to the title is entirely different; as in equity the exercise of the authority is void, and the equitable estate authorized to be conveyed has never passed away from the persons by whom, or on whose behalf the authority was conferred. In this case, therefore, the purchaser cannot be obliged to accept the title, without the concurrence of those persons or their successors in estate, all being *sui juris*."

So far back as 1800 in *Campbell* v. *Walker,* 5 Ves. 678, where a trustee bought at public auction, and for a fair price, the Master of the Rolls, after pointing out that the only way a

purchasing trustee can protect himself is by obtaining the consent of the Court to become a purchaser, said, p. 681:

"The Court would divest him of the character of trustee; and prevent all the consequences of his acting both for himself and for the *cestuy que trust;* for the reason of the rule is, that no man shall sell to himself: a case, in which it is impossible for the Court to know, that he did not do all he ought to have done. These infants had not the guard they ought to have had; that the trustee should not act for his own benefit; and the two characters should not be united."

Coles v. *Trecothick* (1804), 9 Ves. 234, was relied upon to the contrary, but an examination of the case shews that it supports *Campbell's* case because at p. 247 there is pointed out the necessity of "proving that the *cestui que trust* intended the trustee should buy" in order to escape from the rule.

In *Lewis* v. *Hillman* (1852), 3 H.L. Cas. 607 at pp. 629-30, it was said by Lord Chancellor Cottenham:

"I have been surprised, I confess, at this matter being pursued, when the rules of equity are so clear. No man in a Court of Equity is allowed himself to buy and sell the same property. He cannot sell to himself. Even in the case of a fair trustee, he cannot sell to himself. If he has the power or the trust to sell, he must have some one to deal with. Courts of Equity do not allow a man to assume the double character of seller or purchaser; and it is necessary, in order to preserve the interests of persons entitled beneficially to property, to maintain that rule. But here is a case which goes infinitely beyond that. I should lay it down as a rule, my Lords, that ought never to be departed from, that if an attorney or agent can shew he is entitled to purchase, yet, if instead of openly purchasing, he purchases in the name of a trustee or agent, without disclosing the fact, no such purchase as that can stand for a single moment."

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This shews two things, the general rule that a man cannot sell to himself even in a representative capacity, and that even where he has received authority to purchase openly, yet if he purchases secretly in the name of another the purchase cannot stand.

In *McPherson* v. *Watt* (1877), 3 App. Cas. 254 at p. 266, Lord O'Hagan said:

"An attorney [at law] is not affected by the absolute disability to purchase which attaches to a trustee. But, for manifest reasons, if he becomes the buyer of his client's property, he does so at his peril."

And then he goes on to point out what the attorney "must be prepared to shew" to justify the transaction, and concludes:

"And although all these conditions have been fulfilled, though there has been the fullest information, the most disinterested counsel and the fairest price, if the purchase be made covertly in the name of another, without

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communication of the fact to the vendor, the law condemns and invalidates it utterly."

This is a good illustration of how a title derived through a purchase by an attorney from his client might be justified, yet if during the investigation of it the fact should be disclosed that the attorney had "made the purchase covertly in the name of another" then the title could not be established at all, because *ex facie* it was rooted in a transaction which "the law condemns and invalidates utterly."

The latest illustration of the obstacles to self-contracting that I have found is in *Napier* v. *Williams* (1911), 1 Ch. 361, where it was held that covenants in a lease made by one person with himself and others are void.

I have not overlooked *Furnivall* v. *Hudson* (1893), 1 Ch. 335, which was cited to us; I merely note that it was a case of express authority to do the particular act and, therefore, has no application to the present question.

Many examples might be given of instruments which are valid on their face but really void because of incapacity, and so soon as the hidden incapacity is detected by the examiner the *prima facie* title becomes a bad one. For example, a title founded upon a power of attorney given by one discovered to be an infant, *Zouch* v. *Parsons* (1765), 3 Burr. 1794 at p. 1804; *Combes's Case* (1613), 5 Co. Rep. 135 at p. 140; a mort-

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gage given by an infant contrary to the Infants Relief Act of 1874; *Nottingham Permanent Benefit Building Society* v. *Thurstan* (1903), A.C. 6; a lease given by one purporting to act as an agent for an infant; *Doe d. Thomas* v. *Roberts* (1847), 16 M. & W. 778. Nor can a mortgagee buy lands put up for sale under his mortgage: *Hodson* v. *Deans* (1903), 2 Ch. 647, where it is said at p. 652, citing Lindley, L.J. in *Farrar* v. *Farrars, Limited* (1888), 40 Ch. D. 395 at p. 409.

> "It is perfectly well settled that a mortgagee with a power of sale cannot sell to himself either alone or with others, nor to a trustee for himself . . . . nor to anyone employed by him to conduct the sale. . . . . A sale by a person to himself is no sale at all, and a power of sale does not authorize the donee of the power to take the property subject to it at a price fixed by himself, even although such price be the full value of the property. Such a transaction is not an exercise of the power."

And a landlord may not buy the goods of his tenant sold under

his distress, as "mischief arises . . . . by the landlord being both buyer and seller": *Moore, Nettlefold & Co.* v. *Singer Manufacturing Company* (1904), 1 K.B. 820 at p. 826.

Finally, I refer to *Williams* v. *Scott* (1900), A.C. 499, a decision of their Lordships of the Privy Council. That is a case of much assistance in determining the present point because, as the report shews, p. 499:

"The question decided was whether the mortgagor's title was a good and marketable one, he having derived it by purchase from himself as trustee for sale."

The mortgagee, the respondent, had, under the power of sale, agreed to sell the lands to the appellant who resisted an action for specific performance on the ground that the mortgagor's title was bad because he had purchased the property from his mother's estate, which he was a trustee for the sale of. Their Lordships say, p. 503:

"It is clear undisputed law that a trustee for the sale of property cannot himself be the purchaser of it—no person can at the same time fill the two opposite characters of vendor and purchaser."

And as this fact had become apparent during the investigation of title specific performance was refused, even though efforts had been made to overcome the objection by adducing evidence to shew that all the beneficiaries had agreed in the sale with full knowledge of all the circumstances, and an alleged release was submitted as purporting to shew their approval and acquiescence. It was urged that in the absence of evidence to the contrary the Court must assume that the release was a proper one, and that the *cestui que trusts* were informed of all necessary matters. But it was said, p. 508:

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"Their Lordships are unable to agree in this view. The conveyance itself is incapable of any interpretation but one, and that is unfavourable to the title. A trustee for sale of trust property cannot sell to himself. If, notwithstanding the form of the conveyance, the trustee (or any person claiming under him) seeks to justify the transaction as being really a purchase from the *cestui que trust*, it is important to remember upon whom the onus of proof falls. It ought not to be assumed, in the absence of evidence to the contrary, that the transaction was a proper one, and that the *cestui que trusts* were informed of all necessary matters. The burthen of proof that the transaction was a righteous one rests upon the trustee, who is bound to produce clear affirmative proof that the parties were at arm's length; that the *cestui que trusts* had the fullest information upon all material facts; and that, having this information, they agreed to

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and adopted what was done. . . . . Under these circumstances, it would be inequitable to force such a title as this upon the appellant. It is not merely that the purchaser would be running the risk of proceedings being taken by the *cestui que trusts* to reopen the transaction. The purchaser would be saddled with a property which he would be unable for many years to put upon the market, unless recourse was had to some special restrictive condition which might seriously reduce the price a purchaser would be willing to pay for it."

I make this citation also in support of the action taken by the registrar in calling upon the applicant for a ratification from his father before the title could be accepted. But the applicant rejected this opportunity "to justify the transaction" in this manner, and stood his ground upon his bare right to sell to himself as establishing a *prima facie* title. In *Delves* v. *Gray* (1902), 2 Ch. 606, *Williams* v. *Scott, supra,* was applied and specific performance was refused because the vendor was "not able to confer upon (the purchaser) a marketable title" (p. 611) owing to the fact that a trustee for sale had re-purchased the property from his own vendee, the Court observing that "Delves (the trustee) was incapable of purchasing under the circumstances." And *cf.* also *In re Douglas and Powell's Contract* in the same volume, 296 at pp. 313-4.

In the light of the foregoing authorities, I am of the opinion that when an applicant wishes to "satisfy" an examiner that he has a *prima facie* title he must produce one which does not require further evidence, documentary or otherwise, to complete it to the full extent of the interest sought to be registered. If what is produced is only sufficient to shew the examiner that something more is wanted to prevent its being defeated, or avoided, either by the exercise of an election in its favour, or for any cause, then it has not been "established." It will be presumed in favour of it that, *e.g.,* all documents executed and attested as required by the Act are valid and that persons who have executed them have done so in the professed capacity which is essential to due execution, and also that there has been no fraud in transactions which are ostensibly *bona fide* according to the documents produced. But where, *e.g.,* said evidence discloses the fact that the apparently lawful capacity in which a vendor or purchaser acted is a prohibited one to attain the desired object, then there is impressed upon the title such a

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"palpable blot" (*Williams* v. *Scott, supra,* p. 507) that it could not be forced upon a purchaser nor passed by the examiner as *prima facie.* So soon as it appears, in the course of examination, that a transaction which is presumably legally effective is not so, then the whole aspect of the matter changes. If the situation disclosed is such that it is inevitable that the document relied upon must be supplemented by another or receive some further ratification or approval to make it effective, or that some active step must be taken to justify it, then there is no *prima facie* title. As the point is not easy to define precisely and as the subject is one of such great public importance, I shall attempt to elucidate my meaning by giving some illustrations:

1. Where a title turns upon a duly-executed lease or conveyance from Doe, the registered owner in fee, to Roe, the applicant, the title is *prima facie* established in the latter and should be registered. There is no presumption that the transaction, legal on its face, may have been the result of duress or is otherwise liable to be avoided; on the contrary, it is presumed to be valid.

2. But if the evidence disclosed the fact that Roe was a solicitor and had covertly bought the land from one of his clients, then it would not be *prima facie,* because such a transaction could not in any circumstances stand, and it would be necessary for the applicant to take some active step to cure the defect by getting a further conveyance from the client or formal ratification after full disclosure.

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3. Or if it appeared that Roe was really a trustee who had sold trust property to himself, his title would likewise fail and his grantee's with it.

4. If it appeared that a power of attorney, ostensibly valid, under which a lease had been granted had actually been given by an infant, the title which was up to that discovery *prima facie,* would be bad, because an infant cannot give letters of attorney.

5. The same would happen in the case of a lease granted by an agent who was discovered to be the agent of an infant.

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6. Likewise, also, in the case of a mortgage given by an infant under the Infants Relief Act.

7. Likewise, also in the event of a similar discovery in the case of a conveyance by a ward to his guardian, because that is a void act.

In the case at bar we have an illustration of the same person attempting to exercise two capacities at the one time, *i.e.,* the buyer and the seller of a mortgage covenanting with himself. The moment that fact disclosed itself in evidence (here as it happens by the production of the power of attorney already registered), it was shewn that the assignee could not buy from himself as he was in a prohibited capacity, according to the general principle which I am of the opinion extends to this and similar cases, and therefore the instrument was either void or (what in this case has the same effect) of such a nature as to be inevitably voidable unless approved of by the assignor, and such a state of circumstances required the applicant to become the actor in obtaining the approval of the donor of his authority, otherwise no title could be established.

I am unable to see any distinction in principle between this case and several of those cited, *e.g., Williams* v. *Scott* and *Delves* v. *Gray,* and in my opinion the documents and evidence produced to the registrar have failed to establish either a *prima facie* or a "good safe-holding and marketable title," because of the said "palpable blot upon the face of the title," which no examiner of titles could safely pass over in the discharge of his duty, which is well defined in the extract from Williams hereinbefore cited.

It follows that the appeal should be allowed.

GALLIHER, J.A.

GALLIHER, J.A.: The document presented for registration was, on its face, contrary to law. That point is covered by the cases cited to us by Mr. *Hanington.*

The respondent's contention is that it is no part of the duty of the registrar to inquire into the legality or illegality of the instrument, but his duty is to register same if it conforms to the provisions of the Land Registry Act.

I cannot take this view. I think the registrar's duties are

not those of a mere automaton, and the more so in a case like the present, where the instrument on its face is contrary to law.

The appeal should be allowed.

MCPHILLIPS, J.A.: I am in entire agreement with my brother MARTIN, and I do not propose to add anything further other than to say that I concur in allowing the appeal.

Appeal allowed, Irving, J.A. dissenting.

Solicitor for appellant: *H. C. Hanington.*
Solicitor for respondent: *H. Despard Twigg.*

STEWART v. CANADIAN FINANCIERS TRUST COMPANY.

Agreement for sale of land—Misrepresentation—Agent who misrepresents subsequently employed by purchaser—Constructive notice.

A person who is induced by misrepresentation of an agent to enter into an agreement for the purchase of land, is not debarred from relief from the principal because he appoints as his agent the agent who deceived him immediately after the agreement was entered into; he will not be assumed to then have notice of the deceit.

APPEAL from the decision of MACDONALD, J. in an action for the cancellation of an agreement for the sale of land in the New Westminster district and a refund of the moneys paid on the purchase price on the ground of fraudulent misrepresentation, tried by him at Vancouver on the 15th of December, 1914. Statement

On the 11th of March, 1912, the plaintiff entered into an agreement to purchase from the defendant Company two blocks of land containing about eleven acres in the New Westminster

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district, paying down $900 on the purchase price and later paying $380 in interest at different periods. During negotiations the defendant Company was represented by an agent, one Crawford, who represented to the plaintiff that the said lands were reasonably level and perfectly suitable for subdividing into building lots; at the same time Crawford undertook, upon the sale going through, to look after the subdivision of the blocks and obtain the necessary plans for registration on behalf of the plaintiff. More than two years after the agreement was entered into the plaintiff heard that the delay in having the property subdivided was caused by the fact that the municipal council would not approve of the plans as submitted. He then examined the property and found that in fact one of the blocks of land was on a precipitous slope and the other formed part of the overflow of Seymour Creek, a very small portion of either block being, in fact, fit for use for subdivision purposes. The trial judge found for the plaintiff, cancelled the agreement, and ordered a refund of all moneys paid by the plaintiff on account of the purchase price. The defendant Company appealed.

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

Argument

Dorrell, for appellant: Stewart purchased two blocks in 1912. The defendant Company's agent said the land was good herd land and the trial judge found misrepresentation. Crawford and Stewart were old friends and we contend their relationship should be carefully examined. In any case the land was suitable for subdivision: *Stewart* v. *Cunningham* (1915), 21 B.C. 255; 8 W.W.R. 579. A subdivision plan was put in and rejected, and fresh plans were submitted. After the sale Crawford was Stewart's agent, and he should have known of the land and complained before over two years had expired.

E. A. Lucas, for respondent (plaintiff): On the question of the agent's knowledge being notice to the principal, see *United Shoe Machinery Company of Canada* v. *Brunet* (1909), A.C. 330; *Lindsay Petroleum Company* v. *Hurd* (1874), L.R.

5 P.C. 221; *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1. Notice to the agent is constructive notice, but there must be actual notice: see Smith's Equity, 4th Ed., pp. 346, 351; *Dixon* v. *Winch* (1900), 1 Ch. 736; *Sheldon* v. *Cox* (1764), 2 Eden 224; *In re Hampshire Land Company* (1896), 2 Ch. 743; Halsbury's Laws of England, Vol. 1, pp. 215-6, par. 456; Bowstead on Agency, 5th Ed., pp. 346-351; *Wyllie* v. *Pollen* (1863), 3 De G. J. & S. 596. The defendant must shew that the plaintiff knew of the actual condition of the property before the sale: see Halsbury's Laws of England, Vol. 20, p. 726. The only question is that of delay in bringing the action.

Argument

Dorrell, in reply: On the question of constructive notice see Williams on Vendor and Purchaser, 2nd Ed., Vol. 1, p. 248; *Sandberg* v. *Palm* (1893), 54 N.W. 1109.

Cur. adv. vult.

10th August, 1915.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss this appeal.

IRVING, J.A.

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

MARTIN, J.A.

MARTIN, J.A: There is only one point, not dealt with by the learned judge below, upon which, in my opinion, an argument can be founded against the judgment. It is that though the plaintiff has proved that he did not have actual notice of the misrepresentation till very shortly before the action, yet he must be held to have had constructive notice thereof, because he appointed as his agent for the sale of the property the same agent (Crawford) of the defendant Company who had made the misrepresentations to him upon which he bought. The appointment of the agent by the plaintiff was made while the purchase was being negotiated, to take effect immediately upon its conclusion, after which he, Crawford, was to have full charge of the newly-acquired property with the object of subdividing and re-selling it.

The peculiar feature about the case is that the notice that is thus sought to be constructively fastened upon the principal is not that which was acquired by the agent in the course of his duty after he became agent, but something he knew before that

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time in the course of his duty to another principal. In other words, the suggestion is that his prior knowledge should be carried over from the former to the present principal. Now, the very matter of which notice is sought to be constructively brought home to the new principal is that which was falsely represented to him, as the purchaser, by Crawford when he was agent for the vendor only. No case was cited to us which supports the contention that constructive notice should be imputed in such or similar circumstances. On the contrary, the most analogous authorities point to the unreasonableness of the expectation that the new agent should reveal his old duplicity to his new employer: see Williams on Vendor and Purchaser, 2nd Ed., Vol. 1, pp. 248-9, 251-2; and *Waldy* v. *Gray* (1875), L.R. 20 Eq. 238; *In re Hampshire Land Company* (1896), 2 Ch. 743, affirmed in *In re David Payne & Co., Limited* (1904), 2 Ch. 608; *Deep Sea Fishery Company's (Limited) Claim* (1902), 1 Ch. 507; and *The Birnam Wood* (1907), P. 1, from which I extract and apply to the case at bar the following remarks of Cozens-Hardy, L.J., p. 13:

"I think that really would be carrying the doctrine of implied notice to an extent which would be quite shocking, and must interfere with honest and legitimate business dealings."

And Lord Justice Farwell, says, p. 14:

"The Courts have of late years been unwilling to apply the principle of constructive notice so as to fix companies or persons with knowledge of facts of which they had no knowledge whatever. It is extravagant to assume that this man Wotherspoon would have said anything whatever to the Company about his unpaid bill of costs, though I do not think it is necessary to impute any dishonest design to him at all."

MARTIN, J.A.

In *Wells* v. *Smith* (1914), 3 K.B. 722, Scrutton, J. said, p. 725:

"I should be very slow to allow the effects of actual fraud to be nullified by constructive notice."

But furthermore, even if it should be held that as regards others the principal would become affected with notice in such circumstances, *e.g.*, in the case of a subsequent sale by himself to a third party—yet it would not extend to this case where what is attempted to be done is that the deceived person when he applies for relief from the vendor who deceived him should be debarred because he must be assumed to have had notice of

the deceit immediately upon his appointing as his agent the agent who had deceived him. It would, however, be unconscionable to permit the deceiving vendor to take the position that the misrepresentation made by his agent which induced the sale were not in fact true. So far as he is concerned he is, in my opinion, estopped from saying that his own representation made through the same channel as that by which notice is sought to be inferred, was not true, though, of course, it would be open to him to shew that actual notice had been given through the same channel. As Scrutton, J. said in *Wells* v. *Smith, supra,* p. 726:

"I think, a man who tells a lie to another cannot protect himself by saying, 'Your agent should have warned you of my lie.'" MARTIN, J.A.

Now, the defendant Company, by its agent Crawford, "told a lie" to the plaintiff.

The appeal should be dismissed.

GALLIHER, J.A.: The sale herein was for two blocks of land aggregating approximately eleven acres, for a lump sum. The evidence is that had block 43 been as level as block 37, there would have been no complaint as to misrepresentation. The plaintiff Stewart seems to have given his evidence honestly and to have relied absolutely on the representations of Crawford, the admitted agent of the defendants for sale, but the agent of Stewart for subdivision and resale. I must say, however, that I have little sympathy for the position taken by Stewart after a lapse of about two years in which he made no further inquiry as to the nature of this property, and it may be that had defendant's pleadings raised the question of whether Stewart had not so dealt with Block 37 during the interval (or had that been the course adopted at the trial) as to preclude him from making *restitutio in integrum* a different result might have followed, but on the pleadings and the evidence adduced that question is not open to us, and as the case was presented I think the judgment below is right. GALLIHER, J.A.

The appeal should be dismissed.

MCPHILLIPS, J.A.: In my opinion the judgment of the learned trial judge should not be disturbed. I was at first con- MCPHILLIPS, J.A.

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siderably impressed with the view that our decision in *Stewart* v. *Cunningham* (1915), 21 B.C. 255; 8 W.W.R. 579 would govern in the determination of this appeal, but upon full consideration of the facts that decision cannot be said to be decisive upon the particular facts of the present case. *Stewart* v. *Cunningham, supra,* was a case where the character of the land could not but be held to have come to the notice of the defendants in the action—the purchasers of the land. In the present case, however, such was not the case, although it is true there has been very considerable delay. The attempt was made upon the argument to shew that there was such constructive notice of the character of the land that the plaintiff should be disentitled at this late date from relying upon the misrepresentation that the land was level land. With this contention I cannot agree, and I entirely associate myself with what my brother MARTIN has said upon this point. The defendant must be held to be answerable for the misrepresentation of their agent, which is clearly proved (*Lloyd* v. *Grace, Smith & Co.* (1912), A.C. 716; *Milburn* v. *Wilson* (1901), 31 S.C.R. 481) and the plaintiff would appear to have fully established the right to have rescission of the agreement of sale (*United Shoe Machinery Company of Canada v. Brunet* (1909), A.C. 330; 78 L.J., P.C. 101, Lord Atkinson at p. 338).

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Appeal dismissed.

Solicitor for appellant: *Donald Smith.*
Solicitor for respondent: *F. G. T. Lucas.*

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Yukon law—Nuisance—Abatement of—When notice of intention to abate not necessary—Placer mining—Flow of water carrying tailings—Diverting stream—Yukon Placer Mining Act, R.S.C. 1906, Cap. 64, Secs. 15 and 16.

For the purpose of abating a nuisance caused by the plaintiff directing the flow of water through his claims in such a manner as to carry tailings from his claims into those of the defendant, thereby damaging and interfering with the defendant's mining operations, the defendant, at the instance of the mining inspector, entered on to the plaintiff's claims, closed one gate in the plaintiff's dam and opened another, in order to divert the flow of the water and abate the nuisance. An action for trespass was dismissed.

Held, on appeal, affirming the decision of MACAULAY, J. (MACDONALD, C.J.A. and IRVING, J.A. dissenting), that where the nuisance is one of commission, entry may be made on the claims of the wrongdoer without notice for the purpose of abatement.

Held, further, that this rule applies whether there is an emergency or not. *Jones* v. *Williams* (1843), 11 M. & W. 176, followed.

Per MCPHILLIPS, J.A.: The defendant was justified in what he did, in that it was done under the direction of the mining inspector in pursuance of sections 15 and 16 of the Placer Mining Act, and the fact that section 89 of said Act provided for a penalty in no way precluded the defendant from insisting on his right of action by reason of the special damage that was occasioned by the plaintiff's wrongful act.

APPEAL from the decision of MACAULAY, J. in an action for damages for trespass, tried at Dawson, Yukon Territory, on the 18th to the 21st of October, 1914. The facts over which the action arose are as follow: The plaintiff and the defendant, placer miners, owned certain creek claims, the former on Dublin Gulch and the latter on Haggart Creek, Dublin Gulch being a tributary of Haggart Creek, the waters of the latter flowing into the Stewart River, a tributary of the Yukon. The plaintiff's claims are about half a mile above the defendant's. On the plaintiff's claims is a large open cut left from work done in previous years. In 1913 this cut was partially filled with tailings from the plaintiff's previous mining operations. Above the cut is a dam with two gates, one of which lets the water into the reservoir and thence to the cut, and the other leads to a

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waste ditch which runs around and avoids the cut. On the morning of the 31st of May, 1913, in the freshet season, the waste gate in the dam was closed and the water was running through the other gate into the cut, with the result that the tailings in the cut were carried out and down stream onto the defendant's claims. The plaintiff had been warned by the mining inspector not to turn the water into the cut until he (the plaintiff) had built a brush dam below so as to prevent any tailings being carried down on defendant's property, but he neglected to build this dam. On the 31st of May, the defendant, having discovered that the water was running into the cut and carrying tailings therefrom onto his property, requested the mining inspector to investigate, and together they went up to the plaintiff's claims. On their way up Dublin Gulch they passed the plaintiff, and the mining inspector spoke to him, telling him he wanted to see him on his way back, but did not tell him for what purpose, nor did he ask him to accompany them. The mining inspector and defendant then went on up stream to the cut and dam, where the mining inspector made an investigation, and, finding that the water was running into the plaintiff's cut, came to the conclusion that the stream was carrying the plaintiff's tailings down onto the defendant's claims on Haggart Creek. They then returned to see the plaintiff, but could not find him, and, after endeavouring to do so for about two hours, they again went up stream and, under the mining inspector's instructions, the defendant closed the plaintiff's gate leading into the cut and opened the waste gate letting the water from the dam into the waste ditch. They then went down stream, and on the way met the plaintiff, the mining inspector telling him what had been done and directing him not to close the waste gate until he had built his brush dam. The plaintiff started his brush dam a day or two later, and, after completing it, closed the waste gate on the 3rd of June. The plaintiff brought action claiming trespass against the defendant in entering upon his claims and opening the waste gate, alleging that the water thus let into the waste ditch carried tailings into another cut started on one of the plaintiff's lower claims which he had opened and prepared for working. Defendant counter-

claimed for damages by reason of the plaintiff's tailings having been carried on to the defendant's claims, as already described, and in the previous years.

F. T. Congdon, K.C., (*Tabor,* with him), for plaintiff.
J. P. Smith (*Gosselin,* with him), for defendant.

23rd October, 1914.

MACAULAY, J.: At the close of the trial I found as a fact on the evidence that the plaintiff suffered no damage by reason of the opening of gate No. 2 in the dam on the plaintiff's property by the defendant, under the direction of the mining recorder, as the evidence convinced me that no tailings were carried on to the open pit on the plaintiff's property from the waters which were diverted by the opening of gate No. 2 and ran through the waste ditch.

It is argued that in any event the defendant was a trespasser in going upon the plaintiff's property and opening the gate, and as such the plaintiff would be entitled to nominal damages against him by reason of such trespass. I reserved this point at the trial to examine the authorities cited, and also to examine the provisions of the Yukon Placer Mining Act. Under section 15 of the Yukon Placer Mining Act, among other things, the mining inspector "may summarily order any mining works to be so carried on as not to interfere with or endanger the safety of any mining property," and section 89 provides the penalty which may be imposed in default of the observance of such order. Section 16 provides that:

"The gold commissioner, mining recorder or mining inspector, or the deputy of any such officer, or any judge of the Territorial Court, or any one deputed by any of them, may enter into or upon and examine any claim or mine."

The evidence shews that the defendant entered upon the plaintiff's mining claim in company with the mining inspector, Mr. Kelly, and at his request, and under the direction of the mining inspector, the defendant opened gate No. 2 in the plaintiff's dam in order to allow a portion of the water to flow through the waste ditch and abate the nuisance which the evidence shews existed by reason of the tailings from the plaintiff's property being washed down upon the defendant's property by the waters

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which were flowing through gate No. 1 in the plaintiff's dam, and then through several flumes or ditches or "rip raps," as it was described in the evidence, upon the plaintiff's property, and carrying tailings therefrom upon the mining property of the defendant.

Under section 16 the mining inspector had the right to enter upon the property of the plaintiff, and the defendant, being deputed by the mining inspector, in my opinion, was also lawfully upon the property. I am also of opinion that the defendant was lawfully entitled to open the gate as he did in order to abate the nuisance as above described, so long as he did not cause any unnecessary damage by so doing. I have found as a fact that no damage was caused by the opening of the gate as aforesaid.

The defendant was on the ground under the direction of the mining inspector and acted under his direction. Even if he had not been acting under the directions of the mining inspector, in my opinion he would still have been justified in opening the gate in the manner in which it was opened, and for the purposes for which it was opened, and still would not have been a trespasser. Having come to this conclusion, I am of opinion that the plaintiff's action should be dismissed with costs.

MACAULAY, J.

At the conclusion of the trial I also found as a fact that tailings from the plaintiff's property and his workings thereon were allowed to be carried upon the defendant's property, and that he suffered damages in consequence thereof. The evidence further shews that tailings from the workings of other people upon the creek besides the plaintiff also were carried upon the defendant's property, and it is impossible for me to find on the evidence how much damage the defendant suffered by reason of the plaintiff's tailings having come upon his property, as I am unable, upon the evidence, to segregate the damages caused to the defendant by the plaintiff's tailings and by the tailings of the several other parties who were working upon the said creek, and whose tailings were also deposited upon the defendant's ground. The defendant was unable to give any further or better evidence as to the *quantum* of damages suffered, and I am of opinion that if I were to order a reference to ascertain the amount of damage

caused to the defendant by the plaintiff's tailings being deposited upon his property, no better or further evidence could be offered on the reference than was offered before me on the trial. Being unable, therefore, to fix the *quantum* of damage suffered by the defendant, as aforesaid, the only course, in my opinion, I am able to follow, is to award him nominal damages. The defendant will, therefore, be entitled, on his counterclaim against the plaintiff, to damages in the amount of one dollar, and his costs of this action.

The appeal was argued at Vancouver on the 6th of May, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Charles Macdonald, for appellant (plaintiff): The defendant justified his action in opening the gate in question by virtue of the authority vested under section 15 of the Yukon Placer Mining Act in the mining inspector, which states that the mining inspector may summarily order any mining works so to be carried on as not to interfere with or endanger the safety of any mining property. It is contended by the plaintiff that this action cannot possibly apply to the facts in this case, but refers generally to the proper carrying on of mining operations endangering the safety of any mining property, and no section is provided by the Act for enforcing such orders, nor is any authority given to the mining inspector to enter upon the premises and abate any nuisance which he may think exists. If an order is issued by the mining inspector, and such order is not carried out, the only remedy is provided by section 89, which provides that a penalty may be imposed by a justice of the peace in default of the observance of any order issued by the mining recorder. Such an order is subject to appeal to the gold commissioner, and any right to appeal would instantly be done away with if the mining recorder could act upon his own observation. The defendant, in conjunction with the mining inspector, were ordinary trespassers when they attempted to interfere with the plaintiff's property. The right of the mining inspector by section 16 is limited to an inspection or examination. The mining inspector having no rights could not dele-

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gate any authority not vested in himself to the defendant, who did the actual opening. The rights of a mining inspector being statutory, must be strictly observed, and any departure constitutes him a trespasser. On the question of imminent danger the evidence shews that no such danger exists; that a similar state of affairs had taken place from time to time and appeals had been made to the Courts. The right to abate a nuisance by a person threatened can only be exercised in cases of extreme emergency, and the facts in this case do not lead to the belief that there was imminent danger.

Argument

Pattullo, K.C., for respondent (defendant): We contend that the mining inspector had jurisdiction to do as he did under sections 15 and 16 of the Yukon Placer Mining Act, and that the defendant was merely acting under his directions; there was an existing nuisance at the time, which the mining inspector himself found, and he was entitled in such circumstances to do what was necessary to abate the nuisance and prevent damage to the defendant which was then being sustained. In any event the trial judge found as a fact that there was an existing nuisance and that the defendant was being damaged and was justified in entering on the plaintiff's property and that without any notice opening the waste gate for the purpose of abating such nuisance. The evidence fully justified this finding of fact by the trial judge, the best evidence in support of this being the action of the mining inspector himself. [He cited Underhill on Torts, 9th Ed., 235; *Roberts* v. *Rose* (1865), L.R. 1 Ex. 82 at p. 89; *Stiles* v. *Laird* (1855), 11 Morr. 21; *Truesdale* v. *McDonald* (1824), Tay. 121; *Little* v. *Ince* (1853), 3 U.C.C.P. 528 at pp. 544-5; *Earl of Lonsdale* v. *Nelson* (1823), 2 B. & C. 302; *Jones* v. *Williams* (1843), 11 M. & W. 176; *Lorraine* v. *Norrie* (1912), 6 D.L.R. 122; *McCurdy* v. *Norrie, ib.* 134.]

Macdonald, in reply.

Cur. adv. vult.

10th August, 1915.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I concur in the judgment of IRVING, J.A.

IRVING, J.A.: The fifth section of chapter 64, R.S.C. 1906, in my opinion, will not support the judgment. As I understand other members of the Court are of the same opinion, I shall pass on to the second point. But I may say I am of opinion that "summarily" means simply "without ceremony or delay"—*cf. Sale* v. *Lake Erie and Detroit R.W. Co.* (1900), 32 Ont. 159, and was intended to give a right to proceed *ex parte*. The maxim *audi alteram partem* is a general principle of law: Maxwell on Statutes, 3rd Ed., 511-12. Clear and unambiguous language is to be looked for where the common-law rights are to be limited: *Brockwell* v. *Bullock* (1889), 22 Q.B.D. 567 at p. 575.

As to the other ground relied upon by the learned trial judge, *viz.*: the trespass was justified in order to abate a nuisance, we have a delicate point to deal with.

Mr. *Pattullo* referred us to Underhill on Torts, 3rd Canadian Edition, pp. 235-6.

The general rule is laid down in article 105 requiring notice requesting removal of the nuisance to be first given. Then in a note the learned author cites three instances in which notice is not necessary. Perhaps it will be better to set out exactly what he says:

"It must be observed that notice is generally necessary before entry on the lands of another—but it seems that notice is dispensed with in three cases, *viz.*, (a) where the owner of the land was the original wrongdoer, by placing the nuisance there; (b) where the nuisance arises by default in performance of some duty cast on him by law; and (c) when the nuisance is immediately dangerous to life or health."

This is evidently taken from the judgment of Lopes, J. in *Lemmon* v. *Webb* (1894), 3 Ch. 1 at p. 17.

The authority given for the first case is *Rex* v. *Rosewell* (1698), 2 Salk. 459. The report of that case is as follows:

"If H. builds a house so near mine that it stops my lights, or shoots the water upon my house, or is in any other way a nuisance to me, I may enter upon the owner's soil and pull it down; and for this reason only a small fine was set upon the defendant in an indictment for riot in pulling down some part of a house, it being a nuisance to his lights, and the right found for him in an action for stopping his lights."

Underhill, although citing it as an authority for dispensing with notice, nevertheless uses these words (p. 236): "I may

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after notice and request to him to remove it, enter and pull it down."

The writer of the article on Nuisance in Halsbury's Laws of England, Vol. 21, par. 932, speaking of abatement, says: "It is not a remedy which the law favours, and is not usually advisable," although he goes on to state that the right does certainly exist when the nuisance is caused by an act of commission. In paragraph 936 he says, after citing *Jones* v. *Williams* (1843), 11 M. & W. 176, "The trend of later judicial opinion, however, has been to require notice in all cases, except those of emergency, when the abatement involves entry on the land of another."

The reason that it is not favoured by the law, is based on the necessity for the preservation of peace and good order, and that reason should prevail in outlying districts, particularly where there is an officer having the summary powers given by sections 15 and 16.

As long ago as 1795, *Sadgrove* v. *Kirby,* 6 Term Rep. 483, it was pointed out that abatement ought to be allowed in very few cases, for the abator is judge in his own case. It is a remedy in addition to that given by action and ought to be allowed, but sparingly.

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The character of this nuisance must be considered, also the nature of the trespass in respect of which this action is brought. The nuisance was the washing down of tailings from the plaintiff's claim, which tailings were in the natural bed of the stream, on to the defendant's claim (an act of commission) The trespass was the opening of the plaintiff's gate, and the turning of the water into an artificial ditch, the effect of which was that the water was prevented from reaching the tailings. A trespass of such a character, in my opinion, cannot be justified without previous notice, "except in a case of emergency." I do not dispute the proposition of law that nuisances may be abated without notice, but I do not think that a defence of that kind should be allowed to prevail without good grounds. Lord Herschell in *Lemmon* v. *Webb* (1895), A.C. 1 at p. 5, speaks of the necessity of notice. As to whether or not his remark applies to a nuisance of commission, I find that the learned

author of Garrett's Law of Nuisance, 3rd Ed., 374, refers to this passage as implying that in all cases involving an entry on the land of another notice is necessary. I am not sure that the learned author is right. The reference may be only to nuisances of omission. However that may be, I think the plaintiff should have shewn an emergency in this case. The learned trial judge has not specifically found that it was a case of emergency, nor has he set out with particularity how he directed himself in reaching the conclusion he did. The matter is, therefore, one that this Court can deal with.

In *Commissioners of Sewers of the City of London* v. *Glasse* (1872), 7 Chy. App. 456 at p. 465, James, L.J. points out that a commoner (who, of course, is in a better position than the defendant in this case) feeling that he was bound to resort to abating a nuisance, would, if reasonable, give notice of his intention to demolish the offending erections.

In Pollock on Torts, 9th Ed., pp. 432-3, which appeared after the decision of the House of Lords in *Lemmon* v. *Webb, supra,* it says:

"But if the nuisance is on the wrongdoer's own tenement, he ought first to be warned and required to abate it himself."

Then in a note the author adds:

"This has always been understood to be the law, and seems to follow *a fortiori* from the doctrine of *Perry* v. *Fitzhowe* (1846), 8 Q.B. 757; 15 L.J., Q.B. 239."

The learned author then goes on:

"After notice and refusal, entry on the land to abate the nuisance may be justified; but it is a hazardous course at best for a man thus to take the law into his own hands, and in modern times it can seldom, if ever, be advisable."

IRVING, J.A.

This last sentence is quoted with approval by the Chief Justice of Canada in *Riopelle* v. *City of Montreal* (1911), 44 S.C.R. 579 at p. 581, by whom the conditions under which the right of abatement may be exercised are set forth in the following passage from Adrien Gerard's recent book on *Les torts ou delits civils en droit Anglais,* which I translate:

"If the cause (of the nuisance) is on the land of another, the owner of the property injured by the nuisance ought at first to call upon his neighbour to remove the cause; then, if he will not act, he can make an entry upon his land in order to do justice to himself. If for example my neighbour builds on his own land a house which prevents the exercise

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of my right of passage, I ought at first to call upon him to remove it, and if he delays, then I can remove it provided that I do not occasion to him any unnecessary damage and that I do not disturb the public peace. Let it be observed however that this is not a proceeding to be advised, because it is always dangerous to make an entry upon the land of another in order to do justice to oneself, and consequently we do not find any recent decision upon the point."

This passage, the learned Chief Justice says, sets out the conditions subject to which this right of abatement may be exercised, "with admirable clearness."

Now, there was, in my opinion, no pressing urgency in this case. That is clear from the fact that the defendant did not ask the plaintiff to abate the nuisance or go with them to the place when the inspector was about to look at it with a view to proceeding under section 15. The nuisance had existed for some time. It was not of such a grave character that the inspector (who regarded himself not as a volunteer but as one having authority to proceed *ex parte*) had felt called upon to interfere at once. No judge would have granted an *ex parte* injunction in the circumstances. Then, too, we must not forget that the plaintiff's cabin was within a few minutes' walk of the place where the abatement took place, and that the plaintiff was himself in the neighbourhood.

Again, the tenor of defendant's evidence at the trial was that what he did was by the authority of the mining inspector, rather than on account of the urgency of the case.

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Now, let us see what the defendant, who has constituted himself a judge in his own case, has done. First of all, he has determined that his property is being injured by the plaintiff; second, that he is entitled to an *ex parte* injunction restraining him from permitting the water to flow in its natural channel and a mandatory injunction compelling the plaintiff to turn the water into an artificial channel. No Court would have made such an order. The order he was entitled to was an order compelling the plaintiff to brush up his tailings, or to conduct his mining in such a way as not to interfere with the defendant's.

On the whole, I think the defendant has not shewn justification for his act. I would reverse the judgment so far as trespass is concerned and give judgment for the plaintiff for a sum

sufficient to vindicate the plaintiff's rights, say $1, and allow him the costs of the action.

MARTIN, J.A.: In this action the plaintiff sought to recover damages, laid at $2,000, to his mining claims on Dublin Gulch, Yukon Territory, alleged to be caused by the act of the defendant in opening a water-gate in the plaintiff's dam on said claims, thereby diverting the water, which caused tailings to be distributed over portions of said claim, covering up virgin ground which had not been mined. The defendant denied the damage, and justified his action as being done by him by order of the mining inspector under section 15 of the Yukon Placer Mining Act, R.S.C. 1906, Cap. 64, and also as being done in order to abate the nuisance of the water carrying tailings from the plaintiff's claims down to and upon his claim on Haggart Creek (of which Dublin Gulch is a tributary) and he counter-claims for damages caused by plaintiff's tailings.

The learned trial judge found on evidence which fully warrants the conclusion that the plaintiff suffered no damage and dismissed his action with costs, but that the defendant had suffered nominal damages—$1. He also found that the defendant had entered upon the plaintiff's mining claim for the purpose of abating the said nuisance, which had been erected and maintained there by the plaintiff, and the question is, was the defendant justified in so doing to the extent that he can escape even nominal damages for the trespass upon the plaintiff's property? We were informed by appellant's counsel that he did not quarrel with the learned judge's finding as to damages, and only the one question, just stated, was argued. It is not suggested that the defendant did more than was necessary or other than was proper to abate the nuisance (only opening another gate to let the water run out into the waste ditch) or acted in other than a peaceable manner, and the plaintiff at the time of the abatement was not operating his claim.

The case of *Raikes* v. *Townsend* (1804), 2 Smith 9, is an old and sound authority for the proposition, stated aptly in the head-note, that:

"If a man in his own soil erect a thing which is a nuisance to another,

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as by stopping a rivulet, and so diminishing the water used by him for his cattle; the party injured may enter on the soil of the other and abate the nuisance, and justify the trespass; and this right of abatement is not confined merely to nuisances to a house, to a mill, or to land."

This is a nuisance of commission, and it is conceded that no notice to abate the nuisance was given, and it is beyond question that none is necessary in case of an emergency: Addison on Torts, 8th Ed., 72, 101, 505; Underhill on Torts, 9th Ed., 235-6; Pollock on Torts, 9th Ed., 434; *Lemmon* v. *Webb* (1895), A.C. 1 at pp. 5-8; Halsbury's Laws of England, Vol. 21, p. 548. The emergency, however, is disputed in this case, and that question of fact is so difficult to decide that I feel special weight should be given to the finding of the learned trial judge which is based upon valuable local experience of mining conditions, apart from what appears directly upon the record, which places him in a far better position than we are to determine that nice question of practical mining in a far-distant territory where so much depends upon the natural conditions in a very short season. All I need say is that, in my opinion, there is at least some evidence on the record which he would have been entitled to act on, apart from his local knowledge and experience, or judicial notice, and he finds expressly that—

"Even if he had not been acting under the directions of the mining inspector, in my opinion he would still have been justified in opening the gate in the manner in which it was opened, and for the purposes for which it was opened, and still would not have been a trespasser."

MARTIN, J.A.

This justification of the defendant's action would include the existence of an emergency, thereby dispensing with notice. But even if there were no emergency, still as this is a nuisance of commission there is, I think, ample authority to dispense with notice. While the general rule is that notice has to be given, Lord Davey saying in *Lemmon's* case, *supra,* p. 8:

"It is true that where a person desires to abate a nuisance, which can only be abated by going on the land of the person from whom the nuisance proceeds, he must usually give notice of his intention to do so. That seems to me to be reasonable, because his act of going upon his neighbour's land is *prima facie* a trespass, and I can understand that he should be bound to give notice of his intention to do that which would be *prima facie* a trespass before doing it,"

yet in *Jones* v. *Williams* (1843), 11 M. & W. 176, Baron Parke in delivering the judgment of the Court in a case of

nuisance of commission, expressly decided the present point, saying, p. 181:

"It is clear, that if the plaintiff himself was the original wrong-doer, by placing the filth upon the *locus in quo*, it might be removed by the party injured; without any notice to the plaintiff: and so, possibly, if by his default in not performing some obligation incumbent on him, for that is his own wrong also; but if the nuisance was levied by another, and the defendant succeeded to the possession of the *locus in quo* afterwards, the authorities are in favour of the necessity of a notice being given to him to remove, before the party aggrieved can take the law into his own hands."

And at p. 182:

"We think that a notice or request is necessary, upon these authorities, in the case of a nuisance continued by an alienee; and therefore the plea is bad, as it does not state that such a notice was given or request made, nor that the plaintiff was himself the wrong-doer, by having levied the nuisance, or neglected to perform some obligation, by the breach of which it was created."

This is in accordance with the *dictum* of Best, J. in *Earl of Lonsdale* v. *Nelson* (1823), 2 B. & C. 302 at p. 311:

"Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them, without notice to the person who committed them."

These two cases were cited to the House of Lords in *Lemmon* v. *Webb* and nothing was there said to detract from their weight, though, of course, as Lord Herschell said, p. 5, the only question there was that of notice "prior to the removal of boughs overhanging a man's own land."

MARTIN, J.A.

After a careful search I can find no judicial utterance which would entitle me to limit the effect of the unanimous judgment of the five barons of the Exchequer in *Jones* v. *Williams, supra,* in which it is to be noted that Lord Abinger added, with the concurrence of the rest of the Court, after the judgment had been given that notice was necessary in the case of an alienee, that even in his case "it might be necessary in some cases, where there was such immediate damage to life or health as to render it unsafe to wait, to remove without notice." And it is to be observed that there was no allegation of notice in *Raikes* v. *Townsend, supra,* where the right to abate a nuisance of commission was upheld. I, therefore, am of the opinion that the defendant here was right in doing what he did without notice

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and that the *prima facie* trespass has been in all respects justified.

The learned judge also justified his action by said sections 15 and 16 of the Yukon Placer Act, but in the view I have taken, it is not necessary to express an opinion upon the nice question as to whether or no section 15 relates only to the safety of persons, and not to property, apart from persons.

Finally, and apart from all other questions, this appeal ought to be dismissed for the reason given by the Lord Chancellor in *Lemmon's* case, *supra,* p. 7, even if there had been a technical trespass, as follows:

"Then my Lords, it was said there had been some small trespass. The learned judge who tried the case said he did not think that was of importance; and it is obvious that this action was not brought on that account,—it was brought to try the question of right between the parties. Your Lordships would not enter on an inquiry of that description now. It would make no difference whatever as to the costs of the action, because that was not the substantial question to be tried, and it is not suggested for a moment that there were any damages that could be more than nominal. Under these circumstances, I move your Lordships that the judgment appealed from be affirmed, and the appeal dismissed with costs."

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I conclude with a note of warning that this proceeding to abate a nuisance by the act of the party aggrieved instead of resorting to the Courts is one which should not be encouraged because of its liability to bring about a breach of the peace, a recent illustration of which is to be found in *McCurdy* v. *Norrie* (1912), 6 D.L.R. 134; and it was said long ago by Chief Justice Eyre, in *Kirby* v. *Sadgrove* (1797), 1 Bos. & P. 13 at p. 18, that "abatement ought to be allowed in very few cases; for the abator is judge in his own cause."

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GALLIHER, J.A.: In cases of a nuisance of commission the authorities are clear that one may enter upon the property of another in case of emergency and without notice abate the nuisance. In the case at bar no notice was given and the evidence, to my mind, discloses no case of emergency, nor has the trial judge so specifically found.

I do not think the sections of the Yukon Placer Mining Act are applicable to this case. The case, therefore, in my view, is narrowed down to this: in cases of nuisance of commission (such as here) and where no emergency is shewn, did the

defendant commit a trespass by going upon the property of the plaintiff to abate the nuisance without giving notice to the plaintiff?

There was ample opportunity to do so as the mining inspector and the defendant met the plaintiff on their way up to examine the property, and could and should, in my opinion, have informed the plaintiff of their errand. It is true they said they wanted to see the plaintiff when they came back, and on returning and not finding the plaintiff at his cabin, he being temporarily absent, the defendant went back at the suggestion of the inspector and opened the gate in the dam, which is the act complained of. It is suggested that the plaintiff should have remained until their return as they requested, but I entirely dissent from that view. They knew what their errand was when they met him, and should in all decency have told him. Such acts are liable to lead to a breach of the peace and should be discouraged, and had I been trying the case, holding these views, I should have felt that in the circumstances of this case I would have been justified in taking it out of the principle laid down in *Jones* v. *Williams* (1843), 11 M. & W. 176.

The learned trial judge, however, took a different view, and I am not prepared to say he could not reasonably do so, and feel that I should not interfere.

McPhillips, J.A.: This is an appeal from the judgment of Macaulay, J. sitting without a jury in the Territorial Court of the Yukon Territory. The learned judge dismissed the action, which was one of trespass upon and damage to mining property of the plaintiff and entered judgment for the defendant for nominal damages only in respect of his counterclaim—*i.e.*, that tailings from the plaintiff's mining property were allowed to be carried upon the defendant's mining property—it was not possible though, upon the evidence, to differentiate as to the actual damage caused by reason of the fact that tailings from other mining property than that of the plaintiff were also carried upon the defendant's mining property. The learned trial judge held that the defendant was justified in entering upon

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mining property of the plaintiff in that he did so by and with the direction of the mining inspector acting in pursuance of the Yukon Placer Mining Act (R.S.C. 1906, Cap. 64), Secs. 15 and 16, and upon the further ground that there was the right in the defendant even apart from the statute law to abate the nuisance. In my opinion, the learned judge arrived at the right conclusion and the defendant was entitled to justify what he did as being done under the order and direction of the mining inspector, who was acting in pursuance of the statute. The evidence shews that the mining inspector had called the plaintiff's attention to the requirement that he should brush the tailings below before he turned the water on, which he had failed to do, but if I should be wrong in this upon the facts, it is clear that there was the right in the defendant to abate the nuisance. It was argued that as a penalty is provided by the statute—the Yukon Placer Mining Act, Sec. 89—the defendant had no right of action, but, in my opinion, the statute in no way precluded the defendant from insisting upon his right of action by reason of the special damage that was occasioned by the plaintiff's wrongful act: see *Little* v. *Ince* (1853), 3 U.C.C.P. 528 at pp. 544-5; *Truesdale* v. *McDonald* (1824), Tay. 121; and *Stiles* v. *Laird* (1855), 5 Cal. 120; 11 Morr. 21; and section 75 of the Yukon Placer Mining Act.

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It is contended that there was no right to abate the nuisance by entry upon the plaintiff's land because of the fact that there was no previous request requiring the removal of the nuisance. In my opinion, there was upon the facts sufficient previous request, but if I should be wrong in this, in the present case the plaintiff was the original wrong-doer and the notice was not necessary—*Norris* v. *Baker* (1616), 1 Rolle 393. Further, the nuisance arose by default in performance of a duty cast upon the plaintiff by law: see section 75 of the Yukon Placer Mining Act; *Lemmon* v. *Webb* (1894), 64 L.J., Ch. 205; and Underhill on Torts, 3rd Can. Ed., pp. 235-6.

It may be contended that *Lemmon* v. *Webb, supra,* goes the length of holding that a nuisance cannot be abated without previous notice where, to abate it, it is necessary to trespass on the neighbour's land. I hardly think that the case is rightly

reported in so stating, in any case, the nuisance here was one of commission and was also a case of emergency and comes within the language of the Lord Chancellor (Lord Herschell) at p. 206:

"Now, what are the only authorities to which appeal has been made? They are cases where a nuisance has existed on neighbouring soil, where the person complaining of the nuisance could only get rid of it by going on to the soil of his neighbour; and there no doubt it has been held that he cannot justify going on to the soil of his neighbour to remove the nuisance except in the case of emergency, unless he has first given his neighbour notice to remove."

And it is to be observed that Lord Davey says in his judgment, at p. 209:

"I entirely agree with what has fallen from my noble and learned friend on the woolsack, that there is no such obvious consideration of justice as would induce this House to lay down for the first time the proposition contended for by the appellant."

Then as to any damage to the plaintiff, if it could be said that there was a trespass, the learned trial judge, in his judgment, has said, "I have found as a fact that no damage was caused by the opening of the gate as aforesaid." In the light of this I would refer to what the Lord Chancellor said in *Lemmon* v. *Webb, supra,* at p. 207.

In the Court of Appeal in *Lemmon* v. *Webb* (1894), 63 L.J., Ch. 570 at p. 572, referring to *Jones* v. *Williams* (1843), 11 M. & W. 176; 12 L.J., Ex. 249, Lindley, L.J. said:

"*Jones* v. *Williams* was not a case of cutting trees, but it is the leading authority on the right to abate nuisances without notice; and it was decided that a person who suffers from a nuisance on another person's land can enter upon that land and abate that nuisance without notice if the person in possession of the land himself created the nuisance, or in case of emergency, but that in other cases notice to the person in possession and a request to him to abate the nuisance, and non-compliance with that request, are necessary to justify the entry and the abatement of the nuisance by the party aggrieved by it."

And it can be rightly said that the Court of Appeal and the House of Lords quite accepted the authority of *Jones* v. *Williams, supra,* in *Lemmon* v. *Webb, supra.* Also see Best, J. at p. 312 in *Earl of Lonsdale* v. *Nelson* (1823), 2 B. & C. 302 at pp. 311-2 (26 R.R. 363).

The learned editor of the Revised Reports in volume 26, at p. 370, says, referring to the language of Best, J. above referred to:

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"This *dictum* is cited and applied by Lord Herschell (Lord Chancellor) in *Lemmon* v. *Webb* (H.L. 27, Nov. 1894), (1895), A.C. 1; 64 L.J., Ch. 205, 206, where the right to cut down overhanging branches came directly into question."

In the present case the plaintiff being the original wrong-doer, bringing into existence the nuisance, and it being an act of commission and also one of emergency, the defendant was clearly entitled to abate the nuisance and the evidence establishing that the defendant's mining property was damnified by the nuisance, the defendant was entitled to recover damages for the injury sustained. Nominal damages only have been allowed to the defendant upon the counterclaim, and they have been rightly allowed.

MCPHILLIPS, J.A.

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

Appeal dismissed,
Macdonald, C.J.A. and Irving, J.A. dissenting.

Solicitor for appellant: *C. W. C. Tabor.*
Solicitor for respondent: *F. X. Gosselin.*

THE CANADIAN FAIRBANKS-MORSE COMPANY, LIMITED v. UNITED STATES FIDELITY AND GUARANTY COMPANY.

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CANADIAN FAIRBANKS-MORSE CO. v. UNITED STATES FIDELITY AND GUARANTY CO.

Principal and surety—Principal failing to carry out agreement—Change in transaction—Priority of surety—Discharge of surety.

G. agreed to erect a building and lease it to M. when completed, the agreement containing a stipulation that rent was not to be chargeable until the building was finished, damages being fixed for breach of the agreement at $20 a day. Shortly after the commencement of the work on the building U. went surety for the performance of the agreement by G. Before completion G. became financially embarrassed, and work stopped. M. then at his own cost proceeded with the work to completion.

Held, upon the facts and inasmuch as the agreement contained no stipulation that M. in default of G. undertake the completion of the building, the surety could not be called upon to assume any further liability than the said $20 per day.

ACTION tried by MACDONALD, J. at Vancouver, on the 6th of July, 1915, against the surety on a bond for the completion of a building. The facts are set out fully in the judgment. Statement

Martin, K.C. (*C. W. Craig,* with him), for plaintiff.
S. S. Taylor, K.C. (*Harvey, K.C.,* with him), for defendant.

11th September, 1915.

MACDONALD, J.: By agreement dated the 31st of August, 1912, John W. Gibb, alleging that he was the owner in fee simple of lot 541, adjoining the Connaught Bridge in the City of Vancouver, agreed to erect thereon a building of a certain size and description and to lease the land and building, when completed, to the plaintiff for a term of years. A copy of the proposed lease, bearing date the 1st of August, 1913, was attached to the agreement. It was executed by both parties and provided for payment of a rental of $22,000 per year for the first three years; $24,000 per year for the second period of three years; and $26,000 for the last four years. It purported to be in pursuance of the Leaseholds Act, and had Judgment

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no special provisions except an option to purchase the property for $500,000, and a stipulation that in case the building was not finished ready for occupancy on the 1st of August, 1913, "the rent of the premises shall abate and shall not be chargeable until the building is finished and ready for occupation by the Company."

The agreement provided that the building, when erected, should be suitable for the requirements of the above company, and in accordance with certain plans and specifications agreed upon by the parties. It then specially referred to the construction of certain portions of the building and approaches thereto, also to the installation of the heating and sprinkling system. The plaintiff was to have the privilege of storing goods in the basement of the warehouse free of charge for 30 days before the building was ready for occupation. The occupation of such space, however, was not to be considered in any way as acceptance of the building. The building was to be erected and ready for occupation by the 1st of August, 1913. In the event of the building not being completed by said date, Gibb was required to "pay to the Company (plaintiff) $20 per day for such default until the building shall be completed. Strikes, accident, fires or other causes beyond the control of either party shall be considered a plea for extension of time." It then provided for the execution of the lease already referred to commencing the 1st of August, 1913, such lease "to be in the form and contain the covenants which are set forth in the form of lease hereto attached." It was contended that the lease being executed, the bond, hereafter referred to, was only intended to apply in order to ensure construction of the building. I do not think this position is tenable. The lease was not to become operative until the building was completed, and the previous execution was simply to identify the document as to form, terms, and conditions agreed upon. This conclusion is supported by the fact that this lease was not adhered to nor acted upon, but a new lease granted, under which the plaintiff is occupying the premises. After the execution of the agreement, Gibb took steps for the erection of the building, and on the 12th of September, 1912, for that purpose entered into a

contract with one Walter H. Mueller. It was agreed that the cost of the building, if five storeys only, would not exceed $106,000, and that certain payments were to be made from time to time as the work proceeded and the balance to be paid within 30 days after the completion of the work. Shortly after the commencement of the construction of the building, plaintiff received information as to Gibb being financially embarrassed, and as a matter of precaution applied to the defendant for a bond which, upon payment of the premium of $400, was entered into, bearing date the 28th of February, 1913. Such bond was executed by Gibb as principal and the defendant as surety in the penal sum of $50,000, and the condition of the obligation refers to the agreement entered into by Gibb for the construction of the warehouse and is made part of the bond "as fully and to the same extent as if copied at length therein." It provided that the obligation was to be void if Gibb—

"should well and truly keep, do and perform each and every, all and singular the matters and things in said agreement set forth and specified to be by the said principal [Gibb] kept, done and performed at the time and in the manner in said agreement specified, and shall pay over, make good and reimburse to the above-named obligee [plaintiff] all loss and damage which said obligee may sustain by reason of failure or default on the part of said principal."

The construction of the work had in the meantime been proceeded with, and on the 28th of April plaintiff felt confident that the building would be completed by the 1st of August, 1913. On the 8th of May, however, complaint was made to Gibb that the work was progressing so slowly and with such an insufficient force of men, as to make it practically certain that it would not be completed and ready for occupancy within the time limit. It was pointed out that this would cause the plaintiff serious damage and that in the circumstances it would be forced to notify the bonding company, in order to protect its interests. Gibb's financial embarrassment had increased to such an extent that the work was suspended, and, according to a letter from Akhurst, the manager of the plaintiff Company at Vancouver, to his head office, it was completely shut down, prior to the 14th of June. Notwithstanding the statement of Gibb that he was the owner in fee simple of the land, it trans-

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pired that he only had an equity and that there was a large amount payable by him before he could acquire complete title. At this date the contractor refused to further proceed with the work except upon receipt of $20,000, being a portion of the money then owing to him. Gibb had apparently arranged a loan for $125,000 with Harvey Haddon, but until he secured the deed to the property and the building was completed, the loan could not be effected. He could not obtain any temporary assistance from a bank, and unless some financial arrangements were made the work could not be proceeded with. It would appear that if Gibb had owned the property in fee simple, as alleged, this climax would not have been reached. He could have obtained the usual building loan and carried on construction. No point was, however, made by plaintiff as to this false representation of title, and I assume that it was not considered to affect the rights of the parties. Plaintiff was anxious to leave the inadequate premises it then occupied, and Mueller and other creditors of Gibb were pressing for payment. I am satisfied that the defendant Company was aware of the position of affairs, not only through its local agents but also through Smith, a special representative, who came to Vancouver and became acquainted with the situation. Akhurst made various suggestions to his company with the view of overcoming the difficulties, and the creditors during June and July attempted in many ways to arrive at an arrangement that would secure the completion of the building. It was suggested that the plaintiff should purchase the property, but it declined to accede to this proposition. The unsatisfactory condition of affairs is fully outlined in a letter by Akhurst to Thos. McMillan, the vice-president of his company, dated the 2nd of July, 1913. It shewed that the amount required, in order to enable Gibb to obtain title, was for more than had been previously mentioned, and amounted to double the sum of $106,000. Mueller had only received $12,781 on account of his contract and had a large amount due him. There was also due to other contractors various large sums of money for material and work in connection with the building. Akhurst, in discussing the situation and suggesting a course to be pursued, mentioned in his letter

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"that we would also have to make the bonding company a party to the agreement, and I propose to insist on them putting up half the amount necessary." He pressed upon his company the desirability of adopting his suggestions as to purchase, and that the gross amount required would only be $40,000 to $45,000, and if the "bonding company come through, we would only have to put up half this amount." He referred to the site being an exceptionally good one and the rental extremely low, also that Gibb was spending $15,000 to $20,000 more on the building than was even necessary for him to do. He mentioned that the attitude assumed by the defendant was that of sitting back and waiting, claiming they were not responsible until the 1st of August, but that he expected, from the fact of a special representative being on the ground and becoming aware of the value of the lease, to get a definite proposition from such company within a day or two. Plaintiff subsequently, at his own cost, proceeded with the work, so that the building was completed, ready for occupation on the 15th of October, 1913. Unless it can be shewn that the defendant came to a definite and binding agreement with the plaintiff, so as to become liable for the moneys thus expended, I do not think it can be held liable therefor under the bond, it being "the clearest and most evident equity not to carry on any transaction without the privity of him [the surety], who must necessarily have a concern in every transaction with the principal debtor": Lord Loughborough, L.C. at p. 543 in *Rees* v. *Berrington* (1795), 2 Ves. 540.

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The position between plaintiff and Gibb was not similar to that between a building owner and a contractor. The building which Gibb agreed to erect was not to be the property of the plaintiff, but intended only for its use upon payment of the stipulated rent. There was naturally no provision in the agreement between these parties similar to that generally contained in a building contract, whereby the owner could, as in *Wright* v. *Western Canada Accident and Guarantee Ins. Co.* (1914), 20 B.C. 321, upon default of the contractor, proceed with the completion of the building, and charge the amount expended against the contractor. Gibb agreed with the plaintiff for the

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lease of premises, upon which there was to be erected, ready for occupation by the 1st of August, 1913, a certain specified warehouse. Rent was not to be payable until the building was ready for occupation. Failure of Gibb to satisfactorily carry on construction or to complete within the time specified did not entitle the plaintiff to enter on the premises and proceed with the work. It could only claim damages for breach of the agreement. The amount of such damage was fixed at $20 per day. This was considered and decided between the parties as the only "loss and damage" which the plaintiff would sustain "by reason of the failure or default on the part of the said principal" (Gibb). In my opinion, this was the only obligation which defendant undertook at the time of the execution of the bond. Fuller, president of the plaintiff Company, took this view of the purpose and intent of the bond, as indicated by his letter of the 21st of July to Akhurst (complaining of the inadequacy of $20 per day for delay in completion of the building), and he then added "it looks to us as if this were going to be very embarrassing, not getting any substantial damage for the expense and annoyance we are suffering and against which we took our bond." If the principal could only be held liable to the extent mentioned, then the surety could not, without subsequent agreement to that effect, have its liability increased. Plaintiff, through McMillan as vice-president, summed up the situation on the 18th of July, in a letter of that date to Akhurst, as follows:

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> "While the action of the insurance company is not likely to result in strengthening their position with this company, yet they are well within their rights in refusing to take any steps until such time as Gibb may be in actual default. Their position is quite similar to our own—that of 'standing pat' with the hope that those who are actually tied up will be compelled to make the advances or concessions, as the case may be, in order to save themselves from absolute loss."

There were thus two courses open to the plaintiff at this time, either to lie back and do nothing, as mentioned by McMillan, or, if it felt so inclined, upon obtaining the consent of Gibb, to enter upon the property and arrange for the completion of the work. This latter course was not contemplated in the agreement, and would be an extension or, at any rate, a change from the liability created by the bond. Plaintiff was

fully aware of this position, and that it would have to make the "bonding company a party" to any such arrangement. Did defendant ever make the definite proposition already referred to? It is beyond question that there was no agreement executed by the defendant whereby it agreed to reimburse the plaintiff for any portion of its outlay in connection with the building. Plaintiff contends that the correspondence and subsequent course of conduct evidenced an agreement of this nature, which would be binding upon the defendant, or, in the alternative, the completion of the building was for the benefit of Gibb and the defendant, and that it should be repaid moneys thus expended.

Dealing with the first contention, I do not think the evidence adduced proved that the defendant was a party to the completion of the building by the plaintiff. It had no right to object to the plaintiff so acting. The creditors of Gibb were anxious that the building should be placed in a condition so that rents would become payable. It was also necessary to complete in order to obtain the loan from Haddon. Many meetings and consultations took place, and the result was an agreement whereby the plaintiff agreed with Gibb to advance $25,000 towards the completion of the building, such amount to be repaid out of the rent payable during the first and second year of the lease. The letter dated the 1st of August, 1913, containing this agreement, stated that it was without prejudice to plaintiff's rights against the defendant. On the same date the solicitors for the plaintiff notified the defendant that default had been made by Gibb under his contract for the erection of the warehouse, and that the plaintiff would seek payment for such damages as it might sustain by reason of default. It was then arranged that the property should be vested in trustees, and at a meeting held on the 4th of August, 1913, it was "unanimously decided by all those interested to go ahead and complete the building." Documents were prepared by the solicitor for the plaintiff. It was also arranged that the interest of John W. Gibb in the property should be transferred to his father, David Gibb. Akhurst was aware of this solution of the difficulty and was at first named as one of the trustees, but, subsequently, on objection from his head office, declined to act.

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When he reported the result of the efforts to proceed with the construction of the building on the 5th of August, he certainly was not under the impression that defendant had agreed to advance any portion of the contemplated expense. An extract from his letter of that date reads as follows:

"If the bonding company would come through and make an advance no one would suffer any loss, and the bonding company would eventually be reimbursed. If there is anything that you can do to bring about this arrangement I certainly think it is to our interest to do so."

This is emphasized by a letter, dated the 6th of August, 1913, from Smith to Lang, vice-president of the defendant Company, in which he says:

"I quite agree with you that every danger flag is out against our paying out any money on this job."

Whatever opinion the plaintiff may have entertained as to defendant Company eventually contributing to the outlay in the first instance or to the subsequent deficiency, I do not think that the defendant ever receded from the position referred to by Smith. The liability under its bond was thus not extended so as to make it liable for any portion of the moneys expended by the plaintiff or for which it had become liable. In so concluding, I should add that I am not discrediting the evidence given by the plaintiff, but do not think it sufficient to create an agreement of the nature required.

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As to the contention that the completion of the building by the plaintiff was for the benefit of the defendant, and it, consequently, should bear the cost. Assuming that there was no agreement on the part of defendant to reimburse the plaintiff for this outlay, then the plaintiff undertook the completion of the work without being compelled to do so, and I do not think the defendant can be saddled with the burden and held liable for the amount. If the agreement with Gibb had contained a stipulation that the plaintiff could, in default of Gibb completing, undertake the work, then the position might be quite different. While it might be argued that the damage, estimated at $20 per day, might cease to run at an earlier date through the action of the plaintiff, still it had no right to seek recourse from the defendant for the expenditure. It would be a material alteration from the original liability assumed by the defendant,

and if, being called upon to consent to such substituted liability, it refused, then it should not be imposed. I think the plaintiff, being well aware that it had no agreement with the defendant to be recouped for the outlay, weighed the advantage or disadvantage of completing the building and decided, in view of the favourable terms of the lease and location, coupled, perchance, with business friendship towards some of the creditors of Gibb, to adopt the course referred to. In passing, I refer to the option given by Gibb to the plaintiff to purchase the property for $500,000. No reference was made either during the trial or the argument to this privilege having any bearing upon the rights of the parties. It would appear simply to have been a nominal figure. This is borne out by the statements of Akhurst and by the correspondence shewing lower figures quoted during the time when the construction of the building was at a standstill. It is also worthy of mention that in the subsequent lease, dated the 6th of November, 1913, given by W. R. Arnold and David Gibb, as lessors to the plaintiff, under which it is occupying the property, a new option is given at $350,000, thus finally disposing of the first option.

Defendant contends that in the circumstances it is not liable even for the amount of $20 per day from the 1st of August to the 15th of October, when the plaintiff went into occupation of the premises. A number of decisions were cited both as to the amount being a penalty and not liquidated damages, and also as to the defendant being relieved from liability through the actions of the plaintiff. I do not think it necessary to discuss these cases, as the facts differ from the one under consideration, but have, however, sought to be guided by the principles to be deduced therefrom. I think that the amount of damage that the plaintiff would suffer from day to day through lack of facilities in carrying on its business, comparing the old warehouse with the new and otherwise, would be difficult of close adjustment. I consider the parties were entitled to determine the probable amount of damage in advance, and the *per diem* amount of damage fixed is a reasonable one. Unless through other considerations the plaintiff has lost its right to recover, it is entitled to damages for 76 days at $20 per day, amounting to $1,520.

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Variations of the agreement between plaintiff and Gibb were relied upon to relieve the defendant from any liability. It alleged that a different form of lease was entered into between different parties, and that it contained different provisoes from that originally agreed upon. I think these variations are not substantial. In any event, they took effect subsequently to the time when the damage began to accrue. They were not prejudicial to the defendant. Other variations were alleged, such as the active, or at any rate passive, support given by plaintiff to the change in the title to the property and substitution of another party as building owner in place of John W. Gibb. The defendant should not now object and endeavour to escape liability through such changes, as they were caused by the financial embarrassment of its principal, for whose default it had, for valuable consideration, agreed to become liable. I do not think any of the changes were of such a character "as to effect the surety in any way by substantially or materially altering the risk." They all tended to bring about the main object of all parties, *viz.*: speedy completion of the building and occupation by plaintiff.

Plaintiff, under clause 16 of its agreement with Gibb, had the privilege of viewing the specifications covering the "heating apparatus . . . . as well as all piping, belt fittings, vault fronts, and other goods usually sold by the plaintiff Company," and they were to be purchased from it by Gibb, provided the prices quoted were reasonable and compared favourably with other prices. Gibb ignored this portion of the contract, though the plaintiff sought to obtain the benefit of it. It resulted in loss of profit to the plaintiff of $800. This is distinct from the amount of damage agreed upon for non-completion of the building, and should also be recoverable from the defendant under the bond.

There will be judgment in favour of plaintiff for $2,320, with costs.

Judgment for plaintiff.

MOWAT AND MOWAT v. GOODALL BROTHERS.

MACDONALD, C.J.A. (At Chambers)

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MOWAT v. GOODALL

Costs—Appeal from taxation of costs of appeal—Main appeal taken by leave under section 119 of the County Courts Act—County Courts Act, R.S.B.C. 1911, Cap. 53, Secs. 116, 117, 119, 122.

The costs of an appeal taken pursuant to leave granted under section 119 of the County Courts Act, should be taxed on the Supreme Court scale in accordance with the main portion of section 122 of the Act: subsections (1) and (2) of section 122 do not apply.

APPEAL by the successful appellants from the taxation of the costs of appeal. The main appeal had been taken pursuant to leave granted under section 119 of the County Courts Act. The taxing officer held that the taxation fell within the provisions of subsections (1) and (2) of section 122 of the Act, and granted $50 costs, the maximum allowed under said subsections. Statement

The appeal was argued before MACDONALD, C.J.A. at Chambers, in Victoria, on the 14th of September, 1915.

F. C. Elliott, for appellant.
J. Percival Walls, for respondent.

MACDONALD, C.J.A.: Appeal from taxation of the costs of appeal by the successful appellants. The appeal was taken to the Court of Appeal by leave given pursuant to section 119 of the County Courts Act. The taxing officer taxed the costs at $50, holding that the taxation fell within the provisions of section 122, subsections (1) and (2) of the said Act. That section provides that the costs shall follow the event subject to the provisions of subsections (1) and (2) of that section. It is contended that this appeal does not fall within either of these subsections, and I think that contention is right. Said section 119 provides for a special case not contemplated in the other sections giving the right of appeal. It deals with and permits an appeal to be taken where leave is obtained in cases entirely outside of the provisions of the preceding sections. Appeals Judgment

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under that section, therefore, are governed by the general rule that costs shall follow the event, and that the scale shall be the Supreme Court scale unless they can be brought specifically within subsections (1) and (2). Now, subsection (1) applies specifically to appeals under section 117, or appeals from interlocutory judgments, orders or decrees. Clearly the appeal in question does not fall within that subsection. Then, subsection (2) applies only to appeals under section 116. This subsection is also clearly not applicable to appeals under section 119. It may be that the failure to include appeals under section 119 within the beneficial provisions of said section 122 as a *casus omissus,* but that is a matter for the Legislature. It does seem anomalous that the costs of an appeal in a case where a few dollars are involved should be taxed on the Supreme Court scale, while the costs of other appeals under sections 116 and 117 should be taxed on reduced scales. It was suggested by counsel that an appeal under section 119 might involve very important legal questions, and that the pecuniary amount involved would not be the inducing cause to the granting of leave, and that if an important legal question were at stake there was no reason why the appellant should not have full costs. The same might be true of appeals under section 117, but nevertheless such appeals are governed by the restrictive tariff provided by section 122 (1). In the appeal in question, while the matter was of considerable importance to insurance companies it was of no great importance to the general public, and if the insurance company decided to settle a legal principle of importance to itself and to others in the same business, I can see no reason why its customer, sued for the paltry sum of $35, should pay a large sum in costs for the purpose of settling that principle. However, I must decide the case according to the law as laid down by the Legislature, and doing so I must allow the appeal and direct that costs shall be taxed in accordance with the main portion of said section 122, and not with reference to the subsections (1) and (2).

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Appeal allowed.

BECK v. THE "KOBE."

MARTIN, LO. J.A.

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Sept. 17.

BECK v. THE "KOBE"

Admiralty law—Jurisdiction—Seaman's wages—Right of master against ship for wages—Canada Shipping Act, R.S.C. 1906, Cap. 113, Secs. 191, 194.

A master of a ship is put upon the same basis as a seaman in respect of recovery and remedy, as well as of substantive rights under the provisions of the Canada Shipping Act. The claim of a master for wages, where the amount is less than $200, is, therefore, within the restrictive provisions of section 191 of the Act, and the Admiralty Court has no jurisdiction to entertain it.

MOTION by the defendant to set aside a writ and warrant for arrest of a ship in an action by the master of the ship for wages, heard by MARTIN, Lo. J.A. at Victoria on the 8th of September, 1915. Statement

Woodworth, for the motion: The question on which the further authority was asked was understood by me to be whether a master has rights and remedies under the Canada Shipping Act and the Merchant Shipping Act greater than an ordinary seaman. In answering this question, and in particular whether he was bound by section 191, I have consulted MacLachlan on Merchant Shipping, 5th Ed., 218, 237 (n), and 258; Temperly on Merchant Shipping, 2nd Ed., 89; Abbott's Merchant Ships and Seamen, 14th Ed., 185 and 296; Halsbury's Laws of England, Vol. 26, p. 53; and Encyclopædia of the Laws of England, Vol. 14, pp. 529, 532, 533. All these citations from text-books are more or less relevant, and their applicability rates in about the order above given. Argument

Paraphrasing roughly MacLachlan's Merchant Shipping, 258: A master's right to recover his wages *in rem* are the same as the rights of the seaman, and he has no other rights *in rem.* To the same effect is Abbott, p. 296; MacLachlan, p. 218; Temperly, p. 89. By the Law Maritime, a master had no lien for wages or disbursements, while seamen had such a lien: *Bristow* v. *Whitmore* (1861), 9 H.L. Cas. 391 at pp.

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407-8. Section 10 of the Admiralty Court Act must be construed as referring simply to constitution and procedure in that Court, and not as creating rights of action: *Morgan* v. *Castlegate Steamship Company* (1893), A.C. 38 at pp. 46-7. Owing to the fact that the master is agent for the owner of the ship, and in some cases has to act against the interests of the seamen, and owing to certain statutes giving the seamen special rights, the master in regard to his wages does not even possess quite all the rights that the seamen have: see *The Arina* (1887), 12 P.D. 118; Temperley, 80-95; MacLachlan, 237 (n), 218-9; Abbott, 296. Owing to the fact that we warned the plaintiff of his position on the 14th of August, as appears by the exhibit to the affidavit filed, and owing to the further information received that this boat has been rented out by the marshal for upwards of $90 since seizure, the defendant wishes to reserve all rights to recover this rental, to obtain its costs, and recover such damages as may be found.

Argument

Hansford, contra: Sections 188, 189, 190 and 191 of the Merchant Shipping Act, 1854 (17 & 18 Vict., c. 104), Imp., are in substance identical with sections 191, 192, 194 and 195 of Cap. 113, R.S.C. 1906. That a difference between the definition of "master" and "seaman" is intended by Part III. of said chapter 113, appears by the definition of "master" in section 2 (*b*), and the definition of "seaman" in section 126 (*d*). This difference is accentuated by section 215, for if the words "any seaman or apprentice" in section 191 include the term "master," why should not the same words include the term "master" in section 215? That the term "seaman" should be strictly interpreted in section 126 (*d*), *supra,* is borne out by another definition of the same word for the purpose of Part IV. of the same Act, being section 326 (*a*). The pilot referred to in *Farrell* v. *The "White"* (1914), 20 B.C. 576, who recovered $60 on a claim "in the nature of wages" was not a pilot under the Merchant Shipping Act, but rather a "master" as distinguished from a "seaman." That the words "the same rights, liens and remedies" contained in section 194 of said chapter 113, cannot mean that the master is included in the same definition with seaman, is further borne out by their

rank as claimants against the *res,* where the wages of the master come after those of the seaman: Howell's Admiralty Practice, 306.

While the master may have the same remedies as the seaman under said section 194, the right of recovery under section 10 of the Admiralty Court Act, 1861, has never been taken away, although the master may not recover his costs under said section 10, as in the case of a seaman under section 192 of said chapter 113. The broadest interpretation must be given to section 10 of the Admiralty Court Act: *The "Nina"* (1867), L.R. 2 P.C. 38; Maxwell on Statutes, 3rd Ed., 232, which is still law in Canada; *Beaton* v. *Steam Yacht Christine* (1907), 11 Ex. C.R. 167 at p. 171, and which distinctly confers jurisdiction upon the Court of Admiralty to hear and determine "any claim by the master of any ship for wages earned by him." MacLachlan on Shipping, 5th Ed., 219, refers to this section without, however, attempting to reconcile with it his remarks on pages 258 and 237 (n). The statements made by living text-writers on pages 258 and 237 (n) must not be accepted as conclusive, and especially when one bears in mind that such statement is admitted in the introduction to said text as taken practically word for word from the original edition of 1860, and hence before the Admiralty Court Act, 1861.

Argument

Section 10 of the Admiralty Court Act, 1861, might well be interpreted as extending "the rights, liens and remedies" referred to in the Act of 1854, so far as masters are concerned, and inasmuch as section 10 has never been repealed, it should be construed as strengthening rather than weakening the primary security of a master for his wages.

17th September, 1915.

MARTIN, LO. J.A.: This is a motion by the defendant to set aside the writ and warrant of arrest for lack of jurisdiction. The defendant ship, of Canadian registry, is under arrest to satisfy a claim of the master for wages amounting to $190, an amount which on the face of the proceedings is too small to give this Court jurisdiction under section 191 of the Canada Shipping Act, Cap. 113, R.S.C. 1906, in the case "of any seaman or apprentice," according to the recent decision of this

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Court in *Cowan* v. *The St. Alice* (1915), 21 B.C. 540; 8 W.W.R. 1256. But it is submitted that a master is not within the scope or prohibition of that section, and reliance is placed upon the following definition of "seaman" in interpretation section 126 of Part III. of the said Act dealing with "seamen," in the group of sections from 126 to 325 inclusive:

"'Seaman' includes every person employed or engaged in any capacity on board any ship, except masters, pilots, and apprentices duly indentured and registered."

This is essentially the same as the definition in the Imperial Merchant Shipping Act of 1854, section 2.

It is also pointed out that section 215 of the same chapter 113, relating to expenses for injuries, draws a distinction between "the master or any seaman or apprentice." And in section 10 of the Admiralty Court Act, 1861, a like distinction is drawn between the claims of seamen and masters for wages and disbursements, the High Court of Admiralty being given jurisdiction over both, which this Court possesses. The history of various Imperial enactments on the point is considered in, *e.g., The Sara* (1889), 14 App. Cas. 209 (particularly Lord Macnaghten's judgment), *Morgan* v. *Castlegate Steamship Company* (1893), A.C. 38 at pp. 46-8, 51; and *The Arina* (1887), 12 P.D. 118, wherein, at p. 127, it is said by Brett, J. that the master *"ex hypothesi* is not a seaman."

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It is urged that while the "same rights, liens and remedies" as a seaman are given a master under section 194 "for the recovery of his wages, and for the recovery of disbursements properly made by him," yet these are in addition to and not in derogation of his other pre-existing rights. But it is submitted for the defendant that even though a master would in general be excepted from said section 191, yet because of section 194 he can be in no better position than a seaman or apprentice when he resorts to the "Mode of Recovering Wages," as the significant heading runs to this particular group of sections 187-195. Section 194 is as follows:

"Every master of a ship registered in any of the provinces shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages, and for the recovery of disbursements properly made by him on account of the ship and for liabilities properly incurred by him on account of the ship, which, by this Part or by any law or custom, any seaman, not being a master, has for the recovery of his wages."

And *cf.* the similar section 167 (2) of the Imperial Merchant Shipping Act, 1894, c. 66, which is in substance the same as section 1 of the Imperial Merchant Shipping Act (52 & 53 Vict., c. 46), under which a lien for disbursements was first given the master—*Morgan* v. *Castlegate Steamship Company, supra,* at p. 51. After a careful consideration of the various statutes and authorities cited, *e.g.,* Abbott on Merchant Ships and Seamen, 14th Ed., 185, 296, 1130; Temperley on Merchant Shipping, 2nd Ed., 89; MacLachlan on Merchant Shipping, 5th Ed., 218-9, 237 (n), 258; Halsbury's Laws of England, Vol. 26, p. 53; Maude and Pollock on Merchant Shipping, 4th Ed., 122, 240; and Williams and Bruce's Admiralty Practice, 3rd Ed., 208-10, 216; I can only bring myself to hold that it is the clear intention of the Legislature in the enactment of this little group of 9 sections dealing with one subject-matter and which ought to be read together, to put the master upon the same basis as a seaman in respect of recovery and remedy as well as of substantive rights. There is nothing in the circumstances which renders it improper to apply the statutory restriction to the facts before me, as "the case permits" it, to quote the words of the statute, which expression has been considered in two of the English cases I have cited. The master is, in short, given valuable rights but they must be asserted in the same way as others are required to assert them who possess the same rights, or some of them. The reason which actuated Parliament to place by section 191 such a restriction upon these actions for wages, and which I have alluded to in *Cowan* v. *The St. Alice, supra,* applies with even greater force to the claim of a master than to that of a seaman or apprentice.

Judgment

It follows that this Court has no jurisdiction to entertain this action and therefore it must be dismissed, and the warrant for arrest set aside. I see no good reason why the usual order for costs should not be made in favour of the successful party.

Action dismissed.

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CITY OF VICTORIA v. TRUSTEES OF OUR LORD'S CHURCH

CORPORATION OF THE CITY OF VICTORIA v. TRUSTEES OF OUR LORD'S CHURCH IN VICTORIA.

Assessment—Site for building for public worship—"Site"—What included in—Appeal not necessary from improper assessment—Municipal Act, R.S.B.C. 1911, Cap. 170, Sec. 228.

The construction to be placed upon the words "building and site thereof" in subsection (1) of section 228 of the Municipal Act is that not only the land upon which the church is actually built should be exempt from taxation but also the surrounding land required for affording reasonable light, air and access to the structure.

In case an improper assessment is made of such sites the owner need not appeal in order to be relieved from liability.

In re Sisters of Charity Assessment (1910), 15 B.C. 344, distinguished.

ACTION tried by MACDONALD, J. at Victoria on the 16th of September, 1915, for the recovery of $504, and interest, being for taxes alleged to be due the plaintiff Corporation for the year 1912, with respect to a part of lot 1270, section 6, in the City of Victoria. This piece of land, 125 feet by 155 feet, was conveyed by Sir James Douglas to trustees for church and Sunday school purposes in 1875. The defendants contend that such property is exempt from taxation for the year 1912, as being one of the exemptions referred to in subsection (1) of section 228 of the Municipal Act, which is as follows:

Statement

"Every building and the site thereof set apart and in use for the public worship of God."

The parties agreed upon certain admissions of fact, and then submitted the question of liability for the opinion of the Court.

Harold B. Robertson, for plaintiff.

Mayers, for defendants.

23rd September, 1915.

MACDONALD, J. (after stating the facts as set out in statement): It is admitted that for some years there has been erected on this land a church that was "set apart and in use for the public worship of God," and also a building used as

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a Sunday school-house, and which was only for the purpose of holding Sunday school therein on Sunday, and that such Sunday school, when held, commenced and closed with prayer. I think both these buildings come within the intent and meaning of the exemption clause above referred to.

The question then remains whether all the land should obtain the benefit of the exemption or only the portion upon which the buildings are actually situate. I find that, according to the plan produced, the buildings occupy approximately seven-eighths of the land, and the balance, I consider, is only sufficient for the proper use of the church and Sunday school, in affording reasonable light, air and access. While it is true that exemptions from taxation are construed strictly, still I think the proper construction to be placed upon this statute is that not only the land upon which the buildings are actually situate, but such adjoining property within reasonable limits is to be exempt—in other words, that this property is a "site" intended to be relieved from taxation. It is "a plot of ground suitable or set apart for some specific use": see definition of "site" in the Standard Dictionary.

This piece of property should not, in such circumstances, have been assessed, and the taxes sought to be imposed, being levied without jurisdiction, cannot be recovered.

Judgment

It was submitted that it is now too late for the defendant to object to the assessment, and that it should have appealed to the Court of Revision. The decision in *In re Sisters of Charity Assessment* (1910), 15 B.C. 344; 44 S.C.R. 29, is cited in support of this contention. That case arose under the Vancouver Incorporation Act, and, to my mind, does not apply. Under that Act, the assessor properly assessed all land, including the parcel in dispute, without regard to exemptions, and then under its special provisions, the Court of Revision decided as to the nature and extent of the exemptions, and such decision was final.

Under the Act giving exemptions to defendant herein there was no similar provision, and I do not think it was incumbent upon the defendant to appeal in order to be relieved from liability. It was still open to the defendant to refuse payment

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of the taxes sought to be imposed by such improper assessment. While the revision of the assessment roll and the necessary certificate constitutes a finality, this only operates to a limited extent and does not destroy an exemption held by statute.

I might add, that even if the construction placed upon the words of the statute were, that only the land actually occupied by a church was to be exempt from taxation, and the municipality then sought to assess the entire parcel of land, ignoring the statutory right of exemption, such assessment would be invalid. Defendant can thus, in this action, successfully contend that there was no process of segregation, by which it could be determined that an amount less than the sum claimed could be recovered. The total claim is affected by the invalidity of the assessment.

In my opinion, the said sum of $504 is not payable by the defendant to the plaintiff.

By arrangement there are no costs to either party.

Action dismissed.

IN RE THE MARITIME TRUST COMPANY, LIMITED AND BURNS & COMPANY.

MACDONALD, J. (At Chambers)

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Oct. 11.

IN RE THE MARITIME TRUST COMPANY

Company — Liquidation — Application in Chambers — Agreement between company and outsider—Determination of validity of—No jurisdiction —Winding-up Act, R.S.C. 1906, Cap. 144, Sec. 109.

There is no jurisdiction in Chambers to determine as to the validity of agreements between a company and an outsider when the company is in the course of liquidation.

APPLICATION by the liquidator of the Maritime Trust Company for an order directing Burns & Company of New York to deliver over to him certain documents by which mortgages or charges were created by the Company on the ground that such documents are void as against the liquidator, and also for an order directing such parties to render an account of moneys received under such documents and for payment over of the same to the liquidator. Heard by MACDONALD, J. at Chambers in Vancouver, on the 30th of June, 1915. It was admitted that no winding-up rules are in force which explicitly warrant the application, but it was submitted that the Court had jurisdiction to deal with the matter.

Statement

W. C. Brown, for liquidator.

C. W. Craig, for Burns & Company.

4th October, 1915.

MACDONALD, J.: The question is whether the procedure adopted is proper or whether the liquidator should bring an action to ascertain his rights. The latter course would involve delay, and the speedier mode is the one sought to be pursued by the liquidator. This involves the question of jurisdiction, and the rights of Burns & Company should not be dealt with in a summary manner in Chambers, unless the power to do so is clearly conferred. It is contended that rule 46 of the British Columbia Winding-up Rules, coupled with section 109 of the Winding-up Act, supply the necessary power. Rule 46 simply requires that "every application to the Court shall be by summons at

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Chambers, or motion in Chambers," and section 109 of the Winding-up Act declares that "the powers conferred by this Act upon the Court may, subject to the appeal in this Act provided for, be exercised by a single judge thereof; and such powers may be exercised in Chambers, either during term or in vacation." I do not think either the rule or section afford any support to the application. They point out the procedure and the way in which the power may be exercised, but the question of jurisdiction has first to be determined. No case has been cited to me in which the point was raised and where it was, upon consideration, decided that the power existed to determine in a Chamber application, as to the validity of instruments held by parties not connected with the Company. *Cardiff Preserved Coal and Coke Company* v. *Norton* (1867), 2 Chy. App. 405, referred to by counsel for the liquidator, does not assist, as there, the assets sought to be recovered were in the hands of a shareholder of the company. In Palmer's Company Precedents, 11th Ed., Part II., p. 28, reference is made to the limits of the jurisdiction possessed by the Court. It is pointed out that under section 215 the Court has jurisdiction over "outsiders" in specified cases, "but the jurisdiction is limited to such cases." Cases are cited in support of this proposition. An agreement between the Company and an outsider cannot be impeached in the winding-up, an action must be brought: see *In re Imperial Bank of China, India, and Japan* (1866), 1 Chy. App. 339. I think Burns & Company are "outsiders." Cave, J., in *In re Ilkley Hotel Company* (1893), 1 Q.B. 248, on appeal, set aside an order declaring a certain transfer from the company to a third party void. He considered the question of jurisdiction, and decided that there was no authority to grant such order, affecting the rights of the appellant, who was a stranger to the company. He dealt fully with the result that would follow should it be decided such a power existed under the Act (p. 250):

Judgment

> "The Act does not give the Court any power to decide such a question as the County Court judge has decided in the present case. The functions of the Court are administrative; and there is no ground for collecting from the language of the Acts an implied power to decide such a question as this."

I think this language of Mr. Justice Cave applies to the present application.

In my opinion, there is no jurisdiction to grant the order sought to be obtained. The application is dismissed with costs.

Application dismissed.

MACDONALD, J. (At Chambers)

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IN RE THE MARITIME TRUST COMPANY

THOMPSON v. HERRING.

MORRISON, J. (At Chambers)

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THOMPSON v. HERRING

Practice—Trial—Setting down for and notice of—No place of trial mentioned in statement of claim—Rule 435.

Where the statement of claim does not mention the place of trial, the setting down of the case for trial and notice thereof will, on the application of the defendant, be struck out.

APPLICATION by the defendant to strike out the setting down for and notice of trial as irregular. Heard by MORRISON, J. at Chambers, in New Westminster on the 18th of October, 1915. The writ was issued in the New Westminster registry. The statement of claim did not mention any place of trial. The defence was delivered on the 6th of October, joinder of issue delivered on the same day, and the case set down for trial at New Westminster on the 18th of October, 1915, notice being given accordingly.

Statement

A. D. Taylor, K.C., for the application, relied on r. 435 and asked that the setting down for and notice of trial be struck out.

J. P. Hampton Bole, contra: There is no provision in the rules for striking out a notice of trial; we rely on the English practice.

Argument

MORRISON, J.: The English practice at present is that the place of trial is fixed by the judge on the summons for directions. In the present case there was no proper foundation for the setting down for and notice of trial and the application must be granted with costs.

Judgment

Application granted.

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HERON *ET AL.* v. LALANDE *ET AL.*

Taxation—Tax-sale deed—Conclusive evidence of validity of prior proceedings—The Taxation Act, R.S.B.C. 1911, Cap. 222, Sec. 255.

H. purchased lands in 1893 that were sold for taxes in 1896, but the tax-sale deed was made to the purchaser one day before the statutory period of two years allowed for redemption had expired. The property was again sold for taxes in 1903, and a tax-sale deed was made to the purchaser through whom the defendants claim title. In an action by H. for a declaration that the lands were the property of the plaintiff it was held by the trial judge that a provisional tax-sale deed cannot be set aside or annulled except on the grounds set out in section 255 of the Taxation Act.

Held, on appeal, affirming the decision of CLEMENT, J., that the premature execution of the tax-sale deed rendered the same voidable, but not a nullity. When the full period for redemption had expired without tender by the owner, the deed ceased to be voidable except upon the grounds of the invalidity of the sale proceedings.

Statement

APPEAL by plaintiffs from the decision of CLEMENT, J. at Vancouver on the 4th of March, 1915, in an action to set aside certain tax-sales, and the deeds given thereunder. The property in question, purchased by the plaintiff in 1893, was sold for taxes in 1896. The tax title was granted in 1898, but one day under the statutory limit of two years. In December, 1903, the property was again sold for taxes, and by deed dated the 23rd of February, 1906, was conveyed to the British Columbia Land and Investment Agency, Limited, through whom the defendants claim title. The action was brought in 1913 to set aside the title. The trial judge came to the conclusion that he was precluded by section 255 of the Taxation Act, R.S.B.C. 1911, Cap. 222, from declaring void a tax sale except where the sale was not conducted in a fair and open manner.

D. A. McDonald, for plaintiff.
McCrossan, for defendant.

4th March, 1915. CLEMENT, J.

CLEMENT, J.: I am precluded by authority from holding that the deceased Heron lost title to the property in question by laches, abandonment or estoppel. I am happily, however, also precluded, in my opinion, from declaring void the tax deed of 1898 by the statute law of this Province; and, of course, that deed standing, the plaintiffs have no status to attack the later tax-sale proceedings. Section 255 of chapter 222, R.S.B.C. 1911, provides as follows:

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"A tax-sale deed shall, in any proceedings in any Court in this Province, and for the purposes of the Land Registry Act, except as hereinafter provided, be conclusive evidence of the validity of the assessment of the land and levy of the rate, the sale of the land for taxes, and all other proceedings leading up to the execution of such deed; and notwithstanding any defect in such assessment, levy, sale, or other proceedings, no such tax deed shall be annulled or set aside, except upon the following grounds and no other:—

"(*a*) That the sale was not conducted in a fair or open manner;

"(*b*) That the taxes for the year or years for which the land was sold had been paid; or

"(*c*) That the land was not liable to taxation for the year or years for which it was sold."

I have not been referred to any case in which these provisions have been construed. I am well aware that there is high authority for the proposition that I should approach curative sections such as these in a spirit to confine them within as narrow limits as possible. Approaching them in that spirit I must nevertheless have due regard to the English language and to the intention of the Legislature as it is to be gathered from the language used. Unless one is to insert the word "if valid" after the words "tax-sale deed" and "tax-deed" as used in section 255, it seems to me, as I have already intimated, that this statute tells me in so many words that I am not to annul or set aside the tax-sale deed of 1898. To interpolate the words I have suggested would, it seems to me, border on the nonsensical. CLEMENT, J.

The action is dismissed with costs.

The appeal was argued at Victoria on the 11th and 14th of June, 1915, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

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Martin, K.C., for appellants: The assessor sold the lands on the 22nd of July, 1896, and gave a tax-sale deed on the 22nd of July, 1898, being one day too soon. The time for redemption fixed by the statute had not expired by one day. The property was again sold for taxes on the 9th of December, 1903, and a deed was given for the lands to the British Columbia Land and Investment Agency, Limited, on the 23rd of February, 1906. The first sale was a nullity, and the property has been in Heron's name ever since. A tax sale is a purely statutory right, and an owner is deprived only of what the statute expressly enacts: see *Whelan* v. *Ryan* (1891), 20 S.C.R. 65; *Temple* v. *North Vancouver* (1914), 6 W.W.R. 70; *Johnson* v. *Kirk* (1900), 30 S.C.R. 344.

McCrossan, for respondent: There is no merit in the plaintiff's case, (1) because there was complete acquiescence in law and waiver; (2) they are barred under the Land Registry Act as in *Temple* v. *North Vancouver*; (3) we have a second deed that is good; (4) we are protected under the quieting titles of the Taxation Act, Secs. 251 to 256; (5) we are fortified by a specific section validating all tax sales up to 1902: see B.C. Stats. 1903-4, Cap. 53, Sec. 125. In this case the foundation is good and the slip only amounts to an irregularity; even if it were a nullity the statute protects us: B.C. Stats. 1903-4, Cap. 53, Sec. 153; see also *McCutcheon Lumber Co.* v. *Minitonas* (1912), 22 Man. L.R. 681; *Errikkila* v. *McGovern* (1912), 27 O.L.R. 498. There was in law acquiescence, complete abandonment and waiver: *Anderson* v. *South Vancouver* (1911), 16 B.C. 401 at p. 417; 45 S.C.R. 425 at p. 451. In this case plaintiff got all his notices and was notified of the purchase and got his notices of taxes up to 1902. See also *Willmott* v. *Barber* (1880), 15 Ch. D. 96.

Argument

Martin, in reply: As to the meaning of the word "from" see *South Staffordshire Tramways Company* v. *Sickness and Accident Assurance Association* (1891), 1 Q.B. 402; Wharton's Law Lexicon, 10th Ed., 337. This is the same as the *Temple* case, *supra,* except that in that case there was personal service of notice of application for registration, whereas in this there was substitutional service. The registrar never made an

order for substitutional service. He has not answered the point that the deed that was issued one day too soon is a nullity.

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MACDONALD, C.J.A.: The tax sale was effected on the 22nd of July, 1896, and on the 22nd of July, 1898, the collector executed a deed to the purchaser.

The action was brought by appellants, devisees under the will of Robert Heron, who at the times aforesaid was the owner of the lots in question, to set aside the deed on the ground that it was made before the period allowed for redemption had expired. The owner's right was to "at any time within two years from the date of the tax sale or before the delivery of the conveyance to the purchaser at the tax-sale, redeem the land sold." The general rule as to time in cases of this sort when not governed by statute, is that the date of the event from which the time shall run is to be excluded from the computation: Halsbury's Laws of England, Vol. 22, p. 449. There was no statute governing a case of this sort until 1902, when the Interpretation Act was amended making the general rule referred to above statutory: see R.S.B.C. 1911, Cap. 1, Sec. 43.

The deed should in strictness not have been delivered until the 23rd of July, 1898, but that circumstance does not in my opinion assist the appellants now. Had the appellants' testator tendered his money on or before the 22nd of July, 1898, his right could not be denied him, whether the conveyance had then been executed or not.

In my opinion, the premature execution of the conveyance did not make it a nullity: it was voidable at the option of any person having the right to attack it: *Osborne* v. *Morgan* (1888), 13 App. Cas. 227. When the full period for redemption had expired, and no tender had been made by the owner, the deed became a good and sufficient deed to the purchaser, and no longer subject to attack, except upon the ground that the sale proceedings were not conducted in accordance with the law. Such an attack is not made in this case, and as it is admitted that no tender was made within the period of two years, the appellants have no status now to attack the conveyance.

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The situation therefore is that on the 23rd of July, 1898, the period of two years having then expired without tender of redemption money by the owner, the purchaser's right to the property became absolute, and the deed prematurely executed ceased to be voidable except upon grounds which were not insisted upon in this action, namely, the invalidity of the sale proceedings.

In this view of the case it becomes unnecessary to consider the rights of the parties under a subsequent tax sale brought about by reason of non-payment of subsequent taxes.

I would dismiss the appeal.

MARTIN, J.A.

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

GALLIHER, J.A.

GALLIHER, J.A.: I agree in the conclusions reached by the Chief Justice.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I concur in the judgment of the Chief Justice.

Appeal dismissed.

Solicitor for appellants: *Joseph Martin.*
Solicitors for respondent: *McCrossan & Harper.*

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Foreign judgment—Fraud—Pleading—Statement of claim, extension of—Special indorsement—Signature of solicitor—Denial of allegations—Amendment.

Fraud, for the purpose of impeaching a foreign judgment in other respects valid, must be some fraud *dehors* the record.

An allegation of fraud without particulars may be treated as if it were struck out of the pleadings.

A general denial of the allegations in the statement of claim is ineffectual, and will be treated as an admission.

Where an application to amend, by giving particulars of an otherwise defective allegation of fraud, has been refused in the Court of first instance, it will not, except in very unusual circumstances, be granted in the Court of Appeal.

APPEAL from the decision of GREGORY, J. in an action tried by him at Victoria, without a jury, on the 29th and 30th of March, 1915.

The plaintiff had obtained a decree for alimony in a divorce action instituted by her in the Supreme Court of the State of New York, and now sought to enforce the decree against the defendant, who had become a resident in this Province. On the 18th of April, 1907, the Supreme Court of the State of New York pronounced a decree awarding to the plaintiff a separation from bed and board and also awarding her a provision for her support and maintenance, and ordering the defendant to pay to the plaintiff the sum of $4,000 a year in equal monthly instalments. The defendant was a British subject, and it was not clear whether he was domiciled in the State of New York or not, but he appeared in the New York Court, defended the action, and appealed from the judgment unsuccessfully. In 1912 the defendant left the United States, and came to British Columbia. On the 10th of December, 1913, the plaintiff without notice to the defendant entered up judgment in the Court of the State of New York for four monthly instalments awarded by the decree of the 18th of April, 1907, which fell due on the 7th

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of August, September, October and November, 1913. The writ claimed the amount found due by the judgment of the 10th of December, 1913, without mentioning the decree of the 18th of April, 1907. The statement of claim alleged, *inter alia,* the granting of the decree of the 18th of April, 1907, the entering up of the judgment of the 10th of December, 1913, and the non-payment of the sum claimed. The defence commenced with an allegation that "the defendant denies the allegations in paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9 of the statement of claim," there being precisely nine paragraphs in the statement of claim. It then went on to allege various matters, and set up in paragraph 5 that "the decree mentioned in the statement of claim was obtained by the fraud of the plaintiff and by the fraud and perjury of herself and some of her witnesses, and the said Court was deceived thereby"; but the defence contained no allegation of the payment of the sum claimed or any part thereof. Evidence was taken in New York and other States, on the part of the plaintiff to shew the nature and effect of the foreign judgment, and on the part of the defendant to support the charges of fraud and perjury, and the defendant also procured evidence to shew that since the commencement of the action, a receiver had been appointed of his property in the United States, who had paid the first two instalments of alimony claimed.

Statement

On the trial before GREGORY, J. the plaintiff contended that the general denial in the defence was insufficient and amounted to an admission of all the allegations in the statement of claim, and that therefore the defendant must proceed to prove the special defences set up. The learned judge upheld this contention, and offered to allow the defence to be amended. This was refused and the defendant proceeded to develop his defence of fraud. It was objected by the plaintiff that there was no allegation in the defence sufficient to allow evidence of fraud to be given. The learned judge acceded to this contention, but allowed the evidence to be put in, subject to the objection, for use in the event of the Appellate Court reversing his ruling. The evidence was then objected to on the ground that, if it established anything, it only established that the

plaintiff and her witnesses had committed perjury in the foreign Court. The learned judge directed this point to be argued.

Mayers, for the plaintiff: With regard to the doctor's evidence, it is well settled that all questions of evidence are governed by the *lex fori* (*Bain* v. *Whitehaven and Furness Junction Railway Company* (1850), 3 H.L. Cas. 1 at p. 19), and this Court will not admit evidence here which has been properly excluded according to the law of the domestic forum. We admit that the language in the cases cited by the defendant, especially in *Vadala* v. *Lawes,* go the full length contended for, but we submit that such language was not necessary for the decisions, and is irreconcilable with the doctrine of *res judicata.* In *Abouloff* v. *Oppenheimer* (1882), 10 Q.B.D. 295, the fraud was committed on, not only in, the foreign Court, and was admitted. No Court could lend itself to enforce a judgment admittedly obtained by fraud. In *Vadala* v. *Lawes* (1890), 25 Q.B.D. 310, it was proved that the notes on which the action was brought were not *bona fide* commercial paper at all, but were made by the defendant's agent, in fraud of the defendant, to pay the agent's gambling debt. In both cases there was the grossest fraud extrinsic to the record. The language in the two cases, especially in the case of *Vadala* v. *Lawes,* cuts away the whole doctrine of *res judicata,* and is quite irreconcilable with the doctrine laid down in *Flower* v. *Lloyd* (1879), 10 Ch. D. 327, by the majority of the Court, which has been recently approved by the House of Lords in *Boswell* v. *Coaks* (1894), 6 R. 167. Moreover, this case is undistinguishable from *Woodruff* v. *McLennan* (1887), 14 A. R. 242, which has been recently approved in *Jacobs* v. *Beaver* (1908), 17 O.L.R. 496, where all the cases are collected, and which clearly lays down that the fraud to vitiate a foreign judgment must be *dehors* the record. There is no distinction between attacking a foreign and a domestic judgment on the ground of fraud, and *Baker* v. *Wadsworth* (1898), 67 L.J., Q.B. 301, is a direct authority on the point.

Argument

Alexis Martin, for defendant: The point is completely covered by authority. *Abouloff* v. *Oppenheimer* (1882), 10 Q.B.D. 295, and *Vadala* v. *Lawes* (1890), 25 Q.B.D. 310,

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are express that the perjury of the plaintiff or her witnesses in the foreign Court renders the foreign judgment unenforceable in this Court. Moreover, the evidence of the physician who attended the plaintiff was excluded in the foreign Court by virtue of a provision in the New York code which renders inadmissible the evidence of a family physician; that evidence has now been taken on commission and can be used in this Court to shew that the plaintiff ought never to have been granted a separation and alimony by reason of her intemperate habits.

GREGORY, J.: I have given this matter as much consideration as possible since adjournment last night, and if I felt the position was one in which I had to choose between the decision of the Court of Appeal of Ontario and Court of Appeal of Great Britain, I think I would accept the judgment of the latter Court, but it seems to me I am not driven into that position. In the cases of *Woodruff* v. *McLennan* (1887), 14 A.R. 242, and *Jacobs* v. *Beaver* (1908), 17 O.L.R. 496, almost the same question was raised. In *Jacobs* v. *Beaver,* Associate Justice Garrow discussed the question fully, and his reasoning seems to me to be unanswerable. In the English case of *Vadala* v. *Lawes* (1890), 25 Q.B.D. 310, Lindley, L.J. uses language (pp. 317-19) apparently to the effect that perjury alone in the foreign Court would be sufficient to justify our Courts in re-trying the case. It is clear, I think, that there is no difference between enforcing a foreign judgment and one of our own Courts, as far as this question is concerned, and I cannot imagine our own Court granting a new trial of an action on the mere assertion that the evidence in the first trial was perjured; and an offer to prove it, however strenuously that offer may be made. And that is all the defendant has done. Mr. *Martin* says that he will shew that the plaintiff and her witnesses have committed perjury in the New York Courts, and that is all he says.

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In the *Vadala* case there was a distinct defence of fraud raised in the foreign Court: there was an issue of fraud tried, and in that respect it differs from the present case. In this case there is no extrinsic fraud charged—there was no issue of

fraud tried by the New York Courts; and I am only asked to say there was perjury on the part of plaintiff and her witnesses in the New York Courts, and therefore the judgment was obtained by fraud. If true, that of course would be a fraud, but a fraud of perjury only. Both of the English cases referred to are quoted in all the modern text-books, but it is to be noticed in Roscoe's Nisi Prius Evidence, 18th Ed., 208, in referring to the cases it says: "So, where the judgment has been obtained by fraud, even although the foreign Court tried the question of fraud and decided that it had not been committed," etc.

Can it be said the New York Courts tried the question of fraud? I think not. Apart from the language of Lindley, L.J. I cannot find it stated in any case, or text-book, that to prove perjury alone in the foreign Court will enable another Court to refuse to give effect to the judgment already obtained, and much less will the bare offer to do so, enable me to hear the evidence offered in support.

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In these circumstances, I must refuse to hear the evidence at all.

Mayers, on the merits: The cause of action arises when the money under the judgment is recoverable (*Douglas* v. *Forrest* (1828), 4 Bing. 686), and no money was payable until the instalments fell due. This is a final judgment. *Robins* v. *Robins* (1907), 2 K.B. 13 was a decision on the peculiar jurisdiction derived from the Ecclesiastical Courts, and the jurisdiction of the Court in New York is entirely different, being founded on statute. It is clear from the American cases of *Thayer* v. *Thayer,* 145 App. Div. 268, and *Sistare* v. *Sistare* (1910), 218 U.S. 1, that this is a final judgment. Your Lordship can look at these cases on the question of what is the foreign law (*Concha* v. *Murrieta* (1889), 40 Ch. D. 550).

Argument

Martin: The plaintiff cannot rely on the judgment of the 10th of December, 1913, as this was obtained without notice to the defendant, and the decree of the 18th of April, 1907, was not a final judgment within the rule laid down in *Nouvion* v. *Freeman* (1889), 15 App. Cas. 1. The point as to a decree in an action for divorce or separation not being final was

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settled in *Robins* v. *Robins* (1907), 2 K.B. 13. Moreover, the plaintiff is barred by the Statute of Limitations. A foreign judgment is only equivalent to a simple contract debt. More than six years have elapsed since the decree was made, and the cause of action arises when the decree is made and not when the instalments accrue: Pigott on Foreign Judgments, Part I., p. 40.

GREGORY, J.: I have no reasonable doubt as to what is proper to do in this case; as far as the amount due is concerned, it seems to me the plaintiff must succeed. Then the question comes, is this a final judgment? Of course it would be a final judgment in our Courts. Is it a final judgment in the Courts of New York? The evidence of experts called on behalf of the plaintiff is uncontradicted, and it even goes as far as to use the language one would use in applying the test to ascertain if it is final. I must accept their evidence—supported as if by *Thayer* v. *Thayer,* 145 App. Div. 268, and *Sistare* v. *Sistare* (1910), 218 U.S. 1.

As to the judgment of 1913, I do not think there are two judgments. I cannot for a moment doubt that under the New York practice no notice was necessary. What the Court said there was very clear and very direct; it was the judgment of a Court with appellate jurisdiction, and while it was not necessary for the Court to decide this particular point, the opinion expressed was clearly a deliberate *dictum* expressed for the guidance of practitioners, and there is no evidence at all to shew that the practice then stated to be correct practice, has not been the practice for years.

GREGORY, J.

As to the statute of limitations, it seems to me, while the judgment of 1907 is the judgment of the Court—you might say the making of the contract—the Court says it is payable yearly, or monthly. As each year or month expires the instalment payable becomes a fixed amount, and from that date only is payable under the judgment of 1907. The statute, of course, cannot begin to run until an action could be brought, and none could be brought until the money was actually due. The statute not having begun to run until 1913, the claim is not yet barred, and the plaintiff's contention must prevail.

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It has been intimated that this case will be appealed, and I think it should be; it is a very important question. I have all the facts before me, and can consider now any application to stay execution.

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From this decision, the defendant appealed, and the appeal was argued at Victoria on the 24th and 25th of June, 1915, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

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Maclean, K.C., for appellant: The learned judge was wrong in excluding evidence of fraud; the pleading is sufficient, and if it is not, the learned judge ought to have allowed an amendment at the trial. The plaintiff attended on the taking of evidence on commission, the bulk of which was directed to shewing that the plaintiff and her witnesses were guilty of perjury at the original trial, so that she cannot say she was surprised.

Mayers, for respondent: A party who wishes to give evidence of fraud must so frame his pleadings either originally or by amendment that there may be a proper allegation of fraud which the Court may give heed to; it is immaterial whether the other party might be taken by surprise or not. Until there is a proper allegation of fraud in the pleadings, the other party may treat the pleadings as containing no allegation of fraud. We simply treated paragraph 5 as if it had not been present, and we submit we were entitled to do so under the principle expressed in *Wallingford* v. *Mutual Society* (1880), 5 App. Cas. 685 at pp. 697, 701; *Birch* v. *Birch* (1902), P. 130 at p. 138; *Tanghe* v. *Morgan* (1904), 11 B.C. 76; 2 M.M.C. 178, and very lately re-affirmed in *Vatcher* v. *Paull* (1915), A.C. 372 at p. 384.

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24th June, 1915.

MACDONALD, C.J.A.: On the question of fraud, the learned trial judge has held, firstly, that the pleadings did not sufficiently specify the fraud alleged, in other words, that there was not sufficient particularity in the pleadings. We are asked to overrule him in that. I think we ought not to do so. I think the allegation raises no perjury at all, it refers to alleged perjury on the part of the defendant, but it does not particularize the proceedings in which she committed this perjury;

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it might be at the trial; it is not particularized. So I do not think the learned trial judge was wrong in refusing the evidence on the ground that the particulars were not comprehensive enough.

Then as to amending the pleadings. I think the discretion, the very large discretion, vested in the learned trial judge ought not to be interfered with.

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MARTIN, J.A.: That is my view. I think there are no circumstances here that would relieve the defendant from setting out the facts that are essential, and his neglect to do so entitles the opposite party to ignore the allegation.

As to the amendment, that is also my view.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would take the view that the learned trial judge ought to have acceded to the application for the amendment. The pleadings were sufficiently precise to give notice to the plaintiff so that there could be no surprise in that respect, and it is no unusual thing to plead fraud generally, and that is shewn in the Yearly Supreme Court Practice, 1915, p. 251. Paragraph 5 is to be read in conjunction with paragraph 1a of the statement of claim, and that sets up the fact that she had got separation from bed and board of the defendant, and she was given an allowance for the support and maintenance of herself and her children, and the custody of her children. When it is said the decree was obtained by fraud and perjury, it was sufficient to indicate that the allegation was that there was imposition upon the Court. In giving particulars there can be no question on the statement of Mr. *Maclean* that that was impossible to do until the commission evidence had been taken.

Objections overruled.

Argument

Maclean, K.C., on the merits: The writ only contained a claim on the judgment of the 10th of December, 1913, and made no mention of the decree of the 18th of April, 1907. It was specially indorsed, and therefore the claim cannot be varied or extended in the statement of claim: Annual Practice, 1915, p. 366. The latter judgment was obtained without notice to the defendant and is therefore bad. In any case, the plaintiff cannot

recover the two instalments which the evidence shews to have been paid, and it is submitted that she cannot recover anything, as she has given no evidence of non-payment.

Mayers: The writ was certainly not specially indorsed, because it had no heading, and it was not signed. The remark in the Annual Practice is intelligible when one considers that where a writ is specially indorsed no statement of claim is ever delivered, and therefore the claim cannot be extended or varied. Once a statement of claim is delivered, the indorsement ceases to be of any consequence: *Large* v. *Large* (1877), W.N. 198; *Johnson* v. *Palmer* (1879), 4 C.P.D. 258; *Munster* v. *Railton* (1883), 11 Q.B.D. 435; (1885), 10 App. Cas. 680; *Cargill* v. *Bower* (1878), 10 Ch. D. 502; *Lewis* v. *Durnford* (1907), 24 T.L.R. 64. The rule is couched in the widest terms (Order XX., r. 4). All the allegations in the statement of claim were admitted, and among others the allegation of non-payment of our claim (*Hogg* v. *Farrell* (1895), 6 B.C. 387 at p. 392); besides which payment is a matter which has to be specially pleaded (Order XIX., r. 15). In this case the payment was made after action brought, and the defendant should have applied for leave to deliver a further defence (Order XXIV., r. 2), when the plaintiff could have asked leave to claim for further instalments which have accrued due since the action started.

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MACDONALD, C.J.A.: I think the foreign decree of the 18th of April, 1907, was a final judgment, and that the so-called judgment of the 10th of December, 1913, is nothing more than part of the process of execution. The defendant is, therefore, not entitled to go behind the decree and attack it on evidence now sought to be let in contradicting that of the plaintiff and some of her witnesses in the foreign trial with the view of shewing that it was false and ought not to have been believed by the foreign tribunal.

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The plaintiff seeks in this action, which is founded on the said decree, to recover four monthly instalments of alimony alleged to be in arrear under the decree. It was open to the

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defendant to shew that there were no arrears or that a less sum than that claimed was in arrear. In my opinion, he has succeeded in shewing the latter. There were at the time of the trial two of the instalments sued for in arrear: the other two had been recovered by the plaintiff in receivership proceedings in the New York Court. The only answer made to the claim for reduction of the judgment by the amounts so recovered was that the statement of defence did not specifically deny their non-payment.

The facts being undisputed, I would allow an amendment. I would not compel a defendant to pay twice because his solicitor, though pleading the facts generally and sufficiently, to prevent surprise, had not done so in exact complianace with a strict interpretation of a rule of pleading.

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I would allow the appeal as to the said two instalments.

MARTIN, J.A.: I can find no valid reason on the merits for setting aside the judgment arrived at by the learned trial judge, and I shall only make some observations upon two questions of pleading that were raised before us.

The first is one not only of present but general importance, and it is that the first paragraph of the statement of defence infringes rule 213 and should be disregarded, with the result that by operation of rule 209 the allegations in the statement of claim must be taken to be admitted, excepting those that are specifically or necessarily impliedly denied, or stated to be not admitted.

The paragraph in question is:

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"1. The defendant denies the allegations in paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9 in the plaintiff's statement of claim."

At the time this defence was delivered, on the 13th of January, 1914, the statement of claim as it then stood (before amendment) contained only these nine paragraphs, so this is nothing more than a general denial in one paragraph of the whole alleged cause of action. Now, it is true that there has been some relaxation of rule 213 in England, as is best set out in the note thereon in the Yearly Practice for 1915, pp. 271-2, and as exemplified in particular by the cases of *British and Colonial Land Association* v. *Foster* (1888), 4 T.L.R. 574;

Adkins v. *North Metropolitan Trams. Co.* (1893), 63 L.J., Q.B. 361; and *Thornhill* v. *Weeks* (*No. 2*) (1913), 109 L.T.N.S. 146 at p. 148, *per* Kennedy, L.J., but in none of those cases was the denial so general and sweeping as this one. While it is said in the Yearly Practice, *supra,* that—

"In the King's Bench Division it has become a common practice for the defendant to plead in his defence that he 'denies specifically all the allegations in paragraph of the statement of claim,' . . . . or that 'save as above admitted he denies,'" etc.

(and *cf.* Halsbury's Laws of England, Vol. 22, p. 430) yet it is obvious that in many cases such a course could not be permitted, in regard to which the same authority says: "It should not, however, generally be adopted in dealing with the essential allegations," and some apt illustrations of this are given in Odgers on Pleading, 12th Ed., 155.

If the matter were to rest solely on the English cases I should have much doubt about the sufficiency of the present denial, but there is a long standing decision of our former Full Court in *Hogg* v. *Farrell* (1895), 6 B.C. 387; 1 M.M.C. 79, which was pressed upon us as binding, and settling the practice in this Province. The Court there (McCREIGHT, WALKEM and DRAKE, JJ.) held that the objectionable paragraph of the defence infringed the old rule 171 (now 213) saying (p. 392):

"The general denial in paragraph 3, of the statement of defence is bad (see Rule 171) and must be disregarded."

The paragraph, coming after two others containing admissions, was as follows: MARTIN, J.A.

"3. The defendants deny all the other allegations contained in the said statement of claim, and put the plaintiffs to the proof thereof."

No essential distinction can be drawn between that paragraph and the one in question here, so I think there is no other course open to us than to follow the decision of our predecessors in the matter of practice under the same rules and likewise disregard this general denial. There is no hardship in so doing, for the decision of the Full Court settled the practice in this Province 20 years ago, and the appellant was entitled to rely on it as she has done. The object of the present rule in requiring parties to "deal specifically with each allegation of fact" was to abolish abuses which had grown up under the old practice, and it is particularly desirable that in such cases as the

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present, where the issues arose in a foreign jurisdiction, and the evidence is chiefly on commission, there should be no uncertainty as to what is in dispute.

Our attention was drawn to the fact that the amendment of the defence which was offered to the defendant's counsel, on terms which were within the learned trial judge's discretion, was refused.

The second question as to pleading was that the statement of claim has been unduly extended or enlarged beyond the scope of the writ in a manner not authorized by rule 228—as to which *cf.* Odgers on Pleading, 7th Ed., 38, 193-4; Bullen and Leake's Precedents of Pleadings, 7th Ed., 34; Yearly Practice, 1915, pp. 289-90; Annual Practice, 1915, p. 366; and Holmested's Ontario Judicature Act, 4th Ed., 506-7. The point is taken that as the writ was specially indorsed, it thereby contained a statement of claim, and therefore a new statement of claim could not be delivered without leave—rules 16, 225 and 310. But the answer to this is, apart from other objections, that the writ cannot be deemed to have been specially indorsed because it was not intituled "statement of claim" or signed by the solicitor in default of signature by counsel (which is not necessary, r. 200): see *Vancouver Agency* v. *Quigley*

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(1901), 8 B.C. 142; and *Oppenheimer* v. *Oppenheimer, ib.* 145; Yearly Practice, 1915, p. 249. Furthermore, the prescribed words "Delivered," etc., App. X., C. Sec. 1, are omitted. I can only regard the indorsement as general, and there has been no undue extension thereof, and consequently the writ need not have been amended: *cf. Oppenheimer* v. *Sperling* (1903), 10 B.C. 162; *Bugbee* v. *Clergue* (1900), 27 A.R. 96 at pp. 99-100; *Snider* v. *Snider* (1913), 30 O.L.R. 105. But in any event, this is an objection which should have been raised by motion before the delivery of the defence: *Bugbee* v. *Clergue, supra,* affirmed by the Supreme Court of Canada, *ib.* 717; 31 S.C.R. 66, and I see that course was taken in *Snider* v. *Snider, supra.*

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would dismiss this appeal. In my opinion, the learned trial judge arrived at the right conclusion,

and I concur in the reasons for judgment of my brother MARTIN.

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Appeal dismissed, Macdonald, C.J.A. dissenting.

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Solicitor for appellant: *Alexis Martin.*
Solicitor for respondent: *H. G. Lawson.*

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WESTMINSTER WOODWORKING COMPANY, LIMITED, AND GRAHAM v. THE STUYVESANT INSURANCE COMPANY *ET AL.*

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Fire insurance—Preliminary oral agreement to protect property—Made by agent—Company bound.

A preliminary agreement to insure a property from fire, and to protect the risk in the meantime, although informally made by the agent of the insurance company by word of mouth, is enforceable as against the company, which is liable in case of loss.

WEST-MINSTER WOOD-WORKING CO. *v.* STUYVESANT INSURANCE CO.

APPEAL by the defendant Company from the decision of MACDONALD, J. of the 23rd of February, 1915, in favour of the plaintiffs for loss under a policy of fire insurance on their woodworking factory, buildings, machinery and contents, situated in New Westminster. The plaintiff Company had a number of insurance policies on their property, and a portion of such insurance was expiring on or about the 11th of February, 1914. Prior to the 14th of February, Mr. Brooks, the manager of the plaintiff Company, had discussed the insuring of the Company's premises with Messrs. Lennie & Cairns, insurance agents in New Westminster, with a view to obtaining $40,000 insurance altogether following the expiration of the old insurance. The final discussion between them was on February 13th, some of the old policies expiring on that and the following day, and it was arranged that the plaintiffs would

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be insured up to $40,000 from that day, and the companies in which the insuranace was to be had were mentioned, the defendant Company being one of them. Lennie & Cairns, who were the local agents of the defendant Company in New Westminster, then went on the same day to Vancouver to the office of Seeley & Company, who were general agents of the Stuyvesant Insurance Company (having a head office in Seattle, and another office in Vancouver managed by a Mr. Robertson) with full power to insure for the defendant Company. Messrs. Lennie & Cairns said they had a line of insurance for $40,000 for the plaintiff Company, to take effect as the old insurance expired (there being at this time only $4,000 that was still current), Seeley & Company, who represented four companies, would only take $18,000, and they allotted this amount among their companies, of which $6,000 was allotted to the defendant Company. No covering note was issued nor was a policy issued, Robertson however made a notation of the allotment to the defendant Company of $6,000 on a piece of paper that had later disappeared.

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Brooks and Lennie & Cairns had arranged the terms of the payment of the premiums, amounting to $1,200, of which $100 was to be paid forthwith, and the balance of $1,100 in notes spread over eight months. The fire occurred on the 15th of February, 1914.

The appeal was argued at Victoria on the 7th and 8th of June, 1915, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Ritchie, K.C. (*Housser,* with him), for appellant: The fire occurred on the 15th of February, 1914. The evidence relied on was a verbal arrangement between the manager of the plaintiff Company and the defendant Company's local representatives in New Westminster on the 13th of February, the local agents communicating with the Vancouver agents on the same day. This evidence is not sufficient. To make the contract it must be communicated to the other party. There was nothing contractual in what was done. A receipt for a premium is not sufficient unless the money is paid: see *Walker* v. *The Provincial Insurance Company* (1859), 7 Gr. 137;

Argument

(1860), 8 Gr. 217; *The Montreal Assuranace Company* v. *McGillivray* (1859), 13 Moore, P.C. 87; 15 E.R. 33; *Davies* v. *National Fire and Marine Insuranace Company of New Zealand* (1891), A.C. 485; *Henning* v. *The United States Insurance Company* (1871), 4 Am. Rep. 332.

Martin Griffin, for respondents: Seeley & Company, the defendant Company's agents in Vancouver, accepted the $18,000 insurance for their companies on the 13th of February, and there was an absolute binding acceptance by them, and Lennie had the same power. On the question of the binding of verbal covers see MacGillivray on Insurance, p. 197. Because an insurance policy has to be a certain form under their articles, that does not affect an oral contract for insurance: see Holt on Insurance, 3rd Ed., 32; *Canada Ins. Co.* v. *Western Ins. Co.* (1879), 26 Gr. 264; (1880), 5 A.R. 244; *Penley* v. *The Beacon Assurance Company* (1859), 7 Gr. 130 at p. 136; *Campbell* v. *National Ins. Co.* (1874), 24 U.C.C.P. 133 at p. 144; *The Ottawa Agricultural Ins. Co.* v. *Sheridan* (1880), 5 S.C.R. 157 at pp. 174-5; *Moffatt* v. *Reliance Mutual Life Assurance Society* (1881), 45 U.C.Q.B. 561; *Connecticut Fire Insurance Company* v. *Kavanagh* (1892), A.C. 473; *Coulter* v. *Equity Fire Insurance Co.* (1904), 7 O.L.R. 180; 9 O.L.R. 35 at p. 39; *Ruggles* v. *American Cent. Ins. Co.* (1889), 21 N.E. 1000; *Insurance Company* v. *Colt* (1874), 20 Wall. 560.

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Ritchie, in reply, referred to Bowstead on Agency, 5th Ed., 49; *Boston Fruit Company* v. *British and Foreign Marine Insurance Company* (1906), A.C. 336 at p. 343. *Canada Ins. Co.* v. *Western Ins. Co.* (1879), 26 Gr. 264, can be distinguished as that is one insurance company against another. See also *Parsons* v. *Queen Insurance Co.* (1878), 29 U.C.C.P. 188 at p. 203; (1881), 7 App. Cas. 96.

Cur. adv. vult.

2nd November, 1915.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The salient facts are not in dispute. Seeley & Co., who were parties defendant in this action, but were dismissed and are no longer in the case, were appellant's general agents for this Province. They had power to bind

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appellant by any contract of insurance not *ultra vires* of the appellant. In addition to these general agents, whose head office for this Province was at Vancouver, the appellant had a local agent at New Westminster, H. H. Lennie, who also was an original party to this action, but was dismissed from it.

Respondents had a number of policies of insurance against fire in their factory, about to expire, covering in all risks aggregating $35,000. Lennie desired to obtain this insurance for companies which he represented, including the appellant. A rate was agreed upon between him and the respondents, who thereupon gave him authority to place insurance to the amount of $40,000 to replace the expiring policies and to give an additional $5,000 protection. On the morning of the 13th of February, 1914, one of said policies being about to expire on that day, Lennie assured the respondents' manager that the risk, namely, the new line of insurance, which he was authorized to place, was accepted, and that respondents were "covered." He then proceeded to Seeley & Co.'s office, respondents' manager being aware of the nature of his errand, to arrange the placing of the risks. Seeley & Co. undertook this and immediately allocated to four companies, for whom they were general agents, $18,000 of the amount, *inter alia,* $6,000 to the appellant, and a memorandum was made of it in writing by Seeley & Co.'s manager at the time, which memorandum has since been lost. Seeley & Co. assured Lennie that the respondents were covered or protected pending the issue of the policies. They then took steps to procure the placing of the balance with other companies with whom they had writing facilities, but the loss occurred before these arrangements were completed, so that only $18,000 of the total $40,000 appears to have been actually placed.

In a letter dated the 17th of February, the day after the loss, Seeley & Co., writing to appellant's New York agent, said: "On the 13th instant we bound $6,000 in the Stuyvesant on the plant of the Westminster Woodworking Co."

Before coming to the main question in the appeal, namely, whether a verbal agreement to protect the insured pending the issue of policies can be enforced, I shall clear the ground of

one or two matters relied upon by appellant's counsel. He argued that as the insurance applied for was to be in the total sum of $40,000 no contract could be complete until the whole risk was placed. I cannot agree to that contention. The line of insurance agreed upon was to the knowledge of both Lennie and Seeley & Co. intended to replace old policies, one for $15,000 expiring on that day, namely, the 13th of February, and another for a large sum on the following day. It was essential, as Seeley & Co. knew, that these expiring risks should be covered on that day. They were verbally covered in part on that day, as Seeley & Co. admitted in the letter above quoted, by their accepting $6,000 of the risk on appellant's account. I think, therefore, it was quite well understood between all parties that the insurance was to be placed in such a way as to give immediate *interim* protection without waiting for the placing of the whole of the aggregate risks.

Mr. *Ritchie* also contended that Seeley & Co.'s assurance to Lennie on the afternoon of the 13th that the risk was covered to the extent of $18,000 did not bind the appellant because it was not then communicated to the respondents. In my opinion, it was not necessary to communicate that assurance. Lennie, also an agent for the appellant, had given the assurance in the morning, and while it is true that at that time no part of the risk had been allocated to the appellant, yet for the purpose of carrying out the details of the transaction with Seeley & Co., I think Lennie should be regarded as representing the respondents as well as the appellant.

There is ample evidence of a practice or usage amongst insurance companies, including the appellant, to give verbal assurance of *interim* protection pending the issue of the policy. That was a practice admittedly followed by both Lennie and Seeley & Co. as agents for appellant, as well as by other companies.

I now come to the main question in this appeal, *viz.*: the enforcibility of a verbal *interim* agreement and the appellant's power to bind themselves by a verbal contract of this kind, the contention of their counsel being that the making of a verbal or informal contract is *ultra vires* of appellant under its

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charter. Both questions have been decided adversely to the appellant's contention in the Courts of the United States: see *Ruggles* v. *American Cent. Ins. Co.* (1889), 114 N.Y. 415; 21 N.E. 1000; *Insurance Company* v. *Colt* (1874), 20 Wall. 560.

In our own Courts there is very little authority, but what there is would seem to me to point to the same conclusion: *The Montreal Assurance Company* v. *McGillivray* (1859), 13 Moore, P.C. 87, was cited, but in that case the Judicial Committee declined to express an opinion concerning the validity of a parol contract of insurance.

In *Queen Insurance Company* v. *Parsons* (1881), 7 App. Cas. 96, the character and functions of an *interim* receipt or covering note is explained at p. 124, and the improbability that the Legislature intended to subject it to the same formalities as are required in the case of policies is commented on. The effect of that judgment, as I read it, is to draw a distinction between a formal contract of insurance evidenced by the policy and an informal contract leading to the policy and protecting the insured in the meantime; in other words, while the one, namely, the policy, must be formally executed, the other need not. The same distinction is made in the case of *Thompson* v. *Adams* (1889), 23 Q.B.D. 361. In that case Mathew, J. held that a memorandum, shewing the particulars of the risk, and which was initialled by the brokers, was evidence of a contract to insure in the interval between its date and the issue of a policy, and so enforceable in the Courts.

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In *Jones* v. *Provincial Insurance Company* (1858), 16 U.C.Q.B. 477, the Court on demurrer dismissed the plaintiff's action based on a verbal contract of insurance, but intimated that in an action properly framed, the plaintiffs might be entitled at law to damages for not delivering the policy or to be relieved in equity, meaning, I take it, that a bill in equity for specific performance of the agreement to issue a policy might have been filed.

The principles discussed in these cases are applicable to the case at bar. I am not concerned here with the question whether or not the main contract could be made by parol. I will assume

that it could not. What I am concerned with, and it is the crux of this appeal, is whether the preliminary agreement to give a line of insurance and to protect the risk in the meantime may be made informally, and if it may, then does it make any difference that the informal contract is not in writing, but merely by word of mouth? It is not suggested that the statute of frauds applies, nor do I think the Insurance Act or the appellant's charter precludes the making of this informal contract. If then the contract may be informal, I see no reason why, provided it conforms to the law respecting parol contracts, this contract should not be binding though made by word of mouth.

The manner of enforcement, whether by action for specific performance compelling the issue of a policy or otherwise, is not in question here, as it was not raised before us, and appears not to have been raised in the Court below.

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I would dismiss the appeal.

MARTIN, J.A.: I agree with the judgment of my brother MCPHILLIPS.

MARTIN, J.A.

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

GALLIHER, J.A.

MCPHILLIPS, J.A.: I would dismiss the appeal. The learned trial judge, in my opinion, arrived at the right conclusion. The contract of insurance upon the evidence is clearly established. It was entered into by the agents of the assured and the insurance company, all the elements were present to bring about the contractual relationship, the parties were *ad idem* and a valid and enforceable contract was entered into. The law admits of an oral contract of insurance, and no magic exists in it being in writing, and there is no requirements that it should be in writing. It is true where the company is under statutory requirement to proceed in a certain way in effecting insurance, that procedure must be followed, *i.e.*, a requirement which is "public" but no private or indoor management (*Royal British Bank* v. *Turquand* (1855), 24 L.J., Q.B. 327; (1856), 6 El. & Bl. 327; *Mahony* v. *East Holyford Mining Co.* (1875), L.R. 7 H.L. 869; *Bargate* v. *Shortridge* (1855), 5 H.L. Cas.

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297; *McKnight Construction Co.* v. *Vansickler* (1915), 51 S.C.R. 374, Duff, J. at pp. 383-4; Anglin, J. at pp. 386-7, 390) can limit the ordinary and fair scope of authority of the accredited agents of the company and the holding out of such agents as being clothed with authority to effect insurance, in the absence of it being brought home by the most conclusive evidence, the Court is entitled to hold that there is authority to contract. The evidence makes it clear that the custom and usage is to enter into insurance contracts verbally, and even over the telephone. Courts cannot be unmindful of present conditions and the course of business existent round about them, the business community are under no trammels save where the law intervenes and lays down what shall constitute the contract. The contract entered into here would appear to have been in the usual course of business, middlemen are common in such transactions, especially where any considerable amount of insurance is being placed, and to admit of a transaction such as this appeal discloses being rendered nugatory and to hold that it is a case of no contract, would, in my opinion, be acceding to and admitting of dishonesty in business. It is well known that there is eagerness displayed in obtaining insurance risks and great competition, and the placing of insurance is, in general, a transaction of more than ordinary expedition, not admitting of the time to have policies written or even the giving of "*interim* protection notes," "slips" or "binders," and it is only fair to say that the insurance companies, speaking generally, have always exhibited adhesion to the highest principles of honesty, and the business world has had cogent testimony to this in settlements made by the insurance companies following the great conflagrations which have taken place throughout this continent. It would be the working of injustice to have the assured held to the strictest proof and documentary in its nature when it cannot be gainsaid that custom and usage obtains to place insurance as the insurance was placed in this case, and which is established as being in accord with the ordinary course of business in the placing of insurance established by witnesses of the highest standing and character, engaged from day to day in the transaction of this class of

business, and, in fact, not dissented from by the agents of the appellant Company. To hold the appellant Company liable is carrying out on principle the English law as applicable to civil obligations, all the essentials of a contract are present and no injustice is done. That a policy of insurance would have issued in due course had not a loss supervened goes without saying, but owing to a loss occurring within two days of the placing of the insurance, this no doubt has given rise to litigation. In saying this, I am not animadverting in any way upon the good faith or honesty of the appellant Company, as it may well be that the elucidation of the facts consequent upon the proceedings in Court laid matters bare and in a different light than may have been the understanding of the appellant Company, and unacquaintance with all of these facts is the explanation of the denial of obligation. *Citizens Insurance Company* v. *Parsons* (1881), 51 L.J., P.C. 11, was a case where a claim arose before a policy issued—an *interim* receipt had been given, and a fire happened on the same day. Sir Montague Smith, delivering the judgment of their Lordships, at p. 25, said:

"The *interim* note in this case is what it professes to be, preliminary only to the issuing of another instrument—namely, a policy, which the parties *bona fide* intended should be issued."

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In the present case, the contract of insurance was an oral one but equally effective in law, and I am confident that it was in contemplation—in fact, was agreed would be followed by a policy (in the language of Sir Montague Smith), "which the parties *bona fide* intended should be issued." That the Legislature of British Columbia considered that fire insurance might be entered into by oral contract is well demonstrated, when section 4 of the Fire-insurance Policy Act (R.S.B.C. 1911, Cap. 114) is read, which is as follows:

"The conditions set forth in the Schedule to this Act shall, as against the insurers be deemed to be part of every contract, whether sealed, written, or oral, of fire insurance hereafter entered into or renewed or otherwise in force in British Columbia with respect to any property therein, or in transit therefrom or thereto, and shall be printed on every policy of fire insurance, with the heading, 'Statutory Conditions.'"

There is no inhibition against oral contracts of fire insurance, only that, written or oral, the statutory conditions shall

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apply. The learned counsel for the appellant Company in his very able argument relied greatly upon *The Montreal Assurance Company* v. *McGillivray* (1859), 13 Moore, P.C. 87 (132 R.R. 48), as being a decision helpful to him in his contention that the appellant Company would only be liable where a policy of insurance had been issued by the agents in pursuance of the authority given to them, *viz.* (excerpt in part from authority given to agents):

"With full power to receive proposals for insurance against loss and damage by fire in . . . Vancouver and vicinity . . . to fix rates of premium, to receive moneys, and to countersign, issue, renew, and consent to the transfer of policies of insurance signed by the president and attested by the secretary of The Stuyvesant Insurance Company, subject to the rules and regulations of said Company, and to such instructions as may from time to time be given by its officers."

But it is to be remarked that there is not here any prohibition from entering into oral contracts of insurance. Now, in *The Montreal Assurance Company* case, *supra,* it was held, p. 87:

"First, that the powers of M. as manager, being public, must be taken to have been known to H., the insurer, and that the acts of M. in the transaction were *ultra vires* and void, not being within the scope of his general authority as manager, and, therefore, not binding upon the Montreal Assurance Company.

"Second, that as such a contract was not binding on M.'s principals, it did not become binding upon them by reason of its having been entered into through the medium of M., their agent, his powers as agent being restricted by the limitation of the powers of his principals."

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Sir John Coleridge, delivering the judgment of their Lordships, said at pp. 120-1 (and this is important upon the question of private instructions, which is the case before us):

"And upon this they think, the true question for the jury to have been, not what was the real extent of authority expressly or in fact given by the appellants to Murray, but what the appellants held him out to the world, to persons with whom they had dealings, and who had no notice of any limitation of his powers, as authorized to do for them. For it cannot be doubted, that an agent may bind his principal by acts done within the scope of his general and ostensible authority, although those acts may exceed his actual authority as between himself and his principal; the private instructions which limit that authority, and the circumstance that his acts are in excess of it, being unknown to the person with whom he is dealing."

It is, therefore, apparent that *The Montreal Assurance Company* case does not assist the appellant Company where there is limitation of authority and that limitation is not known,

which is the present case. The appellant Company is not governed or controlled by any law or statute which is public which stipulates in what way insurance shall be effected, the further language of Sir John Coleridge, at pp. 122-3, with the facts of the present case in mind, supports the imposition of liability upon the appellant Company.

It is clear that the agents in the present case, in the light of and in accordance with the exposition of the law, so strikingly portrayed by Sir John Coleridge, bound the appellant Company, and an enforceable contract of insurance must be held to have been effected. It follows that, in my opinion, the judgment should be affirmed and the appeal dismissed.

Appeal dismissed.

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

Solicitors for respondents: *W. Martin Griffin & Co.*

MAUVAIS v. TERVO.

Sale of land—Agreement for payment by instalments—Usual statutory covenants for title in agreement—Expropriation by railway for right of way—Rescission.

The plaintiff purchased certain lands under an agreement for sale and entered into possession, the purchase price to be paid by instalments, the vendor covenanting that, upon completion of the payments, he would convey the lands by deed containing the usual statutory covenants. An action for rescission on the ground that part of the land was expropriated by a railway company under statutory powers was dismissed.

Held, on appeal, that an estate agreed to be purchased is the estate of the purchaser from the time of the contract, and if, after the contract, the estate is compulsorily diminished in area or lessened in value, with no fault on either side, the purchaser is not entitled to rescission but to compensation for the diminution.

Reynolds v. *Crawford* (1884), 12 U.C.Q.B. 168 applied.

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Statement

APPEAL from the decision of HUNTER, C.J.B.C. in an action for rescission of a contract for the purchase of land on the ground of misrepresentation, tried by him at Victoria on the 18th, 19th and 22nd of June, 1914, and the 13th, 16th and 20th of April, 1915. Plaintiff intended the property for a hotel site, and had plans prepared for the building. On purchasing, he said to the defendant that there was some question of the railway going through the property, and that if there was anything against it he did not want it. Defendant replied that there was nothing against it, "not even the scratch of a pen." As a fact, however, the Canadian Northern Railway Company had filed a plan of right of way through it. Plaintiff searched the title in the Land Registry Office, but was not shewn the book in which records of the filing of such plans are kept, and there was nothing in the fees book referring to the plan. Defendant, however, knew of the filing of the plan, but it was not clear to the trial judge that plaintiff's inquiry was directed to or included such plan, and, in any event, plaintiff, by searching the title on his own account, seemingly did not rely altogether on defendant's statement. Plaintiff also exercised certain acts of possession by selling some of the standing timber, thus making it impossible for the parties to be placed in their original positions. There being no authority shewn that the Court may allow a claim for rescission and at the same time make an order for compensation in favour of the defendant, the Chief Justice dismissed the action. Plaintiff appealed.

Crease, K.C., for plaintiff.
W. J. Taylor, K.C., for defendant.

6th May, 1915.

HUNTER, C.J.B.C.

HUNTER, C.J.B.C.: As I understand the law concerning this subject, it must be clearly shewn there was misrepresentation leading up to the contract. Now, as already intimated, I am prepared to accept the evidence of Mauvais to the effect that he informed Tervo that he intended to buy the property for hotel purposes, that he understood there had been some talk of a railway coming, and that if there was anything against the property he did not want it; the words being, "If there is

anything against the property I do not want it, that will be my statement now." To which Tervo replied, "There is nothing against the property, there is not the scratch of a pen."

The question, then, is, if there is a misrepresentation clearly contained in the answer given by Tervo, *i.e.*, such misrepresentation as would leave the Court without any doubt on the question? I have looked at that evidence several times, and, while I have some doubt on the matter, I have come to the conclusion that it is not clearly made out there is a misrepresentation in the answer given.

It is quite true that Tervo may have understood Mauvais to be inquiring about the matter generally; and that the essence of the inquiry was, he did not want to have anything to do with the property if there was any danger of the railway interfering and taking any portion of it. If the inquiry was to be understood in that sense, then the answer given by Tervo was not responsive to the question, and from that point of view would be open to the suggestion that there was a suppression *veri*.

But I think the doubt must be resolved in favour of Tervo, because it is not clear that he did not understand the inquiry to be directed specifically to the question whether there was anything against the title, as this was the last question asked and emphasized by the plaintiff, and that this is the case derives some colour from the evidence given by Mauvais, in which he states he informed Graham that if there was anything against the property he did not want it—and to see if there was any incumbrance against it of any kind. Then, if Tervo is to be given the benefit of the doubt as to what inquiry he was answering, there is no misrepresentation proved, as nothing that the Railway Company did became an incumbrance until after the agreement for sale was executed, there being no incumbrance created until the service of the notice to treat.

There is also a difficulty arising from the fact that Mauvais exercised an act of possession in selling the trees. It appears he sold 36 out of some 80 standing on the property; and having exercised such an act as that, it would be impossible to restore the parties to their former position.

No case has been brought to my attention to shew that the

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Court may allow a claim for rescission and at the same time make an order in favour of the defendant for compensation for acts done by the plaintiff in diminution of the value of the property. There is also the circumstance that the plaintiff did not rest wholly on the statement by Tervo, and at his instigation the title was searched by Mr. Courtney. Mr. Courtney failed to find any record of any attempt by the railway to expropriate the property; but there is the fact, none the less, that Mr. Mauvais acted independently in order to make certain; that, of course, militates to some extent against the view that he was acting wholly on Tervo's statements.

The action must be dismissed.

The appeal was argued at Victoria on the 25th and 28th of June, 1915, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Argument

Bodwell, K.C. (*A. D. Crease,* with him), for appellant: Plaintiff intended to buy the property, which was on Portage Inlet, for the purpose of building a hotel, and the property was desirable owing to its proximity to the water. Tervo assured him there was nothing against the property when he knew, as a matter of fact, that the Canadian Northern had filed in the registry office a route map that shewed the line went through the property. Mauvais searched the title but found nothing against the property: *Cato* v. *Thompson* (1882), 9 Q.B.D. 616 at p. 619. Tervo's statement amounted to misrepresentation. There is a warranty of title by implication from the circumstances, and a covenant for title is included in the agreement for sale: see *Erlanger* v. *New Sombrero Phosphate Company* (1878), 3 App. Cas. 1218 at p. 1278. As to the right of rescission and compensation for the logs that were cut on the property see *Lagunas Nitrate Company* v. *Lagunas Syndicate* (1899), 2 Ch. 392 at p. 456; Halsbury's Laws of England, Vol. 25, p. 297, par. 504 and p. 301, par. 510; *Flight* v. *Booth* (1834), 1 Bing. N.C. 370 at p. 376; *Nottingham Patent Brick and Tile Company* v. *Butler* (1886), 16 Q.B.D. 778 at p. 786; *Carlish* v. *Salt* (1906), 1 Ch. 335. The entry of the route map in the registry office was not noted in

any way on the title of the property in question: see *In re Puckett and Smith's Contract* (1902), 2 Ch. 258; *Torrance* v. *Bolton* (1872), 8 Chy. App. 118 at p. 124; *In re Arnold* (1880), 14 Ch. D. 270 at p. 279.

W. J. Taylor, K.C. (*F. C. Elliott,* with him), for respondent: All the defendant said was that the land was unencumbered. The mere filing of a plan by the railway puts them in a position to treat; they can then give notice to treat: see *Monarque* v. *La Banque Jacques-Cartier* (1901), 31 S.C.R. 474; *La Banque Ville Marie* v. *Morrison* (1895), 25 S.C.R. 289; *McDonald* v. *V., V. & E. R. & N. Co.* (1910), 15 B.C. 315; 44 S.C.R. 65. When notice to treat is given by the railway that is the basis of a contract, but the contract between the parties to this case took place some time before the notice to treat was given: see *Kennedy* v. *Green* (1834), 3 Myl. & K. 699; *Fotherby* v. *Metropolitan Railway Company* (1866), L.R. 2 C.P. 188; *Reynolds* v. *Crawford* (1854), 12 U.C.Q.B. 168; *Wicher* v. *C.P.R. Co.* (1906), 16 Man. L.R. 343; *Mason* v. *South Norfolk R.W. Co.* (1889), 19 Ont. 132; *Johnson* v. *Ontario, Simcoe, and Huron R.R. Co.* (1853), 11 U.C.Q.B. 246; *Inverness Railway and Coal Co.* v. *McIsaac* (1905), 37 S.C.R. 134.

Argument

Bodwell, in reply.

Cur. adv. vult.

2nd November, 1915.

MACDONALD, C.J.A.: This action is for rescission of an agreement whereby the defendant agreed to sell certain land near the City of Victoria to the plaintiff, part of the purchase-money being payable in instalments at future dates. The purchaser was entitled to possession and was let into possession. Prior to the date of the sale a railway company had projected a line of railway through these lands, which were building lots, but did not file maps or plans in accordance with the British Columbia Railway Act, so as to charge the lands through which the railway was projected, or at all events, so as to affect the title of the lands in question. Subsequently to the date of the agreement of sale these plans were duly filed, and it is admitted by counsel on both sides that it was from that date that these

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lands were affected or charged and made liable to compulsory purchase.

Two questions are involved in this appeal. The plaintiff claims that the said agreement was procured by defendant's misrepresentation; that he told the defendant he did not want the lots unless the title were clear, and that the defendant replied, "There is not a scratch of a pen against the title." The learned trial judge found that there had been no misrepresentation or wrongful concealment of fact by the defendant. Having heard the witnesses and having observed their demeanour in the witness box, he was better able to decide that fact than we are. There is much to support his conclusion of fact, and I therefore think it ought not to be disturbed. That the title was clear at the date of the agreement of sale is admitted. Defendant's knowledge of the railway company's intentions appears to have been very vague. On the other hand the plaintiff admits a conversation prior to his signing the agreement with Warren, defendant's agent, concerning the railway, and that Warren told him there was some question about the railway coming there. Thereupon the plaintiff gave instructions that the matter should be looked into, and Warren, acting in this instance for plaintiff, employed a solicitor to make a search, but no plans were found. I think the plaintiff was sufficiently put upon inquiry: *Kennedy* v. *Green* (1834), 3 Myl. & K. 699 at p. 719.

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The second question for decision arises on Mr. *Bodwell's* submission that as the defendant had covenanted that upon the completion of payment of the purchase price he would convey by good and sufficient deed in fee simple all the said pieces or parcels of land described, and that the deed should contain the usual statutory covenants, and that because of the subsequent taking by the railway company of a right of way through these lands, which would render the fulfilment of his covenant impossible, the agreement should be rescinded and the plaintiff repaid the purchase moneys already paid by him. This raises a question not entirely novel but one upon which there has been no direct decisions in our Courts. The question was raised but not decided in *Reynolds* v. *Crawford* (1854), 12 U.C.Q.B.

168. The principle upon which, in my opinion, it must be decided is that applied by Lord Eldon in *Paine* v. *Meller* (1801), 6 Ves. 349. In that case the houses which were the subject-matter of the contract, were destroyed by fire between the date of the agreement for sale and its completion. Again, the same principle was applied by Lord Langdale, M.R. in *Robertson* v. *Skelton* (1849), 12 Beav. 260, where it appeared that the buildings agreed to be sold fell down between the date of the contract of sale and its completion. The principle applied in these cases is concisely stated in the argument in the latter case in these words:

"In equity, an estate agreed to be purchased is considered the estate of the purchaser from the time of the contract, and the purchase-money, from that time is held to belong to the vendor. The consequence is, that if, after the contract, the estate be improved in the interval; or if the value be lessened, by the failure of tenants or otherwise, and no fault on either side, the vendee has the benefit or sustains the loss."

These cases are cited with approval in the latest text-books: see Halsbury's Laws of England, Vol. 25, pp. 368, 369; Addison on Contracts, 11th Ed., 482; and Dart on Vendors and Purchasers, 7th Ed., 290-91. This principle has been applied in the United States to cases like the present one: *Stevenson* v. *Loehr* (1871), 11 Am. Rep. 36; 57 Ill. 509, in which it was held that—

"Where a contract is made for the sale of land, the vendor to give a warranty deed on payment of the purchase-money, and between the time of the contract and the making of the deed, a portion of the land is condemned for a railroad, damages for the taking of the land belong in equity to the purchaser, and he cannot treat such taking as an incumbrance and recover therefor on the covenants in the deed."

See also *Pinkerton* v. *Boston & Albany Railroad Company* (1872), 109 Mass. 527, and *Odell* v. *Gulf, C. & S.F. Ry. Co.* (1893), 22 S.W. 821.

Apart from the charge created by the railway company under statutory sanction since the date of the agreement, the defendant's title is admitted to be a clear title, in fact it appears to have been searched, and in effect accepted before the agreement was signed, when the solicitor made the search in respect of the railway.

As I understand it, the defendant makes no claim to the compensation which will be paid for the land taken by the

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railway company. He may be entitled to have it so dealt with as not to weaken his vendor's lien, but that is a matter which does not affect the decision of this case. Although not decisive of this case, it may not be amiss to point out that had the purchaser not been given time for his payments, and had the deed been given immediately, there could be no question that the plaintiff could not succeed on the covenant in the usual short form deed. That covenant is a covenant against the acts of the vendor, and the matter complained of in this action was not brought about by an act of the vendor.

In my opinion, the appeal should be dismissed.

MARTIN, J.A.: I agree that the appeal should be dismissed, and only add some observations with respect to the contention that under the covenant for title this contract must be rescinded. Though there is not much authority in English or Canadian Courts upon the point, yet the very similar case of *Reynolds* v. *Crawford* (1854), 12 U.C.Q.B. 168, is sufficient to turn the scale. In it, Robinson, C.J. delivering the judgment of the Court, said, p. 173:

"The defendant could not help the land being taken by the railway company. A court of equity would compel the plaintiff to accept and pay for the land, upon receiving proper compensation for the part taken by the company."

And again, p. 175:

"He [defendant] claims the right to treat his bargain as cancelled, because the railway company have exercised an authority which the law gives to them, and which neither the defendant nor he could prevent. If the defendant has in any point failed, which we do not see, the plaintiff has his remedy upon the agreement; but we cannot hold that by anything that was proved the contract was rescinded."

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Then there is the case of *Baily* v. *De Crespigny* (1869), L.R. 4 Q.B. 180, which was an action on a covenant contained in a certain lease, whereby the defendant covenanted that neither he nor his assigns should or would during the term permit to be built any messuage, etc., on a paddock fronting the demised premises. Afterwards said paddock was compulsorily taken by a railway company under an Act of Parliament, and the company erected certain buildings thereon as authorized by said Act. The Court (Cockburn, C.J., Lush, Hannen, and Hayes, JJ.) said, p. 186:

"The Legislature by compelling him to part with his land to a railway company, whom he could not bind by any stipulation, as he could an assignee chosen by himself, has created a new kind of assign, such as was not in the contemplation of the parties when the contract was entered into. To hold the defendant responsible for the acts of such an assignee is to make an entirely new contract for the parties."

It is true that there the Act of Parliament had been passed after the covenant, but I see no difference in principle between the subsequent passing of an Act of Parliament and the subsequent exercise of compulsory powers of expropriation under an existing Act, or powers enjoyed by the Crown for, *e.g.*, taking lands for the sea or land forces for purposes of defence, as was, in fact, done by the Imperial Government a few years ago in the harbour of Esquimalt, not far from the lands in question, now in the same municipality. The same result might and often does occur when municipalities constantly exercise their standing statutory powers of expropriation in opening new roads or widening, altering, or diverting old ones, or taking lands for public parks, etc. Everyone, especially near large centres, lives under the shadow of a compulsory taking of his lands for purposes authorized by the Legislature. If a purchaser wishes to escape from the consequences of this state of things, he should protect himself in the way suggested by Maule, J. cited at p. 186 in *Baily* v. *De Crespigny, supra.*

A good illustration of the difficulty and loss, without recourse from the vendor, that a vendee encounters from the exercise by a municipality of its powers to alter streets is to be found in *Monarque* v. *La Banque Jacques-Cartier* (1901), 31 S.C.R. 474, wherein the Court said (pp. 478-9):

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"Elle n'a pas garanti a l'appelante que l'autorite municipale ne changerait jamais les limites de la rue Ontario, ne l'aborlirait pas toute entiere peut-etre."

The *Baily* case is noted and the subject discussed in Williams on Vendor and Purchaser, 2nd Ed., Vol. 2, pp. 1020-1:

"Suppose, however, that the house or the adjoining land were taken by the railway company after the formation of the contract but before its completion, the case would be governed by the general rule, unless the continued existence *in statu quo* of the whole property sold up to the time for completion were an essential condition of the sale. If not, the purchaser would have to pay the whole purchase-money and take a conveyance of the property in its altered condition, but he would be entitled to compensation from the railway company in respect of his equitable estate

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or interest in the land compulsorily taken. Where it is an essential condition of the sale that the property shall be conveyed in its existing state, it appears that the contract will be discharged, if before completion the whole or any part thereof be taken away compulsorily under parliamentary powers."

And *cf.* pp. 506-8, respecting loss or destruction of the property by fire, tempest, earthquake, irruption of sea, etc., and diminution in value. The last-cited paragraph as to "essential condition" does not apply to the present case.

MCPHILLIPS, J.A.: The learned Chief Justice of British Columbia, who was the trial judge, dismissed the action, one for rescission upon the ground of misrepresentation.

The case for the appellant was that he informed the respondent that he wished to purchase the land for a hotel site and stipulated that it should be free from all claims by any railway company for right of way or other purposes and generally free from incumbrances, and that he would not purchase if it was to be traversed by a railway or incumbered in any manner. The evidence led by the appellant would not appear to at all establish the claimed misrepresentation; there would not appear to have been any false representation nor any representation inducing the appellant to enter into the agreement of sale and become the purchaser of the land. In the result following upon the entry into the agreement of sale whereby the appellant became the purchaser of the land, the land became subject to expropriation proceedings by the Canadian Northern Pacific Railway Company by the exercise of the statutory powers admitting of compulsory taking, and the land taken does materially and perhaps absolutely destroys the land for the purposes by the appellant intended when purchasing the same. The learned Chief Justice, in my opinion, has arrived at the right conclusion upon the evidence, and that which has resulted is not imputable to the respondent—it is an incidence that may affect any land when it comes within the route of a railway. The burden of proof was on the appellant, and that burden was not satisfactorily discharged; the appellant must be held to have purchased the land, not induced by any misrepresentation upon the part of the respondent, in

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purchasing land the risk of expropriation proceedings may be said to be ever present, not only for railway purposes but for many other purposes of public utility; if the appellant was desirous of ensuring himself against that which has happened, and if it was his settled purpose to have nothing to do with the land if it should be traversed by a railway, and that in such event the contract was to be rescinded, he should have stipulated for a covenant to that end; and if the respondent had entered into any such covenant, no doubt rescission would have had to be decreed, although prevention of expropriation proceedings would be impossible. Such is not, however, the position, and the appellant has failed to establish those requisites which are essential in decreeing rescission (*United Shoe Machinery Company of Canada* v. *Brunet* (1909), A.C. 330 at p. 338; 78 L.J., P.C. 101 at p. 103). The learned Chief Justice, in his reasons for judgment, stated that no case had been brought to his attention "to shew that the Court may allow a claim for rescission and at the same time make an order in favour of the defendant for compensation for acts done by the plaintiff in diminution of the value of the property"—this would be no insuperable difficulty if it could be said, and, I think, in this case it could be rightly said, that the selling of 36 trees out of some 80 standing trees would only be a matter of compensation. Lord Lyndhurst (then Lord Chancellor) in *Harris* v. *Kemble* (1831), 5 Bligh, N.S. 730 (35 R.R. 83) at pp. 751-2, said:

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"The question, then, comes to this, whether the taking and holding possession so long under the agreement, altering the theatre contrary to the provision in the agreement, the appellants thereby, as it is contended, injuring the theatre, and by their conduct affecting materially the interests of the property; whether these circumstances are sufficient to induce the Court to enforce the specific performance of the agreement? I think not; because these matters are of account and compensation; and it is not necessary upon any of these grounds to decree a specific performance."

Therefore, had the respondent established a case for rescission it was relief which could have been granted, notwithstanding the acts of possession, interference with and selling of the trees, but that case failed of being established to the satis-

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faction of the learned Chief Justice of British Columbia, and being in agreement with him, it follows that, in my opinion, the appeal should be dismissed.

Appeal dismissed.

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Solicitors for appellant: *Crease & Crease.*
Solicitors for respondent: *Courtney & Elliott.*

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R. B. ANDERSON & SON v. HILLCREST LUMBER CO.

R. B. ANDERSON & SON, HILLCREST LUMBER COMPANY, MURCHIE & DUNCAN, AND LAZENBY v. DAWBER: WALLIS, GARNISHEE.

Attachment—Service of attaching order—Subsequent receipt of executions by the sheriff—Effect of on attaching order—Creditors' Relief Act, R.S.B.C. 1911, Cap. 60, Secs. 3, 31 and 34.

The service of an attaching summons, although not a transfer of the debt, creates a charge on it in favour of the attaching creditor which is not taken away by the subsequent receipt of writs of execution by the sheriff.

Robert Ward & Co. v. *Wilson* (1907), 13 B.C. 273 not followed.

APPEAL by plaintiffs, other than R. B. Anderson & Son (respondents), from the order of BARKER, Co.J. made at Duncan, on the 19th of May, 1915, ordering that moneys paid into Court by the garnishee be paid out to the sheriff to be distributed by him to those entitled in accordance with the Creditors' Relief Act. The facts relevant to the issue on which the parties agreed are as follows: In *Hillcrest Lumber Co.* v. *Dawber*: *Wallis, garnishee,* the garnishee order was served on Wallis on the 31st of January, 1914, and judgment entered against Dawber on the 20th of February, 1914, for $86.36; and execution placed in sheriff's hands on the 24th of February, 1914. In *Murchie & Duncan* v. *Dawber*: *Wallis, garnishee,* judgment was entered on the 14th of April, 1914, for $402.70,

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execution issued and placed in sheriff's hands on the 15th of April, 1914, and garnishee order was served on Wallis on the 21st of April, 1914. In *Lazenby* v. *Dawber*: *Wallis, garnishee,* judgment was entered for plaintiff on the 14th of April, 1914, for $458.75, execution placed in the sheriff's hands on the 15th of April, 1914, and garnishee order served on Wallis on the 21st of April, 1914. In *R. B. Anderson & Son* v. *Dawber*: *Wallis, garnishee,* the garnishee order was served on Wallis on the 25th of April, 1914, judgment recovered against defendant on the 13th of April, 1915, for $752.87, and warrant of execution placed in sheriff's hands on the 16th of April, 1915. The garnishee, paid into Court on the 9th of April, 1915, $756.15. It was admitted that the four garnishee orders were served in the above order. The question at issue is the interpretation to be placed upon subsection (3) of section 31 of the Creditors' Relief Act. Statement

The appeal was argued at Victoria on the 28th of June, 1915, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

F. C. Elliott, for appellants: Three garnishee summonses were served, and later on the respondent served a fourth. The trial judge followed *Robert Ward & Co.* v. *Wilson* (1907), 13 B.C. 273, and held that the attachment was for the benefit of all the creditors under section 31 (3) of the Creditors' Relief Act. An attaching creditor is not a creditor by execution: see *Re Hutchinson; Ex parte Plowden* (1886), 54 L.T.N.S. 302 at p. 304; *Ex parte Joselyne; Re Watt* (1878), 38 L.T.N.S. 661 at p. 662. The group of subsections to section 31 of the Act is governed by the first subsection: see *Inglis* v. *Robertson* (1898), A.C. 616; *Lang* v. *Kerr, Anderson, & Co.* (1878), 3 App. Cas. 529. As to whether section 31 (3) applies to all attachments see *Williamson* v. *Woolliams and Naismith* (1911), 16 B.C. 346; *Hudson's Bay Company* v. *Hazlett* (1896), 4 B.C. 450. Argument

H. W. R. Moore, for respondent, relied on section 31 (3) of the Act. The rule that the property in the debt transfers to the judgment creditor when the order of attachment is served must not be taken too literally: see *Norton* v. *Yates* (1906),

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1 K.B. 112. None of the creditors have applied to have the money paid out to them.

Elliott, in reply, referred to the English cases, where an attaching order puts a person in the position of a secured creditor.

Cur. adv. vult.

2nd November, 1915.

MACDONALD, C.J.A.: The attaching summons of the appellant, the Hillcrest Lumber Company, was served on the garnishee on the 31st of January, 1914, judgment was recovered against the judgment debtor and the writ of execution delivered to the sheriff on the 20th of February following. The other appellants, Murchie & Duncan and Thomas Lazenby, recovered judgment against the judgment debtor on the 14th of April of the same year, and delivered writs of execution to the sheriff on the following day. Their attaching summonses were served on the garnishee on the 21st of the same month. The respondent served his attaching summons on the garnishee on the 25th of the same month, and recovered judgment about a year later, and delivered his writ of execution on the 16th of April, 1915.

No orders absolute were made in any of these suits, but the garnishee paid a sum of money into Court on the 9th of April, 1915. This sum was by the order appealed from directed to be paid out to the sheriff for distribution under the Creditors' Relief Act. If the appellants' contention is right, that this money is not distributable under the said Act, it will all go to the appellants, leaving nothing for the respondent, whereas under the order appealed from appellants and respondent will all share in its distribution.

MACDONALD, C.J.A.

The decision of the appeal depends on the construction of section 31 of the said Act, but the case of the said Lumber Company must be considered by itself, as it differs from those of the other appellants in this, that when that appellant's attaching summons was served there were no writs of execution in the sheriff's hands, though there were several such in his hands at the time the money was paid into Court by the garnishee.

In my opinion, all the subsections of section 31 of the said Act are controlled by the opening sentences of subsection (1).

The sheriff's interest in moneys attachable arises only when there are executions in his hands, and there are or appear to be insufficient goods of the debtor to satisfy them and his own fees. CLEMENT, J. appears to have given a wider application to this section (*Robert Ward & Co.* v. *Wilson* (1907), 13 B.C. 273), but, with deference, I am not prepared to go as far as that decision goes.

The Lumber Company says it became entitled to the attached debt from the date of the service of the attaching summons and the receipt by the sheriff after that date of writs of execution gave him no right to intervene, and did not affect the rights which the Lumber Company acquired theretofore.

The respondent, on the other hand, contends that section 31 (3) makes the fund distributable under the Act, and even if the sheriff had no right to the fund when the Lumber Company's attaching summons was served, yet the mere service of the summons did not transfer the debt, and when writs of execution subsequently came into the sheriff's hands before the attaching creditor had been paid by the garnishee, all creditors then entitled under the Act were within the purview of section 31 (3). I have, therefore, to consider the meaning controlled as aforesaid of these words:

"Any judgment creditor who attaches a debt shall be deemed to do so for the benefit of himself and all creditors entitled under this Act."

Now, at the time the debt in question was attached by the Lumber Company there were no creditors entitled under the Act, that is to say, none who had placed themselves in a position to claim its benefits.

The claim that the service of the summons operated to transfer the debt from the garnishee to the attaching creditor is founded on the language of James, L.J. in *Ex parte Joselyne*; *Re Watt* (1878), 38 L.T.N.S. 661, which seemed so to hold. This language, however, has been explained in the cases of *In re Combined Weighing and Advertising Machine Company* (1889), 43 Ch. D. 99; *Norton* v. *Yates* (1906), 1 K.B. 112; and *Cairney* v. *Back* (1906), 2 K.B. 746; holding that an attaching order does not transfer the debt but that the primary creditor takes subject to prior equities. It seems to me that

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the service of the attaching summons, while not a transfer of the debt, creates a charge on it in favour of the attaching creditor, which is not taken away by the subsequent receipt of writs of execution by the sheriff. Had there been executions in the sheriff's hands at the time the attaching summons was served, then section 31 would have given the sheriff the prior right, *i.e.*, the right himself to attach the debt or to take advantage of the process of judgment creditors commencing their attachment proceedings thereafter.

I think the appellant Lumber Company is entitled to be paid out of the fund in question the amount of its claim and costs. As that claim is smaller than the sum of money in Court, the rights of the other appellants have to be considered. With respect to them, following what I have said, I think the sheriff was entitled to the moneys because when their attaching summonses were served, the sheriff's right had arisen by reason of his having several writs of execution then in his hands.

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Their appeal therefore fails.

MARTIN, J.A.: This is a contest under section 31 of the Creditors' Relief Act between garnishing creditors. The effect of a garnishee order, and the principal cases thereon, have been well considered by Warrington, J. in *Norton* v. *Yates* (1906), 1 K.B. 112, and it amounts only to a charge upon the debt and not to a transfer of the property in the debt from the debtor to the garnishor, and an order absolute does not give any further effect to the charge upon the debt which was created by the order *nisi* which

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> "is, in fact, the order which creates the charge once for all, and not merely conditionally. The order absolute which follows is not an order dealing with the charge which has been already created, but is an order on the garnishee to pay the amount of the debt to the garnishor":
>
> *per* Walton, J. in *Cairney* v. *Back* (1906), 2 K.B. 746 at p. 750.

After giving due regard to the object of the Legislature as expressed in sections 3 and 34, I think the correct view of the expression "any judgment creditor who attaches a debt," in subsection (3) of section 31, is that it includes only plaintiff

creditors who happen to have judgments at the time they obtain a garnishee order.

Here all the four judgment creditors have executions, and three of them are on the same footing in that their garnishing orders *nisi* were issued after judgment: these three are clearly within subsection (3) and the money must be distributed by the sheriff, but according to my said view of the section, the remaining one (the appellant Company) is not within that subsection, because it got its garnishing order, *i.e.*, attached its debt, before judgment. There is nothing in the Act to justify us in depriving it of the priority that the first attaching creditor has always been held to secure as the result of his diligence—the maxims *vigilantibus et non dormientibus jura subveniunt* and *prior tempore, potior jure* cover the principle, which has been recently recognized in *Slinger* v. *Davis* (1914), 20 B.C. 447, and earlier in *Wilson Bros.* v. *Robertson and Rolston* (1902), 9 B.C. 30. I agree that, in any event, payment of the debt "under subsection (3) should not be made to the sheriff unless there are in [his] hands several executions and claims," etc., etc.—by several I understand more than one. The position of a garnishing execution creditor in certain circumstances in the working out of the Act is peculiar, for, as was said in *In re Greer* (1895), 2 Ch. 217, "his right to the money is vested, but liable to be divested."

MARTIN, J.A.

The appeal should, therefore, be dismissed.

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

MCPHILLIPS, J.A.

Appeal allowed, in part.

Solicitor for appellants: *E. T. Cresswell.*
Solicitor for respondent: *H. W. R. Moore.*

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STRONG v. CANADIAN PACIFIC RY. CO.

STRONG AND THE A. R. WILLIAMS MACHINERY COMPANY OF VANCOUVER, LIMITED v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Negligence—Damage to ship and boiler.

Practice—Plaintiffs not owners until after accident—Adding parties—Action for indemnity—Abandonment of pleading by conduct—Canada Shipping Act, R.S.C. 1906, Cap. 113, Sec. 25.

W. contracted to sell and install a new boiler in L.'s steam tug. W. hired C.'s crane and operators, including slings, to lift the boiler into the boat. During the operation the slings broke and the boiler, falling into the tug, both tug and boiler were damaged. The accident occurred in October, 1911. L., who was a foreigner, agreed, when ordering the boiler, to give W. a mortgage on the ship, this was to be done by L. transferring the ship to S., a British subject, and S. giving the mortgage to W. S. did not get his certificate of British registry or become owner until January, 1912, and the mortgage was not actually given to W. until the 3rd of September, 1912. W. made good the damage, and suit was brought by S. and W., as owner and mortgagee respectively, against C. for injury to the tug.

Held (MACDONALD, C.J.A. dissenting), that as S. and W. were not respectively owner and mortgagee at the time the accident took place they had no right of action.

Held, further, that the application to add L. as a party plaintiff should be refused, as his consent in writing to such a course had not been obtained.

APPEAL from the decision of HUNTER, C.J.B.C., in an action for damages to the tug Lady Lake and her boiler, tried by him at Vancouver on the 21st, 22nd and 23rd of October, 1913. Prior to the accident over which the action arose, one G. W. Lindsay, who owned the Lady Lake, entered into an agreement with the plaintiff, The A. R. Williams Machinery Company of Vancouver, for the installation of a boiler in his vessel. Owing to Lindsay not being a British subject, it was agreed that Lindsay should transfer the vessel to the plaintiff Charles E. Strong, the secretary of the plaintiff Company, who would give said Company a first mortgage on the ship to secure its lien on the boiler. Strong received his certificate of registry and became owner on the 11th of January, 1912, and the mort-

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gage from Strong to the plaintiff Company was given on the 3rd of September, 1912. The plaintiff Company in order to transfer the boiler from the car to the vessel in question hired from the Canadian Pacific Railway a crane with appurtenances, including a man to operate the crane (who was in the Canadian Pacific Railway's employ), also slings for carrying the boiler. The boiler was moved from the car to the boat on the 27th of October, 1911, and while lowering the boiler with the crane into the hold of the vessel the slings parted, precipitating the boiler into the vessel and causing the damage complained of. The plaintiffs claimed $5,711.02 damages for injury to the vessel and the boiler. The learned Chief Justice concluded that judgment should go for the plaintiff for $1,747.21 damages to the boiler and $674.50 damages to the vessel. The defendant Company appealed.

Statement

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

Bodwell, K.C. (*McMullen,* with him), for appellant: One Lindsay was the real owner of the boat at the time of the accident on the 27th of October, 1911. Lindsay was an American and could not register in Canada. He transferred the boat to Strong, but Strong was not the registered owner until the 11th of January, 1912. The plaintiff, The A. R. Williams Machinery Company, obtained a mortgage to secure repayment of the machinery and certain advances, but this mortgage was not given until the 3rd of September, 1912, nearly a year after the accident. The plaintiffs have therefore no status for bringing this action. The boiler fell by reason of the parting of the slings. The custom was to lease the crane to any one who wanted to use it; the crane man was in the employ of the Canadian Pacific Railway. The operation of installing the boiler in the boat was in the hands of Lindsay, and the crane man was under his orders. What caused the accident was the inherent weakness of the slings and the shearing of the slings on the angle irons on the bottom of the boiler. [He referred to *B.C. Canning Co.* v. *McGregor* (1913), 18 B.C. 663.]

Argument

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M. A. Macdonald, for respondent: There is abundant evidence to justify the conclusion arrived at by the trial judge. Even if it is a contract of hiring they are still liable, as they must supply proper material. There is no evidence that the cable broke at the angle iron. Lindsay complained that the cable was not strong enough, and in letting down the boiler the crane man (who was in the employ of the defendant Company) let it down by jerks that ended in the cable giving away. A mortgagee has a right to maintain an action against those who injure the property on which he has a mortgage.

Argument

Where there was an agreement to give a mortgage, that is in equity a mortgage: see *Mann et al.* v. *English et al.* (1876), 38 U.C.Q.B. 240.

Bodwell, in reply.

Cur. adv. vult.

2nd November, 1915.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss this appeal. The plaintiff, the A. R. Williams Machinery Company, agreed with one Lindsay, the then owner of the steam tug Lady Lake, to install a new boiler in her and to remove an old one. That Company hired the defendant's crane and operators to lift out the old and lift in the new boiler. In my view of the case it is immaterial whether the contract was as contended for by defendant's counsel merely for the use of the crane and operators, or, as contended for by plaintiff's counsel, a contract to do the work involved in taking out the one and placing the other boiler in the tug. That much-contested question is, in my opinion, immaterial, because, assuming the defendant's contention to be right, if by reason of the defective appliance furnished by defendant under the contract, the damage complained of was done, the defendant is liable as for a breach of its contract to furnish appliances, in this case, the slings, reasonably fit for the purpose they were to be put to. Now, there is ample evidence that the loan of the slings was not gratuitous. The evidence given on plaintiff's behalf is that $6 was charged by the defendant for the use of the slings, and the defendant's employee, Parsons, who was in charge of the crane, admits that the slings "would have to be charged up" against the plaint-

iff Company. There is also evidence that the sling which broke was defective, and not reasonably fit for the purpose for which it was supplied. The damage caused by reason of the breaking of the sling was made good by the plaintiff Company at an expense amounting to the sum for which judgment was given below.

The question of parties and the frame of the action arises on these facts: the tug belonged to the said Lindsay, a new boiler was sold to him by the plaintiff Company on a hire agreement under which the property was not to pass to the purchaser until paid for. The injury to the boiler was repaired at an expense of $1,747.21, and to the tug at $674.50. Some time after the damage was done, but in pursuance of a prior verbal agreement, Lindsay transferred the tug to the plaintiff Strong, the secretary of the plaintiff Company, and Strong mortgaged it to the plaintiff Company to secure payment of the price of the boiler.

The defendant's contention, based upon these facts, is that as to the injury to the tug the cause of action was not that of the plaintiff Company nor of the plaintiff Strong, but was that of Lindsay only. That objection can be met by treating the action as one by the plaintiff Company for indemnity. If the cause of action was Lindsay's, he could call upon the plaintiff Company to make good the damage to the tug, and for that matter to the boiler as well, and the plaintiff Company upon making good the loss could recover the same from the defendant. Neither Strong nor Lindsay were necessary parties to such an action. While this action is not so framed, yet the issue in such an action is the issue, and the only issue in this one, and was fully tried. The objection was not pressed at the trial, and should not prevail here. The plaintiff Strong is a superfluous party, and his joinder, I think, has not affected the costs. Whether he could succeed on his own status as subsequent transferee of the tug, I do not think it necessary or useful to decide.

MACDONALD, C.J.A.

MARTIN, J.A.: After a careful perusal of the evidence, I have reached the conclusion that it justifies the judgment.

MARTIN, J.A.

But a legal difficulty arises respecting the allowance of

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damages to the ship, because at the time of the accident, 27th October, 1911, it is conceded that it was not the property of either of the plaintiffs, but of one George W. Lindsay, who on the 13th of September, 1911, gave an order for the boiler in question, reserving to the vendors a lien thereon, and an agreement to give a first mortgage on the ship to secure the lien. Lindsay being a foreign subject could not own a ship registered in Canada, so it was arranged that he would transfer the ship to the plaintiff Strong, who was to give a mortgage on her to the plaintiff Williams Company to secure repayment of the machinery and for certain advances, including the customs duty, paid on bringing the ship to Canada from the United States, which mortgage was not given till the 3rd of September, 1912. The bill of sale from Lindsay to Strong is not in evidence, nor its date, but from Strong's evidence it appears that he did not get his certificate of British registry, or become owner, till the 11th of January, 1912, nearly three months after the accident. The statement of claim sets up, paragraph 3, that the plaintiff Strong was the owner of the ship at the time of the accident, but this is denied in the defence, paragraph 3, and in paragraph 8 thereof, it is alleged that Lindsay was the owner at that time. Thus the question of ownership was clearly raised, and though it was admitted by the plaintiff in his evidence that Lindsay was the owner,

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yet no assignment of Lindsay's claim has been put in evidence. In such circumstances it is submitted that the plaintiffs cannot recover for any damage done to Lindsay's ship, and the objection is well taken. It was urged that since Lindsay had agreed to transfer the vessel to Strong and that Strong was to give a mortgage to the plaintiff Company, it was really in the position of a mortgagee and therefore could maintain this action. But whatever else may be said of this shuffle, Strong did not even become the owner till January, and section 45 of the Canada Shipping Act provides that—

"Except in so far as is necessary for making such ship available as security for the mortgage debt, a mortgagee shall not, by reason of his mortgage, be deemed to be the owner of a ship, nor shall the mortgagor be deemed to have ceased to be owner of such mortgaged ship."

I think that this contention is too far-fetched, and cannot be given effect to.

I am unable, in view of the pleadings and evidence, to take the view that the course of the trial was such that it can be said that the case was so conducted that the defendant's counsel led the "Court and opposing counsel to believe, and to act upon the belief that the issue" so pleaded was abandoned, within the meaning of *Scott* v. *Fernie* (1904), 11 B.C. 91, and *cf. Tanghe* v. *Morgan, ib.* 76; and in 2 M.M.C. 178 (where a fuller report is given); *King* v. *Wilson* (1904), 11 B.C. 109; and *Haddington Island Quarry Company, Limited* v. *Huson* (1911), A.C. 722 at p. 729, wherein their Lordships of the Privy Council held the defendants to the pleadings though another issue had been argued before us in this Court.

And I also find myself unable to regard or deal with the case as though it were one of indemnity and third party, and thereby dispense with the necessity of the owner Lindsay being upon the record—that would be a fundamental alteration which I think we would not be justified in countenancing.

But we were asked to amend and add Lindsay as a party plaintiff. I was, at first, of the opinion that this ought not to be done, as it was not asked for at the trial, and in *Durham Brothers* v. *Robertson* (1898), 1 Q.B. 765; 67 L.J., Q.B. 484, the Court of Appeal refused to add an assignor as a party to cure an objection to an invalid conditional assignment, Chitty, L.J. saying, p. 774:

"The trial has taken place, and it is not possible now to make any amendment by adding parties or otherwise." MARTIN, J A.

But in *Howden* v. *Yorkshire Miners' Association* (1903), 72 L.J., K.B. 176, an action respecting the funds of a miners' association wherein the trustees of the association were not originally parties, it is said, p. 178:

"In the course of the argument in the Court of Appeal the Court ordered that the trustees should be made defendants in order to give them an opportunity of appearing and being heard."

Lord Justice Stirling, at p. 187, explaining the situation, said:

"The persons in whom the funds were legally vested were not parties, and I have never known such an action as this where the trustees were not parties to it. I think it is clear that under Order XVI. rule 11 we have power to add parties at any time. That applies, of course, to the Court of first instance; but by Order LVIII. rule 4 the Court of Appeal has all the powers and duties as to amendment and otherwise as the High

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Court. It seems to me, therefore, that the trustees have now been properly made parties. It was objected that there is no evidence of any application to the trustees or refusal by them to sue. We have now the trustees here; and it was stated on their behalf that they were bound to act on the directions of the council."

The prior decision of the same Court in the *Durham* case was not referred to, and it is strange and embarrassing that there should be such a direct conflict of opinion, and the uncertainty is increased by another earlier decision of the same Court in *Edison & Swan United Electric Light Company* v. *Holland* (1889), 41 Ch. D. 28, wherein the judges, Cotton and Lindley, L.JJ., differed as to their power to add third parties as defendants, but agreed in declining to do so in the circumstances, if they had power, Cotton, L.J. laying stress on the fact that the relief had not been applied for below. In the case at bar, I am of the opinion that justice does not require us to exercise the power, if we have it, by adding the party, and also I point out that a proper foundation for the application was not laid, because the necessary "consent in writing thereto" of the proposed plaintiffs, which must be under his own hand—*Fricker* v. *Van Grutten* (1896), 2 Ch. 649, and *cf. Hill* v. *Hambly* (1906), 12 B.C. 253—has not been obtained.

MARTIN, J.A.

I note that we have exercised the power to amend pleadings though no amendment was asked for below: see *King* v. *Wilson, supra,* and terms there imposed.

The result is that the appeal should be allowed by reducing the judgment by the amount awarded for damage to the ship, $674.50, with costs—*Dallin* v. *Weaver* (1901), 8 B.C. 241.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I concur in the judgment of my brother MARTIN.

Appeal allowed, Macdonald, C.J.A. dissenting.

Solicitor for appellant: *J. E. McMullen.*
Solicitor for respondents: *M. A. Macdonald.*

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KELLY v. CANADIAN PACIFIC RAILWAY COMPANY.

KELLY v. CANADIAN PACIFIC RY. CO.

Banks and banking—Bills and notes—Lost cheques—Payment on forged indorsement—Notice given to bank where payable—Cashed at another branch of same bank—Bills of Exchange Act, R.S.C. 1906, Cap. 119, Secs. 156 and 157.

The defendant Company paid the plaintiff wages by cheques drawn on the Bank of Montreal in Vancouver. The cheques were lost in Seattle, and notice to stop payment was telegraphed the bank on the same day. On the following day the cheques were cashed upon forged indorsements at the branch of the same bank in Spokane, and from there forwarded to the Vancouver branch, where they were debited to the account of the defendant company.

Held (McPHILLIPS, J.A. dissenting), that an action will not lie for the wages for which the cheques were given while the cheques are outstanding in the hands of third parties.

Davis v. *Reilly* (1898), 1 Q.B. 1 followed.

Held, further, that the plaintiff should either have taken proceedings to recover the cheques or joined the Bank of Montreal as a party to the action.

APPEAL from the decision of GRANT, Co. J. in an action tried at Vancouver on the 17th of March, 1915. The plaintiff, a carpenter, was employed by the defendant Company on a carpenter's gang at Harrison Mills for the months of March, April and May, 1914. He received for his services three cheques, dated respectively the 15th of April, 15th of May, and 15th of June, 1914, payable at the Bank of Montreal in Vancouver. The plaintiff went to Vancouver on the 1st of July, but the banks being closed on that day, he was unable to cash the cheques. He then went to Victoria and from there to Seattle and Tacoma. He missed the cheques on the morning of the 8th of July in Seattle, and immediately telegraphed the Bank of Montreal in Vancouver to stop payment. He then went to Vancouver, where he saw the paymaster of the defendant Company, who on the 9th of July, after he had been advised of the loss, went to the bank to stop payment, and later on the same day wrote the bank a letter to the same effect. The

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cheques were cashed at the Bank of Montreal in Spokane on the 9th of July, and were sent by that branch to the Bank of Montreal in Vancouver, where, on the 11th of July, they were debited to the account of the defendant Company. The plaintiff sued the defendant Company for $176.90, the three months' wages for which the cheques had been given, or in the alternative, for the payment of the amount of the cheques. The trial judge gave judgment for the plaintiff for the amount claimed. The defendant Company appealed.

Statement

The appeal was argued at Victoria on the 22nd of June, 1915, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Mayers, for appellant: The cheques were cashed in Spokane on the 9th of July at the Bank of Montreal, on the same day payment was stopped at the Bank in Vancouver, where the cheques were payable. When a creditor takes a negotiable instrument he takes it in satisfaction of the debt, conditional upon its payment when due, and the question of conditional payment has not arisen here. He took the cheques in full payment, as the words "these cheques are taken by me in full payment" are written on the cheques. Having lost the cheques, he cannot sue the maker for the recovery of their amount: see *Ramuz* v. *Crowe* (1847), 1 Ex. 167; he can neither recover on the note nor on the original consideration—*Crowe* v. *Clay* (1854), 9 Ex. 604; *Davis* v. *Reilly* (1898), 1 Q.B. 1. This was an absolute payment—*Sibree* v. *Tripp* (1846), 15 M. & W. 22. Suppose he succeeded in this case, he would still have a right to claim the cheques from the Bank: see *Young* v. *Grote* (1827), 5 L.J., C.P. (o.s.) 165; *Imperial Bank of Canada* v. *Bank of Hamilton* (1903), A.C. 49.

Argument

R. M. Macdonald, for respondent: Payment was stopped in Vancouver on the 9th of July, the cheques were cashed at the branch of the same bank in Spokane on the same day, and paid in Vancouver on the 11th. The branch in Spokane dealt with the cheques as a stranger, as the cheques were payable in Vancouver. The stopping of payment of the cheques on the 9th had the effect of reviving the right of action: see Bills of Exchange Act, Sec. 167. When the cheques were presented

at the bank in Vancouver on the 11th, they should not have been paid, but on being paid, the original cause of action arose. It makes no difference whether the countermand is made by the plaintiff or not: see Falconbridge on Banks and Banking, 2nd Ed., 186; *Rose-Belford Printing Co.* v. *Bank of Montreal* (1886), 12 Ont. 544; *Woodland* v. *Fear* (1857), 7 El. & Bl. 519. As to the effect of countermanding payment see *Cohen* v. *Hale* (1878), 3 Q.B.D. 371.

Mayers, in reply.

Cur. adv. vult.

2nd November, 1915.

MACDONALD, C.J.A.: The respondent (plaintiff in the action) sues for three months' wages for which he had been given by his employer (the appellant) three cheques drawn on the Bank of Montreal, Vancouver branch. When the action was commenced, these cheques were outstanding in either the hands of the said Vancouver branch, or of the Spokane branch or agency of the Bank of Montreal. The business relationship of these two branches does not clearly appear. Evidence was admitted to shew that the Spokane branch or agency cashed the cheques on forged indorsements, and then forwarded them to the Vancouver branch, which branch appears to have claimed the right to charge these cheques against the appellant's account. At the trial a clerk from the bank was called to produce the cheques in Court. The right of the bank, therefore, to the cheques pending the settlement of any contest with the appellant in respect of the indorsement, is not in dispute. The result is that the respondent was not in position to deliver up the cheques upon judgment being given in his favour.

At common law, it is well settled that the respondent could not succeed unless he could deliver up the cheques. Formerly, in equity relief in case of a lost negotiable instrument could be obtained upon a sufficient indemnity being given, and by our Bills of Exchange Act a like relief is provided for. The situation, then, is that judgment has been given against the appellant in respect of the cheques or the wages which they represent, although the cheques are outstanding in the hands of third parties, whose right to insist upon payment of them from the

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appellant may, in the future, be established, and who are, at all events, not estopped by the judgment in this action from insisting that the indorsements are genuine, and that they are entitled to insist upon payment by the appellant.

In these circumstances, I think the appeal must succeed. The respondent should either have recovered possession of the cheques, if they rightly belonged to him, before commencing this action, or should have joined the holders of them as third parties in this action, and thereby enabled the Court to dispose of the whole matter in such a way as to protect the interests of all concerned.

MACDONALD, C.J.A.

The appeal should be allowed.

MARTIN, J.A.

MARTIN, J.A.: This is an action to recover the sum of $176.90 for wages as a carpenter, or alternatively, for payment of three cheques for the same amount given for said wages for March, April and May, 1914, and payable to the order of the plaintiff. He lost said cheques on the 8th of July last, after carrying them about with him, and the Bank of Montreal paid them and still holds them, though they were produced in Court by the bank when the plaintiff swore that the indorsement thereon was not his, but a forgery. The position, therefore, is peculiar in that though the notes had been lost, yet at the time of bringing the action they were not lost but found, and were held by the bank, which refused to give them up. Sections 156 and 157 of the Bills of Exchange Act containing certain remedial provisions as to lost instruments (considered in *e.g.*, Byles on Bills, 17th Ed., 344; Falconbridge on Banks and Banking, 2nd Ed., 742-3; Maclaren on Bills, 4th Ed., 378-81; *Orton* v. *Brett* (1899), 12 Man. L.R. 448, and *Palmer* v. *Reilly* (1906), 2 E.L.R. 308) have, therefore, no direct application to the case. The plaintiff has taken no steps under section 49, or otherwise, to assert his title to or rights under, the originally lost and forged bills as against the Bank of Montreal, so the position simply is that he comes into Court asking for the payment of a bill which is held by another person. In such circumstances, the case is to be decided by the "general rule of law" laid down in *Ramuz* v. *Crowe* (1847), 1 Ex. 167 at p. 172; *Crowe* v. *Clay* (1854), 9 Ex. 604; *Davis* v. *Reilly* (1898), 1 Q.B. 1;

and *In re A Debtor* (1908), 1 K.B. 344; that the plaintiff must, in order to succeed, be the holder at the date of the beginning of the action. And *Crowe* v. *Clay* shews that the demand for which the bill was given cannot be sued upon where the creditor is not the holder of the bill, the Court saying (p. 608):

"It appears, therefore, that the loss of a negotiable bill given on account of a debt is an answer to an action for the debt, as well as one to the bill."

And again:

"To entitle the plaintiff to sue, he ought to be the holder of the bill, and the bill ought to be due; and there seems no reason why the defendant may not rely on a defect of the plaintiff's title, in either of these respects, leaving the others unnoticed."

And in *Davis* v. *Reilly, supra,* it was said, p. 3:

"It seems to be clearly settled at common law that an action will not lie for the price of goods, for which a bill of exchange has been given, while the bill is outstanding in the hands of a third party. At the date of the commencement of this action he was not entitled to sue, and we have no power to amend so as to give him a new cause of action which he had not got when the action was begun."

As to the countermanding of the cheque, I am unable to accept the submission that the bare fact that it was countermanded by the defendant at the request of the plaintiff entitles the latter to sue on the original contract, on the theory that a cheque that has been countermanded must always be regarded as one that has never been given. That this may be so in certain circumstances, appears from *Cohen* v. *Hale* (1878), 3 Q.B.D. 371, but that it would be so in the peculiar circumstances of the case at bar does not at all follow. The attempt of the plaintiff to stop payment of the cheque by a vague telegram from Seattle on the 8th was clearly insufficient—*Curtice* v. *London City and Midland Bank, Limited* (1908), 1 K.B. 293—but he went to Vancouver and next day got the defendant's paymaster to go with him to the bank and stop payment, which was done verbally, and by the following letter:

MARTIN, J.A.

"Vancouver, B.C., 9th July, 1914.

"To the Manager of Bank of Montreal,
"Vancouver.

"Dear Sir,—Claim is made that the following three cheques have been lost and I should feel much obliged if you would, in the event of any of them being presented for payment, hold same, advising me. March cheque 1353, Roll 34 $54.90 favour of F. Kelly, April cheque F.65 Roll 34 $58.35 favour of F. Kelly, May cheque 1130 Roll 34 $63.65 favour of F. Kelly.

"Yours truly,
"A. Baker, Paymaster."

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After this was done, the plaintiff asked the paymaster when he would get his money, and was told "in about six months, not before." The plaintiff later went back to work for the defendant, and shortly after the six months had expired, he began this action, on the 5th of February last, after the paymaster had informed him that he had no orders to pay him. It could not seriously be contended, in these circumstances, that the plaintiff could, immediately after the countermand, have turned round and sued the defendant for the original debt, and yet that is the result of what we are asked to hold, if a general rule is to be laid down. The fact of the still outstanding, originally lost cheque held by the bank which cashed it, and which in effect denies that the indorsement is a forgery, places the defendant Company in such a peculiar and dangerous position that it is entitled as a matter of law for its business protection to require the plaintiff to get possession of the cheque before recovering the amount for which it was given.

It is unfortunate that the bank was not added as a party, or other proper steps taken before action brought, and that the plaintiff thus finds himself in this unenviable position, but in view of *Davis* v. *Reilly*, I can, I confess with reluctance, come to no other conclusion than that the only order we can legally make is that the appeal should be allowed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal involves the consideration of the following facts, and the question is, is there liability upon the appellant in view of these facts? The respondent, an employee of the appellant, was given three paymaster's wages' cheques for the months of March, April and May, 1914, for $54.90, $58.35 and $63.65, respectively, bearing date the 15th of April, 15th of May and 15th of June, 1914, in all for the sum of $176.90. The respondent lost the cheques before indorsing them—the cheques were payable to the respondent's order. The respondent on the 8th of July, 1914, when in Seattle, Washington, U.S.A., discovering that he had lost the cheques, wired the Bank of Montreal at Vancouver, the bank upon which the cheques were drawn, in the following terms: "Stop all payments on cheques C.P.R. Frank Kelly," and on the 9th of July, 1914, the paymaster of the appellant wrote a

letter to the Bank of Montreal countermanding payment of the cheques, and that same should be held, the paymaster to be advised. Apparently, notwithstanding the advice received by the Bank of Montreal, which is admitted, the cheques were presented to the agency of the bank in Spokane, Washington, U.S.A., on the 9th of July, 1914, and by that agency cashed. Later the cheques, in the ordinary course, were forwarded to the bank at Vancouver, when they were paid and debited to the account of the respondent. The bank cashed the cheques in Spokane upon forged indorsements. The bank was under no duty to cash or pay the cheques in Spokane—that was not the mandate that issued to it—and in making payment in Spokane it was really acting not for the appellant, its customer, but for itself: see *Capital and Counties Bank* v. *Gordon* (1903), 72 L.J., K.B. 451. When the cheques reached the bank at Vancouver, if not before, there was knowledge that payment of the cheques had been stopped, nevertheless it would seem that the bank charged up the amounts called for by the cheques to the account of the appellant, its customer. Payment of the cheques being stopped, the authority to pay stood revoked (Sec. 167, Bills of Exchange Act, R.S.C. 1906, Cap. 119) and still stands revoked; that the bank has paid the wrong person must be a loss which it will have to sustain, it is a matter, though, between itself and the appellant (see section 49 (*c*), Bills of Exchange Act), and it rests with the appellant to give the notice in writing of the forgery which has been established. If the appellant fails to give the notice within one year after notice of the forgery, the bank is protected in the payment. Section 50 of the Bills of Exchange Act gives the right to claim repayment to the bank, as well as the customer, on whose behalf the payment has been made. In the present case there was the right, once payment of the cheques was countermanded and the cheques forthcoming, in the respondent to look to the drawer for payment of the amount due to him, the debt for which the cheques were issued being a subsisting debt, not extinguished in any way by the acceptance of the cheques lost and later cashed by the bank upon forged indorsements: see *M'Lean* v. *Chydesdale Banking Company* (1883), 9 App. Cas. 95;

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Cohen v. *Hale* (1878), 3 Q.B.D. 371; *Hinton Electric Co.* v. *Bank of Montreal* (1903), 9 B.C. 545. The bank acquired no title to the cheques and had no right to debit the appellant with the cheques proved to have been paid upon forged indorsements, and further, payment had been countermanded (*Mead* v. *Young* (1790), 4 Term Rep. 28; *Robarts* v. *Tucker* (1851), 16 Q.B. 560; 3 Camp. R.C. 680; *Bank of England* v. *Vagliano Brothers* (1891), A.C. 107 at pp. 157-8). Upon the facts of the present case there can be no question that the bank is liable to the appellant for the moneys wrongly debited against the appellant's account: *Bank of Montreal* v. *The King* (1907), 38 S.C.R. 258 at p. 264; and Davies, J. at p. 274:

"The bank became the plaintiff's debtor for the money had and received and, outside of estoppel, nothing but payment, accord and satisfaction or a release under seal would be an answer to plaintiff's demand."

In *Bale* v. *Parr's Bank (Limited)* (1909), 25 T.L.R. 549, Lawrence, J., at p. 551, said:

"One of the essential terms of the contract between banker and customer was that the banker would not part with the customer's money without his authority; and here the term had admittedly been broken."

Also see *North and South Wales Bank, Limited* v. *Macbeth* (1908), A.C. 137; *Dominion Bank* v. *Union Bank of Canada* (1908), 40 S.C.R. 366. The respondent has no action against the bank. Payment of the cheques being countermanded, the bank is not bound to pay them to the respondent, in fact, cannot do so. In the result the respondent looks, and properly looks, to the appellant to pay the amount due to him, and the appellant's plea of payment has failed of being established. The bank produces the cheques in question in this action, and states, through a clerk of the bank, who is called, that the cheques were cashed on the 9th of July, 1914, in Spokane, and debited to the respondent's account in Vancouver on the 11th of July, 1914. Upon this state of facts, the cheques should go to the appellant. Grant on Banking, 6th Ed., at p. 93 states:

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"It is thus the duty of a banker, in the absence of an agreement to the contrary with his customer, and if the customer's account is settled, to return a cheque after cashing it. If the banker retains possession of the cheque, he retains it as agent of the drawer. Therefore, where a drawer is a party to an action, and his account is in credit with his banker, a

notice to produce is all that is necessary to get the paid cheque before the Court. (*Partridge* v. *Coates* (1824), Ry. & M. 156; *Burton* v. *Payne* (1827), 2 Car. & P. 520.)"

The contention here is that the cheques have been paid, but the facts establish to the wrong person, and the cheques having been charged up to the appellant, assuredly the appellant, the drawer of the cheques, is entitled to the cheques and, upon seeing the cheques, it is apparent that the indorsements thereon are forged, and it follows that the appellant, giving the written notice required by the Act (Bills of Exchange Act, Sec. 49), will be entitled to compel repayment by the bank, and what better proceedings could have been followed than was followed in the present case? The respondent, the payee, sues the drawer of the cheques, the cheques having been countermanded, for the wages due to him. This he could unquestionably do, in my opinion, upon two grounds: Firstly, the cheques having thereon forged indorsements and being paid by the bank, not to the respondent, the proper payee, the Bills of Exchange Act, Sec. 49, in giving a right of action to the drawer of the cheques against the drawee inferentially precludes the bank from being subject to suit at the instance of the payee. Secondly, the cheques being countermanded, the original indebtedness is a subsisting indebtedness, and the respondent had the right to sue for the debt due and owing to him. The proper course for the appellant to have pursued was to have invoked the third-party procedure, and served the bank claiming indemnity over, and the forgery being established, as it was established, would have been entitled to a judgment against the bank for the amount of the respondent's judgment against it. *Charles* v. *Blackwell* (1877), 46 L.J., C.P. 368, whilst a leading authority in England cannot be considered an authority in Canada, as the statute law upon which it was decided is very different. There, there was a forged indorsement by procuration, and it was in that case held "that the bankers were justified in paying the cheques, and were protected in doing so by 16 & 17 Vict., c. 59, and the cheques having been properly paid and returned to the drawer, no action on the cheque or in trover for the cheque would lie." There is the further question as to whether the writings which issued to the plaintiff really are cheques. They

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are only to be paid by the bank when properly indorsed, and the indorsement upon the back thereof reads as follows:

"This cheque is accepted by me in full payment and satisfaction of all claims for services rendered as signified in the body of the cheque. I also hereby acknowledge to have received the amount this cheque calls for."

In my opinion, it is not proved that the writings which the respondent issued to the appellant, although called cheques, are really cheques, *i.e.*, Bills of Exchange, not being unconditional orders in writing, and they were not negotiable as such (sections 17 and 165, Bills of Exchange Act). The indorsements on the back of the cheques had to be signed, it was not the case of the payee merely indorsing, but he was to sign a release of all claims as signified in the body of the cheques, and also acknowledge the receipt of the moneys the cheques called for. To call the writings cheques will not make them cheques or bills of exchange within the meaning of the Bills of Exchange Act—*Bavins, Junr. & Sims* v. *London and South Western Bank* (1900), 1 Q.B. 270 at pp. 272, 275; *Capital and Counties Bank* v. *Gordon* (1903), A.C. 240, Lord Lindley at p. 252. The writings or instruments not being negotiable, they merely constitute evidence of a debt and the fact that the respondent does not produce them does not preclude him suing for the debt due to him. However, in the present case, they are accounted for, they are not lost, and the appellant cannot be called upon to pay to other than the respondent. Even if the cheques were negotiable and lost, the respondent could have sued, giving indemnity (sections 156, 157, Bills of Exchange Act). Law after all is common sense, and it would be deplorable if, upon the facts of the present case, the judgment appealed from could not be sustained, as to set aside the judgment will work irreparable loss to the respondent and deprive him of moneys justly due and payable to him.

MCPHILLIPS, J.A.

Upon the whole, I am of the opinion that the judgment should be sustained and the appeal dismissed.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellant: *J. E. McMullen.*

Solicitors for respondent: *Bird, Macdonald & Ross.*

BERGKLINT v. WESTERN CANADA POWER COMPANY, LIMITED

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Master and servant—Injury to servant—Negligence—Defective system—Provision of barrier—Common employment.

The plaintiff with two fellow workmen were sent to clear the side of a hill of stones and loose material preparatory to the commencement of drilling operations on a ledge that was from 20 to 30 feet immediately below the brow of the hill back and above which the clearing was done. Upon finishing their clearing operations they proceeded to operate the drill on the ledge below, and while so working the plaintiff was struck and injured by a stone that rolled from the hill above. The plaintiff contended that the Company was negligent in not protecting the incline with barriers to stop loose material from coming down. The jury (without answering the questions submitted to them) brought in a verdict at common law for $10,000.

Held, on appeal, that the jury might reasonably find that the barrier should have been erected and it was for them to say whether its non-erection was the fault of the Company or their superintendent or foreman.

Wilson v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326 distinguished.

APPEAL by defendant Company from the decision of MORRISON, J. and the verdict of a jury on the second trial of this action, tried at Vancouver on the 24th to the 31st of March, 1915, at which the jury (without answering the questions submitted to them) brought in a verdict at common law for the plaintiff for $10,000. The plaintiff, a native of Sweden, had been some six months in the Province and had worked for the defendant Company for about two months before the accident. The Company was engaged at the time in excavating on the side of a mountain at Stave River for the purpose of erecting a power-house. The plaintiff was sent to assist a drillman and his helper who were operating a steam-drill on a ledge about 35 to 40 feet from the bottom of the ravine and about 20 or 30 feet below the natural brow or brink of the hill. The three men had been sent up to remove any loose material from the brow of the hill and farther up; water was running down the side of the hill and past the place where the men were about

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to place their drill. Whilst the plaintiff was clearing the ledge for the drill some loose stones and dirt came down from above and one of the stones struck him on the head, knocking him off the ledge and causing him to fall some 25 or 30 feet, striking projecting rocks on the way, breaking both legs in his fall and causing him other injuries. He was confined to the hospital for nine months, was permanently injured in one leg, was not able to work for about two years, and underwent several operations to remove diseased bone from his leg. His complaint was that the hill should have been cleared six or eight feet back from the brow, and as water was running from the hill there should have been a protection in the way of logs or planks tied together with ropes, which would catch the rolling stones and dirt, and that the absence of these logs constituted a defective system. The defendant Company contended that the work was carried on under a competent foreman and engineers and they, being fellow workmen, the Company was not liable even if there were negligence. Also that the scheme of putting up a protection in the way of logs and planks above the brow of the hill would be a greater source of danger than the stones. On the first trial the jury found there was a defective system and awarded $5,500 damages. The Court of Appeal set aside the verdict and dismissed the action: see (1912), 17 B.C. 443. On appeal to the Supreme Court of Canada a new trial was ordered: see (1914), 50 S.C.R. 39. The defendant Company appealed from the judgment and verdict on the second trial on the grounds that the doctrine of common employment applies in the circumstances of this case and that the damages were excessive.

The appeal was argued at Victoria on the 1st and 2nd of June, 1915, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

Argument

Sir C. H. Tupper, K.C., for appellant: The only question before the Court is whether the plaintiff is entitled to a verdict at common law. The evidence brings us within the doctrine laid down in *Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326. The damages, $10,000, are excessive. The man's condition

today is good except for a slight defect in one leg and he can now earn half of what he did before the accident. The charge of the learned trial judge was not in accordance with the evidence; there was continual misdirection.

S. S. Taylor, K.C., for respondent: There are three common law points: (1) Hayward was the Company. He was not a fellow servant, but was, as far as the plaintiff was concerned, the master. (2) The Directors (through the executive committee and particularly McNeil) were aware of the conditions. It was a condition they knew, or in the alternative ought to have known. A director was the assistant general manager of the works and was the secretary of the directors' executive. The directors therefore had personal knowledge of the works and to an extent personal direction of them. In the alternative, the directors, through their executive committee, were especially charged with, and took special supervision and direction of, this construction work, as its sole business. (3) The absence of the systems and safeguards contended for in this case, as follows: (a) the absence of due precaution by logs or barriers; (b) the absence of a system of watching and protecting the workmen from rolling stones; (c) the absence of a sufficient system of berms; where such systems as in the circumstances in this case should be matters of original installation, the works being dangerous; they were of a permanent nature, and it was the duty of the Company to see that they were installed, and they could not leave this to, or rid themselves of that liability by appointing any superintendent or foreman. In any event these are facts to be found, and as the jury has found a verdict at common law, they have found each and every one of these facts, and there is evidence to justify these findings, and such findings should not be reversed. On the first point see *Young* v. *Hoffmann Manufacturing Company, Limited* (1907), 2 K.B. 646; *Canadian Northern Railway Co.* v. *Anderson* (1911), 45 S.C.R. 355. *Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326 can be distinguished as Hayward and the plaintiff did not take their orders from a common master; see also *Feltham* v. *England* (1866), L.R. 2 Q.B. 33. On the second and third points see *Canada Woollen Mills* v. *Traplin* (1904),

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35 S.C.R. 424; *Howells* v. *Landore Steel Co.* (1874), L.R. 10 Q.B. 62 at p. 63; *Grant* v. *Acadia Coal Co.* (1902), 32 S.C.R. 427. The question of "system" is one for the jury to decide: *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420; *Brooks, Scanlon, O'Brien Co.* v. *Fakkema* (1911), 44 S.C.R. 412.

Tupper, in reply: The crucial point is to shew the jury were wrong in finding a defective system because of a barrier not being put on the brow of the incline. They never use barriers in such circumstances as they are more dangerous than the stones; we are dealing with a very temporary condition: see *Johnson* v. *Boston Tow-Boat Co.* (1883), 135 Mass. 209. There was no necessity of taking anything more away and it was safer to take everything away than put logs there. On the question of what precaution is required under the law see *Wood* v. *Canadian Pacific Railway Company* (1899), 6 B.C. 561; 30 S.C.R. 110; *Weems* v. *Mathieson* (1861), 4 Macq. H.L. 215; *Warmington* v. *Palmer* (1901), 8 B.C. 344. On the question of Hayward's status see *Hedley* v. *Pinkney & Sons Steamship Company* (1894), A.C. 222; *Burr* v. *Theatre Royal, Drury Lane, Limited* (1907), 1 K.B. 544; Beven on Negligence, 3rd Ed., 666; *Cripps* v. *Judge* (1884), 13 Q.B.D. 583; *Perry* v. *Rogers* (1898), 51 N.E. 1021; *Di Vito* v. *Crage* (1901), 59 N.E. 141; *Ball* v. *Niagara Falls Co.* (1903), 79 App. Div. 466; 79 N.Y. Super. Ct. 734.

Argument

Cur. adv. vult.

2nd November, 1915.

MACDONALD, C.J.A.: This is an appeal from the judgment at the second trial of this action.

The judgment at the first trial was appealed and by the judgment of the Supreme Court of Canada a new trial was ordered. The evidence on behalf of the plaintiff has not been weakened but has, I think, been strengthened at the second trial, though the defendants have endeavoured to make out a better case for the application of the doctrine of *Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326. Apart from this defence, I think I should be only giving effect to the views of the learned judges of the Supreme Court of Canada by holding that the

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evidence is sufficient to justify the verdict of negligence on the part of defendants or their servants.

The only question remaining then is that depending upon the defence above referred to. In my opinion the defendants must fail. The work which was being done was an excavation in rock, 400 feet in length and 100 feet in width. But it is only necessary to deal with the portion which consisted of the excavation for the power-house, namely, about 200 feet in length and 100 in width. This involved the removal of rock to a depth of over 100 feet from the highest point or crest of the rock excavation. About that point was a hillside extending back for some distance and covered with a deposit of earth, boulders and small stones. The work had been in progress for about a year. The plaintiff was injured while working in the rock cut by a stone which appears to have rolled down the hillside and fallen over the brink of the rock-cut and struck him when at work. It was contended that the appellant had not furnished a safe place for the plaintiff to work in. The jury found a general verdict in favour of the plaintiff which involves a finding of all facts necessary to be found in plaintiff's favour to support it. The plaintiff's contention was that there should have been a barrier at the crest of the rock-cut above him to protect him from falling missiles. The appellant contended that it had adopted proper means for his safety by having the loose rock and any material likely to come down removed by the plaintiff and two other workmen before he started the work at the point at which he was injured. There was evidence that that was not sufficient protection—that in addition there should have been a barrier.

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It appears to me that the conclusion to be drawn from the remarks of the learned judges in the Supreme Court of Canada is that the jury might reasonably find that the barrier should have been erected, and that their difficulty was to say whether its non-erection was the fault of the Company, or their superintendent or foreman. In my opinion it was not the fault of the fellow-workmen.

I think it was open to the jury to find that the barrier ought to have been erected in the beginning. That the workmen

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were being employed for a year underneath this sloping hillside without proper protection. The jury could reasonably find that the protection should have been of a permanent nature, and was not necessarily such as a foreman or superintendent had to provide from time to time as the work progressed.

In this view of the case *Wilson* v. *Merry, supra,* has no application, and the appeal should be dismissed.

I do not think I should interfere on the ground that the damages awarded were excessive.

IRVING, J.A.

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

MARTIN, J.A.

MARTIN, J.A.: Whatever may have been said by others about the insufficiency of evidence at the former trial to prove a lack of system, or failure to provide a safe place to work in the first instance, it is quite clear to me that the deficiency has been supplied at the second trial, and the verdict is fully warranted by the evidence.

The appeal therefore should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Tupper, Kitto & Wightman.*
Solicitors for respondent: *Taylor, Harvey, Grant & Stockton.*

IN RE CANADIAN NORTHERN PACIFIC RAILWAY COMPANY AND CORPORATION OF CITY OF NEW WESTMINSTER

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IN RE CANADIAN NORTHERN PACIFIC RY. CO. AND CITY OF NEW WESTMINSTER

Railways—Assessment and taxation—Exemption—Plans approved by minister must first be filed—B.C. Stats. 1910, Cap. 3, Schedule, clause 13 (e)—R.S.B.C. 1911, Cap. 194, Secs. 16 and 17.

The Canadian Northern Pacific Railway Company purchased certain lands within the City of New Westminster as to which they had not complied with the conditions required under the Railway Act before the Company could build its railway thereon. All properties of the Railway Company "which form part of or are used in connection with the operation of its railways" are by statute, exempt from taxation. The Court of Revision held that the lands were not exempt from taxation.

Held, on appeal (MCPHILLIPS, J.A. dissenting), that until lands have been definitely applied to the use of the railway they are not exempt from taxation.

APPEAL from the decision of CLEMENT, J. of the 19th of May, 1915, dismissing the appeal of the Canadian Northern Pacific Railway Company from the decision of the Court of Revision of the City of New Westminster, holding that certain lands of the Railway Company within the City are not exempt from taxation under clause 13(*e*) of the Schedule to Cap. 3, B.C. Stats. 1910, being An Act to ratify an Agreement of the 17th of January, 1910, between the Crown and said Railway Company whereby all properties and assets which formed part of or are used in connection with the operation of the said Company should be exempt from all taxation. The property in question had been purchased by the railway Company but no plan of the general location of the railway right of way within the City had been approved of by the minister of railways or registered in the registry office in New Westminster pursuant to sections 16 and 17 of the Railway Act. The Railway Company appealed on the ground that it was their intention to eventually use the property in connection with the operation of the railway and were therefore entitled to the exemption.

Statement

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The appeal was argued at Victoria on the 17th of June, 1915, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Davis, K.C., for appellant: The question is whether the property in question is exempt from taxation under clause 13 (*e*) and (*d*) of the Schedule to Cap. 3, B.C. Stats. 1910. The trial judge held it was not exempt because it was not part of the railway system. We say it was required for the purposes of the railway but is not yet built on. The plan, profile and book of reference of the property are with the minister but are not yet approved by him. They must be approved before they can be registered in the registry office, and they must be so registered before the property can be built on for railway purposes. It is land that is to be part of the right of way and is therefore exempt.

Argument

Martin, K.C., for respondent: Section 17 of Cap. 4, B.C. Stats, 1910, incorporates the British Columbia Railway Act, but it is not incorporated in Cap. 3. The British Columbia Railway Act does not apply to Cap. 3, but it does to Cap. 4. The plans should be approved by the minister and filed in the registry office so that we will have notice of what property is entitled to exemption.

Davis, in reply.

Cur. adv. vult.

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MACDONALD, C.J.A.: There is evidence that the lands against the assessment of which the Railway Company appeals were purchased by or on behalf of the Company for railway purposes.

The appellants (the Railway Company) rely upon Cap. 3, B.C. Stats. 1910, clause 13 of the Schedule thereof, sub-clause (*e*) which reads as follows:

> "The Pacific Company [the appellant] and its capital stock, franchises, income, tolls, and all properties and assets which form part of or are used in connection with the operation of its railway, shall, until the 1st of July, A.D. 1924, be exempt from all taxation whatsoever."

It is not denied by the respondent that if these lands fall within the above description the Municipality is bound to

exempt them from taxation. Their contention is that these lands do not form part of the railway. That they have not yet been used in connection with the operation of the railway is either conceded by appellant or is so plain upon the evidence and admissions of counsel as to make it unnecessary to discuss that part of the clause. The neat question therefore is, do these lands form part of the railway?

The appellant admitted that no map pursuant to section 16 of the British Columbia Railway Act, being Cap. 194, R.S.B.C. 1911, or pursuant to similar provisions in the Acts of which this is a consolidation, had been submitted to or approved by the minister of railways, or deposited with him or with the registrar of titles pursuant to the succeeding sections, so that the appellant could not without contravening section 27 of the said Act build its railway on the lands in question. The most that appellant's counsel has endeavoured to say is, "We bought these lands for the purpose of rights of way and other requirements of our railway, and although we are not yet in a position to use them for those purposes we *bona fide* intend so to do at a future time and as such these lands are, within the true intent and meaning of said exempting clause, part of our railway."

I think the clause must be strictly construed, and so construing it, I agree with the learned judge that in the circumstances of this case the Municipality was within its rights in assessing these lands. Whether or not they shall become part of the railway is contingent upon the sanction of the minister of railways. It is to my mind manifestly impossible for the appellant to say that these lands are definitely part of their railway so long as it is open to the minister to say "Your railway shall not be constructed on these lands, or if on any of them, then only upon such as I designate."

MACDONALD, C.J.A.

It was not an unreasonable, but a manifestly reasonable construction to place upon the Act, and it is in my opinion in accord with its language to hold that until lands have been definitely sanctioned or applied to the use of the railway they cannot be held to be within the language of the said clause and exempt from taxation. That construction is in accordance with manifest convenience. This Railway Com-

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pany is authorized to acquire other lands not to form part of its railway nor to be used in connection with the operation of it. There is no presumption that because the lands have been acquired by the Railway Company they are to become part of the railway. Proof of that is upon the Railway Company, and until the Company can shew these lands are definitely and unconditionally made portion of the railway, or are used in connection with the operation of the railway, they fail to bring them within the purview of the exempting clause.

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 would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This is an appeal of the Canadian Northern Pacific Railway Company from the decision of CLEMENT, J. upon an appeal to a judge of the Supreme Court from the Court of Revision of the City of New Westminster (Cap. 170, Sec. 258, R.S.B.C. 1911), the learned judge having dismissed the appeal, *i.e.*, confirmed the decision of the Court of Revision which rejected the appeal to them upon the ground advanced that being that the lands assessed were the lands of the Canadian Northern Pacific Railway and exempt under the provisions of an agreement ratified by statute (B.C. Stats. 1910, Cap. 3), the particular clause upon which the exemption was and is claimed reading as follows: [His Lordship read clause 13 (*e*) already set out, and continued.]

The City of New Westminster is a municipality under the provisions of the Municipal Act (Cap. 170, R.S.B.C. 1911), and the Canadian Northern Pacific Railway is a railway company incorporated by the Legislature of the Province of British Columbia (B.C. Stats. 1910, Cap. 4) and authorized to construct, maintain and operate railways in the Province of British Columbia and in particular (Cap. 4, Sec. 3 (*a*), (*b*) and (*c*)) a line connecting with the main line of the Canadian Northern Railway at the eastern boundary of the Province and through the Province to the City of Victoria and on to a point

on Barclay Sound, passing through *en route* the City of New Westminster and the City of Vancouver on the mainland and by car ferry to Vancouver Island and railway to the City of Victoria, constituting the British Columbia section of the Canadian Northern transcontinental system. The land in question is shewn upon the evidence to be the property of the Canadian Northern Pacific Railway Company although not completely, as regards many of the parcels of land, as yet upon the register in the land registry office, the same being in various stages of progress towards that end, but it is clear that all the lands against the assessment of which the appeal treats are lands either in the name of the Canadian Northern Pacific Railway or in the names of trustees for the Company and not yet completely registered in the name of the Company but held under agreements of sale to the Company. Whatever may be the stage at which the title in the Land Registry office has reached this may be said with certainty that in equity in respect of all the parcels of land the Company is the owner thereof and the moneys of the Company were paid in the acquirement of the lands. The assessment roll shews in some cases that other persons and corporations have been assessed for some of the lands, but that is quite understandable as the assessment roll is prepared according to the best information to be had at the time and is mainly based on the registered title in the books of the land registry office, whilst it may well be that at the time of search the registered owner may not be in fact the owner or entitled to the lands (sections 236-238, Cap. 170, R.S.B.C. 1911). The appeal to the Court of Revision is not confined to the person assessed; any person having a registered interest in any land, real property, or improvements within the municipality may appeal if he thinks that any person has been assessed too low or too high or has been wrongfully inserted or ousted from the roll, so that as the Company has registered interests in land in the City of New Westminster the appeal is complete in essentials and the sole matter really for determination is, do the lands come within the statutory exemption? It is admitted that there is no plan upon file in the land registry office shewing that the lands in question are to be traversed by

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the railway and will form the right of way of the Company. It was contended at the bar that a plan shewing this was on file with the minister of railways but it was conceded that the material before us on this appeal did not establish the fact, so that fact also must be deemed not to have been proved. The railway to be constructed and in course of construction, as it will be seen by the Act confirming the agreement between His Majesty the King and the Canadian Northern Railway Company received very considerable aid from the Province of British Columbia, *viz.*: $35,000 a mile, and bonds were guaranteed both as to principal and interest running throughout a period of thirty years, this aid being for the due construction and operation of the lines of railway in the Province of British Columbia, which completed, would give entry to the Pacific Coast to the Canadian Northern Railway, a transcontinental railway already in the final stages of completion across Canada, and in further aid the exemption of taxation is given. The British Columbia Railway Act (Cap. 194, R.S.B.C. 1911) applies to the appellant the Canadian Northern Pacific Railway Company this being declared by section 17 of the Act of incorporation (B.C. Stats. 1910, Cap. 4), save where inconsistent with the provisions of the agreement. It is therefore necessary to read the British Columbia Railway Act, save those clauses specifically excepted and any sections inconsistent, into the two Acts which come under review upon this appeal (B.C. Stats. 1910, Caps. 3 and 4). Under the interpretation section of the British Columbia Railway Act, "Railway" means any railway which the company is authorized to construct and operate and shall include all branches, sidings, stations, depots, wharves, rolling stock, equipment, works, property, real or personal, and works connected therewith, and also every railway bridge, tunnel or other structure connected with the railway and undertaking of the company. Now it is clear upon the evidence that the land in question is to form part of the right of way of the railway, and is required by the railway in the due completion of the line of railway and was bought for the purposes of the railway, it being necessary to obtain the land so as to complete the undertaking. To say that no plan is filed

in no way concludes the question; the filing of the plan is a matter, it is true, of necessary procedure and must precede the actual construction of the railway, but it is nowhere enacted that the Railway Company shall before acquiring land which shall eventually form part of the railway, first, file the plan called for by the British Columbia Railway Act. It is to be remembered that the Canadian Northern Pacific Railway is authorized to build its railway by special Act, and defines the *termini,* and it is along the route of the railway as defined in the Act of incorporation that the Canadian Northern Pacific Railway Company has acquired the land in question, whilst in the case of a company obtaining its corporate powers solely under the British Columbia Railway Act, the route is settled by the minister of railways (sections 16, 17, 18, Cap. 194, R.S.B.C. 1911) and it is to be noted that a plan is to be filed after completion of the railway (section 23). It is true that the construction of the railway is not to be commenced (section 27) until the plan has been duly sanctioned and deposited with the minister of railways and with the district registrars of titles, but in the case of the Canadian Northern Pacific Railway the railway was by the Legislature expressly authorized to be constructed (section 3, Cap. 4, 1910). The Canadian Northern Pacific Railway was authorized "to purchase, hold, lease or sell land for any of the purposes of the Company and for the purposes of townsites, parks and pleasure grounds, and to lay out and survey the same" (section 34, Cap. 4, 1910). There is no inhibition upon purchasing before the filing of the plan and unquestionably prudent officers acting in the best interests of the Company would purchase at a time deemed most advantageous and at times in the name of some other person or corporation as it is a matter of common knowledge that when it is thought that land will be traversed by a railway or a railway pass near by undue inflation of values ensues tending to almost deter in some instances the prosecution of the contemplated undertaking. The evidence is conclusive that the lands in question are lands to be used for right of way purposes and to

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be used in connection with the operation of the railway. The learned judge, it would appear (although we have no written reasons before us), has held that, owing to the non-filing of the plan, no exemption can be claimed. This appeal resolves itself into a construction of the different statutes which have application to the Company. In Maxwell on Statutes, 5th Ed., 83-4, we find this language used:

"In a word, then, it is to be taken as a fundamental principle, standing, as it were, at the threshold of the whole subject of interpretation, that the plain intention of the Legislature, as expressed by the language employed, is invariably to be accepted and carried into effect, whatever may be the opinion of the judicial interpreter of its wisdom or justice. If the language admits of no doubt or secondary meaning, it is simply to be obeyed. If it admits of more than one construction, the true meaning is to be sought, not on the wide sea of surmise and speculation, but 'from such conjectures as are drawn from the words alone, or something contained in them'; that is, from the context viewed by such light as its history may throw upon it, and construed with the help of certain general principles, and under the influence of certain presumptions as to what the Legislature does or does not generally intend."

It is clear that as regards the history of the provincially as well as federally aided undertaking, the object sought to be attained was the construction of a third transcontinental line traversing all Canada, and the Legislature in its wisdom determined that it was in the public interest to incorporate a company in British Columbia which would at an early date be able to complete the line known east of the Rocky Mountains as the Canadian Northern Railway. Further the history of the construction of transcontinental lines in Canada shews that they have all been heavily subsidized by the governments of the day, and one species of aid is that by way of exemption from taxation extending over a considerable number of years, in the case of the present Company, fourteen years. A large proportion of the capital to construct the lines of railway is achieved by the flotation of Government guaranteed bonds and going upon the money markets of the world unquestionably the exemption from taxation is a most potent factor in the successful flotation of the bonds in that it greatly relieves the company from what would otherwise be a most serious drain upon the earnings, and not only upon the earnings but before construction and

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operation a most serious withdrawal of large sums from the moneys realized upon the sale of the guaranteed securities, therefore it is no undue construction to place upon the language of the statute to arrive at the conclusion that the plain intention of the Legislature was to give a most complete exemption commencing at the inception of things, that is, from the time of the incorporation of the company and the statutory ratification of the agreement with His Majesty the King all lands acquired and which were to form part of the railway or be used in connection with the operation of the railway should be exempt from taxation, and the time that exemption took effect was the 10th of March, 1910, the date of the passage of the two Acts incorporating the Company and ratifying the agreement. In the preamble to the Act ratifying the agreement this language is found:

"Whereas the Government of the Province of British Columbia deems it in the public interest to aid in the construction of the lines of railway hereinafter mentioned, for the purpose of securing to the people of British Columbia reasonable passenger and freight rates, and to assist in the opening up and the development of the Province."

It is apparent from this that the advantage of the people is sought to be attained and it follows that the Legislature following out this view in its wisdom statutorily conferred on the Company this very extensive exemption from taxation and it is fair to assume that the construction of the lines of railway would bring compensating advantages to the municipalities through which the lines of railway would go equal to or greater than any deprivation of revenue by way of withholding the properties of the Company from taxation therein. In Maxwell, at p. 85, we find this further language:

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"The words of a statute, when there is doubt about their meaning, are to be understood in the sense in which they best harmonize with the subject of the enactment and the object which the Legislature has in view."

To hold that no lands shall be exempt from taxation unless shewn upon a plan already filed would operate to impose taxation upon lands although acquired for the railway out of moneys derived from the guaranteed securities and thus reduce the capacity of the Company to construct the lines of railway and further affect the security held by the Government of the

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Province as it will be seen that clause 9 of the agreement provides that

"Such securities shall be secured by a trust instrument, or instruments, to trustees, to be approved of by the Government, granting a first mortgage or charge (subject to the exception hereunder) upon the specific lines so to be aided, and upon the car-ferry, tolls, incomes, rents, and revenues thereof, and upon the rolling stock, equipment, and property of the Pacific Company acquired for the purpose of and used in connection with said mortgaged lines and ferry, and upon such of the franchises of the Pacific Company as may be appurtenant thereto."

It is a fair presumption that the Legislature intended to give an absolute exemption not to be frittered away by technical interpretation, and to hold that the lands are not exempt until completely vested in the Company by registration in the land registry office or shewn upon a filed plan is too strained an interpretation and to hold that would only be possible if the statute in its language was intractable and would admit of no other construction. The construction ought to be to the end to effectuate the spirit, intent, and meaning of the Legislature. It cannot be assumed that the Legislature was unmindful of the procedure so well known and so generally adopted by railway companies in acquiring lands for right of way purposes and that is to acquire the lands by private treaty and to exercise compulsory powers of expropriation only where necessity requires it to be done, and in so acquiring lands their acquisition precedes in many instances the actual filing of the plan, and there are obvious and prudent reasons for this course of procedure. In the construction of clause 13 (*e*) of the agreement it is to be taken disjunctively. Firstly, there is exempt "all properties and assets which form part of" the railway; and secondly, "all properties and assets which . . . . . are used in connection with the operation of its railway." It is conceivable that there may be properties and assets of the railway which are not used in connection with the operation of the railway, and can it be deemed to be the intention only of exempting the latter properties and assets? I do not so read the statute. The plan to be filed is a plan of the right of way, the terminal points, the station grounds, the property lines and owners' names, the areas and length and width of the lands, the

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bearings and all open drains, watercourses, highways and railways proposed to be crossed or affected, the grades, curves, highways and railways proposed to be crossed or affected, and the book of reference shall describe the portion of land proposed to be taken. This plan must necessarily be prepared with care and with great accuracy in detail and it is understandable that considerable time must elapse before its filing, but to say that lands previously acquired although acquired for right of way purposes and purposes of the railway are not exempt from taxation until this plan be filed or unless the lands be shewn upon the plan is to render nugatory (and I state this with all respect to the learned judge who has so decided) the plain intention of the Legislature as expressed by the language contained in the statute. In *Lion Marine Insurance Association* v. *Tucker* (1883), 53 L.J., Q.B. 185, Brett, M.R. said at p. 189:

"It is, I consider, a well-settled rule that in construing a statute or a document it is not right to follow merely the words of the statute or document, taking them in their ordinary grammatical meaning: but it is necessary also to apply those words to the subject-matter dealt with in the statute or document, and then to construe them with reference to that subject-matter, unless there is something which compels one not so to construe them. The rule is, I think, that the ordinary meaning of the words used in the English language must be applied to the subject-matter under consideration."

To interpret the statute as giving an exemption to the Company of all its lands which form a part of the railway which it is authorized to construct is to give it, in the language of Brett, M.R. at p. 191, in the case last cited, "the sensible, just and businesslike reading." There is no language which can be said to cut down or minimize the plain effect of the words used: the exemption is given in absolute terms and those terms should be given effect to. Lord Herschell in *Kent County Council* v. *Gerard* (*Lord*) (1897), 66 L.J., Q.B. 677 at p. 682, said: MCPHILLIPS, J.A.

"But I entertain a strong objection to any canon of construction which introduces by implication into a statutory clause qualifying expressions which are not there, and alters the plain meaning of words which are to be found in it. I may add that, in my opinion, the intention of the Legislature must be inferred from the language which it has used."

In the present case we have the learned judge holding that the lands in question do not form a part of the railway because of the fact that the plan has not been filed. This unquestion-

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ably is the introduction of a qualifying provision which the Legislature has not used.

That notwithstanding the entries upon the register in the Land Registry office, the Company was entitled to prove title to the lands in question and insist that they are the lands of the Company, it is only necessary to refer to the recent decision of their Lordships of the Privy Council in *Howard* v. *Miller* (1915), A.C. 318 at p. 329.

I am therefore of opinion that the appeal must succeed.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Davis, Marshall, Macneill & Pugh.*
Solicitors for respondent: *McQuarrie, Martin & Cassady.*

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LUND AND HAZELL v. VANCOUVER EXHIBITION ASSOCIATION.

LUND AND HAZELL v. VANCOUVER EXHIBITION ASSOCIATION

Building contract—Architect's final certificate—Extension of time for completion of work owing to default of owner—Damages for delay in completion—No waiver by extension—Penalty or liquidated damages.

The giving of the final certificate by the architect under a building contract shewing the balance due the contractor, but in which no mention is made of damages for the contractor's delay in completing his work, does not preclude the owner from claiming damages. The fact that an extension of time has been granted for the completion of the work owing to delay caused by the owners, does not constitute a waiver by the owners from claiming damages under the penalty clause (MCPHILLIPS, J.A. dissenting in part).

Westholme Lumber Co. v. *St. James Limited* (1915), 21 B.C. 100 followed.

When the amount of compensation for delay in the erection of a building under a contract is fixed at a certain sum per day up to a certain time and a greater sum per day for further delay, it may, in certain circumstances, be held to be liquidated damages.

Public Works Commissioner v. *Hills* (1906), A.C. 368 followed.

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APPEAL from the decision of MORRISON, J. in an action tried at Vancouver on the 21st, 22nd and 25th of January, 1915. The plaintiff Lund entered into a contract with the Vancouver Exhibition Association on the 3rd of April, 1913, for the construction of the "Transportation Building" at the exhibition grounds in the City of Vancouver for the sum of $26,250. On the 18th of April Lund assigned to the plaintiff Hazell all moneys due or to accrue due under the contract. Lund completed the building, and on the 2nd of October the architect issued a final certificate in his favour for $4,128. This sum the defendant refused to pay. During the construction the defendant's architect changed the contract by instructing Lund to suspend the laying of the floor until the roofing of the building was completed. Lund claimed that this change put him to an additional expense of $2,500, and he claimed this amount under an item of extras. The Association counterclaimed for $3,750 for liquidated damages by reason of Lund's failure to deliver the building at the time agreed upon after allowing him ten extra working days owing to the change made by the architect in the contract. The defendant paid into Court the sum of $538 in full settlement of all claims. The trial judge gave judgment for the plaintiffs for the amount due under the architect's final certificate, disallowed the claim for extras, and allowed the defendant's counterclaim. The plaintiffs appealed.

Statement

The appeal was argued at Victoria on the 15th and 16th of June, 1915, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Bodwell, K.C. (*Alfred Bull,* with him), for appellants: We claim $4,128, being the final payment under the contract; and we are also entitled to $2,500 for extras. The defendant counterclaims for $3,750 for damages which arose owing, as it contends, to the building not having been completed within the time fixed by the contract. The contract provides that the work must be done to the satisfaction of the architect, upon whose certificate payments are made. The architect issued his certificate for the final payment and we are entitled to payment:

Argument

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see *Hickman & Co.* v. *Roberts* (1913), A.C. 229. The extras claimed arose owing to a change in the contract by the defendant, whereby it wanted the roofing finished before the flooring was done. The architect said, when asked for a certificate for the extras, that there was no use in issuing it as the defendant would not pay. As to the counterclaim for penalties, we stopped work until we could get a certificate from the architect for the extra work when completed. An extension of time was granted and in fact we finished the work within the extended period: see *Roberts* v. *Watkins* (1863), 14 C.B.N.S. 592; *Ardagh* v. *The City of Toronto* (1886), 12 Ont. 236; *British Thomson Houston Company (Limited)* v. *West Brothers* (1903), 19 T.L.R. 493; Hudson on Building Contracts, 4th Ed., 532.

Argument

Ritchie, K.C. (*W. C. Brown,* with him), for respondent: The architect is not the judge as to what is an extra. There must be an alteration from the original contract before there can be an extra, and we contend an order to put the roof on before the flooring is not an alteration: see Halsbury's Laws of England, Vol. 3, p. 235. The work must be done to the satisfaction of the architect and the method of doing the work as directed by the architect is not an extra: see *Jones* v. *St. John's College* (1870), L.R. 6 Q.B. 115; *Simpson* v. *Kerr et al.* (1873), 33 U.C.Q.B. 345; *Westholme Lumber Co.* v. *St. James Limited* (1915), 21 B.C. 100; *Clydebank Engineering and Shipbuilding Company* v. *Don Jose Ramos Yzquierdo y Castaneda* (1905), A.C. 6; *Webster* v. *Bosanquet* (1912), A.C. 394; Hudson on Building Contracts, 4th Ed., 514-6.

Bodwell, in reply: If an architect gives certificates without any deduction for penalties it is *prima facie* evidence that he has given the extentions: see *Pashby* v. *Mayor of Birmingham* (1856), 18 C.B. 2.

Cur. adv. vult.

2nd November, 1915.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: The learned trial judge has reached a conclusion in this matter which I find myself unable to say should be disturbed by this Court.

GALLIHER, J.A.: I would dismiss the appeal as to the $2,500 extras claimed. While I am satisfied that plaintiff tendered upon the basis that the floor would be laid previously to the roof being put on, and while I am also satisfied that to do so would have been reasonable and workmanlike if no change had been made in the flooring, and also that the change in flooring entailed considerable extra work and expense, the plaintiff having agreed to the change and signed the contract to that effect, and also having received an additional sum of $600 on account of such change (true without its being specified as to the time for laying flooring) it becomes a question whether to have put down the floor under these changed conditions previously to the putting on of the roof would have been workmanlike and reasonable. I find no difficulty in agreeing with the finding of the learned trial judge in this respect.

As to the $3,750 allowed on the counterclaim. The giving of the final certificate by the architect shewing the balance due and making no mention of demurrage does not, in the circumstances of this case, preclude the respondent from claiming such demurrage. The cases cited by Mr. *Bodwell* are, I think, distinguishable. Mr. *Bodwell* also contended that where there had been an extension of time granted in consequence of delay caused by the owners, the penalty clause was waived.

GALLIHER, J.A.

This Court, composed of MACDONALD, C.J.A., IRVING and MCPHILLIPS, JJ.A., held otherwise in *Westholme Lumber Co. v. St. James Limited* (1915), 21 B.C. 100, and in my opinion, that decision is applicable to the facts here.

There remains only for consideration the question as to whether the sum fixed as demurrage is a penalty or liquidated damages. Considering the purposes for which the building in question was required, the necessity for having it completed within a certain time in order that the fair might be held during that year, its completion in good time so as to make all necessary arrangements as to advertising, exhibiting, renting of space and granting of privileges, all of which were circumstances within the knowledge of both parties, the fixing of a definite sum up to a time certain, and of a greater sum if greater delay ensued, seems to me to indicate that the parties

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had in view what was necessary to bring it within the rule laid down by the Privy Council in *Public Works Commissioner* v. *Hills* (1906), 75 L.J., P.C. 69.

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MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I concur in dismissing the appeal, but would allow the appeal on the counterclaim. If it could be successfully contended that the clause in the contract providing for the deduction from the contractor's total compensation of the $50 per day and $200 per day respectively is a clause effectively providing for liquidated damages in case of delay in completion, with which I disagree, it is clear to me that owing to the delays upon the part of the owners and non-payment of moneys due upon the progress certificates, as well as changes in the method of doing the work and the extension of time given, and the statement in the letter of the 21st of June that "we will enforce our penalty clause," the owners are precluded from claiming damages as liquidated damages. The work was brought to final completion and a final certificate issued, and the final certificate shews $4,128 to be due to the appellants and it is certified that there is no balance due to the contractors or owners, in fact it is a final stated and settled account by the architect binding upon the contractors and owners and being the final certificate under articles VIII. and X. of the contract, is conclusive evidence of the performance of the contract and that that sum is due thereunder. It would be inequitable upon the facts of the present case to hold the contractors liable for liquidated or any damages. It was only in event of the failure of the contractors to complete the building on the 1st of July, 1913, that the owners were to be permitted to withhold from the contractors the *per diem* deduction of $50 and $200 per day. And it is to be noted that Article VI. of the contract states that "the contractor shall be subject to the following penalty" and that the $50 and $200 per day payable in case of a delay of completion before the 1st of July, 1913, is contingent upon there being no default upon the part of the owners, but there was default. In the result, according to my construction of the contract, no penalties can be exacted. The present case is not within the principle of the decision of this Court in *Westholme*

Lumber Co. v. *St. James Limited, supra,* where, notwithstanding extension of time, the penalty clause was held to be operative.

The learned counsel for the respondent strongly relied upon *Jones* v. *St. John's College* (1870), 40 L.J., Q.B. 80, but that case is clearly distinguishable. There the work had to be completed within the stipulated time unless an extension of time were granted, but no extension of time was granted. In the case before us an extension of time was granted and there has been great default as well by the owners, and as before stated it would be inequitable to preserve to the owners any right of enforcement of the penalty clause: *Arnold* v. *Walker* (1859), 1 F. & F. 671; *Russell* v. *Da Bandeira* (1862), 13 C.B.N.S. 149; *Forrestt and Son Limited* v. *Aramayo* (1900), 83 L.T.N.S. 335; *Dodd* v. *Churton* (1897), 76 L.T.N.S. 438. Should, however, I be wrong in my conclusion that the owners are not entitled to have consideration given to the counterclaim, and that same must be looked at as being either liquidated damages or a penalty, the claim can only be viewed as one of penalty, and the amounts fixed, *viz.*: $50 and $200 a day, are not conclusive as to the amount recoverable. The actual damages suffered must be proved and recovery could only be had for that amount, and giving the most favourable effect to the evidence the maximum that could be said to have been shewn by way of damages was $1,750 and $3,750 has been allowed, therefore upon this view of the matter the learned trial judge has erred to the extent of $2,000 in allowing the $3,750. That the amounts fixed in the contract as penalties cannot be looked upon as liquidated damages is in my opinion clearly shewn by the decision of their Lordships of the Privy Council in *Public Works Commissioner* v. *Hills* (1906), 75 L.J., P.C. 69 at p. 72, and upon the facts it cannot be said in the present case that the amounts fixed in the contract "can be taken as a genuine pre-estimate of loss." *Webster* v. *Bosanquet* (1912), A.C. 394, is in no way in disagreement with the principle as defined by their Lordships of the Privy Council, but if it is, this Court is bound by the decision of the Privy Council. Therefore in this view the most that could have been allowed upon the counterclaim was $1,750,

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or if the Court were of the opinion that an opportunity should be given to assess the damages actually suffered a new trial upon the counterclaim might be directed.

Upon the whole, though, I am of the opinion that nothing can be allowed upon the counterclaim and that it should be dismissed.

In the result, in my opinion the appeal should be dismissed, save as to counterclaim, and as to that the appeal should be allowed.

Appeals dismissed,
McPhillips, J.A. dissenting on the counterclaim.

Solicitors for appellants: *Buchanan & Bull.*
Solicitors for respondent: *Ellis & Brown.*

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HAZELL *ET AL.* v. LUND AND THE ROYAL TRUST COMPANY, AND THE BOARD OF SCHOOL TRUSTEES OF POINT GREY AND THE CORPORATION OF THE MUNICIPALITY OF POINT GREY.

Mechanics' liens—Lien on public school built by school trustees—Trustees take over and complete building on default of contractor—Mechanics' Lien Act, R.S.B.C. 1911, Cap. 154, Sec. 16—Public Schools Act, R.S.B.C. 1911, Cap. 206, Sec. 56.

The defendant Lund entered into a contract with the Board of School Trustees of Point Grey for the construction of a school building. He subcontracted portions of the work to each of the several plaintiffs and they, upon the completion of their work, each filed mechanics' liens and brought actions for the enforcement thereof. The actions were by order consolidated. The trial judge held that the liens were established and they were entitled to enforce them.

Held, on appeal, *per* MACDONALD, C.J.A. and GALLIHER, J.A., that the provisions of the Mechanics' Lien Act extend to property held by public school trustees for school purposes, the express exemption from execution in the Public Schools Act shewing that the Legislature had in mind the subject-matter of exemption of school property from forced sale, there being nothing apart from the express exemption to indicate that the Legislature intended that the rights of the lien holders

should not attach to the property of such bodies, the existence of such express exemption shewing an intention not to make any further exemption.

Per MACDONALD, C.J.A.: Although under the terms of the contract upon the contractor's default the owner is entitled to take his place, complete the contract, and charge the cost of completion to him, deducting it from the balance of the contract price, in effect the parties agreed that, in such an event, the owner should become the contractor's agent to complete the contract, which cannot be done as against a lien holder under section 16 of the Mechanics' Lien Act. The full balance of the contract price when the work was taken over, is therefore, as between the owner and the lien holder, still owing by the owner to the contractor.

Per MARTIN and MCPHILLIPS, JJ.A.: Where a lien is enforced by sale under the Mechanics' Lien Act there is a "taking under execution" and liability to such enforcement by sale as an exclusive means of realizing the lien constitutes a liability to be taken in execution, to which, by virtue of the Public Schools Act, the property in question cannot be subject.

The Court being equally divided the appeal was dismissed.

APPEAL by defendant School Board and Corporation from the decision of GRANT, Co.J. of the 30th of December, 1914, at Vancouver, in a consolidated mechanic's lien action arising out of a contract for the construction of a municipal school building. The defendant, the Royal Trust Company, was the registered owner of the land upon which the school was built, and had previously conveyed the land to the Municipality of Point Grey, but the deed had not been registered. The contract for the erection of the building was made by the Board of School Trustees to the defendant Lund. Lund subcontracted different portions of the work to the several plaintiffs. The work was proceeded with, but eventually the architect, not being satisfied with its progress, took the work over on the 18th of May, 1914, and completed the building. Previously to the work being taken over the plaintiffs filed liens against the property under the Mechanics' Lien Act, and subsequently brought actions to enforce their liens. An order was subsequently made consolidating the actions. One of the claims only (Briscoe's) was for wages. When the work was taken over by the architect there was still due the contractor on the basis of a completed building $9,197.55, and the trustees expended $8,397.74 in completing the building, leaving a balance of $817.81. The ques-

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tions raised were: (1) whether under the Mechanics' Lien Act a lien can be enforced against property, either of a school board or of a municipality, and (2) whether the several plaintiffs were entitled to liens in the aggregate for the full amount due the contractors when the work was taken over, or whether the owner was entitled to first deduct therefrom the cost of the completion of the building. The trial judge found that the plaintiffs had established their claims for liens and gave judgment accordingly with leave to apply as to the steps necessary to work out or enforce their liens.

Statement

The appeal was argued at Victoria on the 14th and 15th of June, 1915, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Ritchie, K.C. (*W. H. D. Ladner,* with him), for appellants: The question is whether the Mechanics' Lien Act applies in case of a public school building acquired under the provisions of the Public Schools Act, R.S.B.C. 1911, Cap. 206, Sec. 45, Subsecs. (*a*) and (*b*). The trial judge took the view that because section 3 of the Mechanics' Lien Act expressly excluded "public roads" from its operation, that "public buildings" not being expressly excluded are therefore included in the Act. We contend an inference cannot be drawn that because the Legislature makes it clear that "roads" do not include "public roads" that therefore buildings must include "public buildings": see *Mersey Docks* v. *Cameron* (1865), 11 H.L. Cas. 443 at pp. 521-2. The lands are acquired for public-school purposes and are not liable to be taken in execution: see *Scott* v. *School Trustees of Burgess and Bathurst* (1859), 19 U.C.Q.B. 28; *Larsen* v. *Nelson & Fort Sheppard Railway* (1895), 4 B.C. 151; Wallace on Mechanics' Liens, 2nd Ed., p. 45; *King* v. *Alford* (1885), 9 Ont. 643; *Crawford* v. *Tilden* (1907), 14 O.L.R. 572 at p. 577. If school lands cannot be sold they cannot be seized in execution: Holmested's Mechanics' Lien Acts (1899), pp. 29-30; *Guest* v. *Hahnan* (1895), 15 C.L.T. 61; *Central Ontario Railway* v. *Trusts and Guarantee Co.* (1905), 74 L.J., P.C. 116; *McArthur* v. *Dewar* (1885), 3 Man. L.R. 72 at p. 81; *Moore* v. *Bradley* (1887), 5 Man. L.R. 49; *Trustees of*

School District Number Eight, Havelock, Kings County v. *Connely et al.* (1912), 41 N.B. 374; 9 D.L.R. 875; *Leonard* v. *City of Brooklyn* (1877), 71 N.Y. 498; *Henry Taylor Lumber Co.* v. *Carnegie Institute* (1909), 74 Atl. 357; *Lee* v. *Broley* (1909), 2 Sask. L.R. 288. In any event the plaintiffs are confined to a small balance due the contractor after the work was completed under section 8 of the Mechanics' Lien Act: see *Fuller* v. *Turner and Beech* (1913), 18 B.C. 69.

Bodwell, K.C. for respondents: On the question of costs see *Humphreys* v. *Cleave* (1904), 15 Man. L.R. 23. We say the school trustees wrongfully ousted the contractor from his work and the trial judge is right in holding that the plaintiffs are entitled to recover on a *quantum meruit*: see *Lodder* v. *Slowey* (1904), A.C. 442; *Cutter* v. *Powell* (1795), 6 Term Rep. 320; 2 Sm.L.C., 11th Ed., 1 at p. 48. It may be inferred from section 3 of the Mechanics' Lien Act that public buildings are subject to lien actions: see also *Gardner* v. *London Chatham and Dover Railway Co. (No. 1)* (1867), 2 Chy. App. 201; *Marshall* v. *South Staffordshire Tramways Company* (1895), 2 Ch. 36; *Trustees of School District Number Eight, Havelock, Kings County* v. *Connely et al.* (1912), 41 N.B. 374; 11 E.L.R. 473. The termination of the contract can only be enforced before the time fixed for the completion of the work had expired: see *Walker* v. *London and North Western Railway Co.* (1876), 1 C.P.D. 518; *Stewart* v. *The King* (1901), 7 Ex. C.R. 55; (1902), 32 S.C.R. 483.

Argument

Alfred Bull, on same side: The liens were filed and the property attached before the defendants started work on the building upon their ousting the contractor, so that all money due the contractor at that time must be paid the plaintiffs. The default of the contractor was entirely due to the delay of the Board of Trustees in making their payments.

Ritchie, in reply.

2nd November, 1915.

MACDONALD, C.J.A.: Appellants' counsel rested their case upon two grounds, first, that the Mechanics' Lien Act does not extend to property held by public school trustees for school purposes; and secondly, that the learned judge was in error in

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holding that the several plaintiffs (respondents) were entitled to liens in the aggregate greater than the sum of $817.03.

The first question is one depending upon the true construction of the Mechanics' Lien Act read in connection with the School Act. The School Act makes it the duty of the school trustees to provide suitable school facilities for the children within their district, and for such purpose to organize and establish schools, and it is declared by said Act that the school property shall be exempt from taxation and shall not be liable to be taken in execution.

The Mechanics' Lien Act gives labourers, sub-contractors and material men rights to liens for the price of their labour, contracts or material, upon the building or erection and the land in connection therewith upon which the labour has been expended, the contract executed or the material supplied. The lien attaches not only to the interest of the person who contracts to have the building erected but to the interests of other persons who consent to or acquiesce in the work being done. The word "person" in the Act is defined to include a body corporate, firm, partnership, or association, and the word "owner" includes any person having an estate or interest legal or equitable in the lands. The only other statutory provision having any bearing on the question at issue is section 3 of the Mechanics' Lien Act, which declares that nothing in the Act shall extend to work done upon a public street by a municipal corporation.

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We were referred to a number of cases bearing upon the first question, one of the earliest in Ontario being *Scott* v. *School Trustees of Burgess and Bathurst* (1859), 19 U.C.Q.B. 28. As I read that case the determining factor was the provision in the statute which provided for the levy of a special rate to raise the money to satisfy the judgment, a method which is provided in our own School Act and in the legislation of many if not all of the Provinces. Where such a method is provided it may reasonably be inferred that the Legislature intended that that remedy should be the only one and should exclude the ordinary remedy of seizure and sale under execution. The same principle is enunciated in the recent case before the Supreme Court of New Brunswick—*Trustees of School District Number Eight,*

Havelock, Kings County v. *Connely et al.* (1912), 41 N.B. 374; 9 D.L.R. 875, and in some other cases which I need not refer to. In those Provinces public-school property was not by statute expressly exempted from process of execution.

Now, if this substituted means of obtaining payment of a judgment is the real or paramount factor leading to the conclusion that such school property though not expressly so exempted is yet impliedly so because another means of obtaining payment of judgments against the trustees is substituted for process of execution, that factor is lacking in mechanics' lien cases where sub-contractors, or employees of the contractor, are concerned, as they cannot obtain a judgment against the school board, and thus enjoy the substituted method of enforcing their claims. The analogy between judgment creditor and mechanics' lien claimants fails in at least one important respect. As the Mechanics' Lien Act was passed for the very purpose of giving rights beyond those against the primary debtor, the *ratio decidendi* of the cases above referred to have no application to a case like the present. If the claimant cannot reach the property through the Act he cannot get satisfaction at all from the trustees: *King* v. *Alford* (1885), 9 Ont. 643, was relied upon by appellants' counsel, but that case does not in my opinion assist the appellants' case. It decided that as the railway company could not itself alienate its property so as to defeat the public objects for which it was created, neither could a creditor nor claimant under the Mechanics' Lien Act sell such property and so defeat those purposes. To the same effect is the *dictum* of the Privy Council in *Central Ontario Railway* v. *Trusts and Guarantee Co.* (1905), 74 L.J., P.C. 116.

MACDONALD, C.J.A.

In the case at bar the trustees have at least the implied power of sale of school property. They are not at all events prohibited from selling. They may acquire property either by purchase or by lease, or in any other way which will enable them to supply the proper school facilities, and while inconvenience might be caused to such bodies by the application to them of the provisions of the Mechanics' Lien Act, yet I am of opinion that something more than that must appear before the lan-

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guage of the enactment can be cut down so as to exclude their property from its operation.

Mr. *Ritchie* for the appellants pressed very strongly the argument that the express exemption of school property from sale under execution contained in our School Act puts his clients in a stronger position than were similar bodies who were obliged to rely upon an implied exemption from execution as in the *Havelock* case, *supra*. He also distinguished the Manitoba cases of *McArthur* v. *Dewar* (1885), 3 Man. L.R. 72; and *Moore* v. *Bradley* (1887), 5 Man. L.R. 49 at p. 53, on the ground that in Manitoba there was neither express nor implied exemption from process of execution. His submission in effect was that given an express or implied exemption from execution, the Court ought to imply an exemption from the operation of the Mechanics' Lien Act, but if, as in Manitoba there is neither an express nor an implied exemption from execution, there, of course, could be no implied exemption from the operation of the Mechanics' Lien Act, and he argues that that is the reason why the Manitoba cases appear to be against his contention but are not really so. The same argument is applicable to the decision in the Saskatchewan Courts. The answer to that contention is that these cases are of no assistance either one way or the other because our statute differs from the statutes of those Provinces, and expressly exempts school lands from execution. But instead of the appellants being in a stronger position than such bodies would be either in Ontario or New Brunswick, they are in a weaker one. In those Provinces there was no express exemption from execution but the Courts thought, as I read the cases, that there was an implied exemption to be inferred principally from the substituted remedy already referred to. But the express exemption found in our Act shews that the Legislature had in mind the subject-matter of exemption of school property from forced sale, and I think, therefore, that the maxim *expressio unius est exclusio alterius* is applicable to this case. I therefore rest my decision on two grounds, first, that apart altogether from the express exemption from execution, there is nothing to indicate that the Legislature intended that the rights of lien holders should not attach to the

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property of bodies such as school trustees, and secondly, that the existence of the express exemption from execution shews an intention not to make any other exemption, or, in other words, it exhausted the subject-matter of exemptions from forced sale.

Then again, section 3 of the Mechanics' Lien Act is a limitation on its application to property of a public body and the maxim aforesaid is again appropriate.

On the other ground of appeal. There was some controversy as to who should be considered the owner within the meaning of section 8 of the Mechanics' Lien Act. I will not go into details, but will content myself with saying that in my opinion the school trustees are the owners there referred to. Owner does not necessarily mean owner in fee simple, nor registered owner, but one having an interest capable of being charged. The interests if any of the Royal Trust Company and of the Municipality are bound because the work was done with their knowledge and consent, but they are not the owners referred to in said section 8.

It now becomes necessary to refer briefly to certain of the facts of the case. The appellants unquestionably greatly hampered and delayed the contractor Lund in his work from the beginning thereof up to the end of February, 1914, when Lund very properly declined to go on further with the work until moneys which were withheld from him were paid. A settlement was then arrived at by which the trustees agreed to pay the arrears due on progress certificates for which Lund accepted their promissory note; and to pay $4,500 damages for loss sustained by reason of his being hampered and delayed as aforesaid. Lund on his part agreed to resume and complete the work with reasonable diligence. The promissory note and damages were paid in due course, and Lund resumed work and carried it on until the 4th of May, when he became, through lack of capital, unable to carry the work on to completion. His foreman, Briscoe, who was in charge, when asked as to the circumstances which lead to his stopping work on the 4th of May, said:

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"The reason was I could not find another place to drive a nail and as we were short of building material and finishing material finished the contract up as far as I could go at that time.

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"You had no more material? No sir.

"Were you ordered to leave the work by the architect or by the clerk of the works. No, sir."

This material was within Lund's contract. Lund himself, speaking of the notification by the architect of the 28th of April, complaining of delay in completing the work, said:

"I could do nothing more with the School Board. They took advantage of my absence and stepped in there without giving me a little bit of time to raise $1,400 or $1,500, which I am confident I could have raised amongst my friends.

"Where did you receive this letter? Received it in California.

"Did you do anything in consequence of receiving that? Nothing much. I waited in San Diego for four or five days before I returned waiting for a notification from the Bonding Company, because I was prepared to take up the proposition with the Bonding Company, if I had got such a notification from them. I paid no attention to it because I was absolutely disgusted with the whole thing."

Now, the architect did not take over the work under clause 33 of the contract until the 18th of May after ample notice to Lund and his bondsmen that he would do so if the work were not proceeded with. I am therefore at a loss to understand the finding of the learned judge that Lund was wrongfully excluded from the works, and not permitted to complete the building. Lund has taken no action against the trustees and has not defended the action of the lien claimants, nor counterclaimed against his co-defendants, but appears to have acquiesced in the course taken by the trustees. In this view of the facts there was no breach of contract by the trustees after the settlement of February, and from that time, which made a new starting point, it is not suggested that the appellants delayed or hampered Lund in any way in his work, or were in default in making payments of moneys due him under the contract. If therefore the appellants, as I think they did, rightly took charge of the work on the 18th of May and completed it themselves, what are the rights of the lien holders in the circumstances? At that time on the basis of the completed building there would be due to Lund $4,197.55, as the learned judge has found, and, according to an estimate made by the said Briscoe, it required only $1,355 to complete the work contracted for. The trustees however expended $8,379.74 in completing it, and shew a balance of only $817.81 as now due from them to Lund.

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It was not contended at the bar by appellants' counsel that the liens, if any, of the several plaintiffs did not attach before the 18th of May, the date on which the work was taken over by the respondent Trustees. The only claim for wages is that of Briscoe, and his claim stands on a different basis from that of the others, and I think it cannot be disputed that he is entitled to a lien for the full amount of his claim irrespective of what was due from the owner to the contractor.

This case raises a question under the Mechanics' Lien Act which, so far as I know, has never yet been passed upon by the Courts. By the contract between the Trustees and Lund it was agreed that in the event which happened, namely, his failure to proceed diligently with the work, the Trustees should be entitled to take his place, complete the contract, and charge the cost of completion to him, deducting it from the balance of the contract price.

Section 16 of the Mechanics' Lien Act provides as follows:

"No assignment by the contractor or any sub-contractor of any moneys due in respect of the contract shall be valid as against any lien given by this Act. As to all liens, except that of the contractor, the whole contract price shall be payable in money, and shall not be diminished by any prior or subsequent indebtedness, set-off, or counterclaim in favour of the owner against the contractor."

In effect the parties agreed that in the event aforesaid the owners should become the contractors' agents to complete the contract. Now, it is clear to me that the contractor could not appoint a third person to complete the contract, assign to him the unpaid balance of the contract price, and thus defeat existing liens even if the intent were entirely innocent, and it seems equally clear that this could not be done by prior agreement between the contractor and owner. In this view I must hold that the full balance of the contract price, namely, $9,197.55 is, as between the trustees and the lien holders, still owing by the owners to the contractor.

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I do not know upon what principle the learned judge allowed the lien holders' claims to the extent of $13,498.03. It is said to have been by way of *quantum meruit,* but in my view of the case no question of *quantum meruit* is in issue in these consolidated actions. Such a question could only have arisen if

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the contractor had been wrongfully prevented from completing his contract and had elected to sue the trustees not for damages for breach of contract but upon a *quantum meruit* for the work done, but even that is not a case which could be made out by these plaintiffs, so that the question of *quantum meruit* may be dismissed altogether.

In the result I think the plaintiff Briscoe is entitled to a lien for the full amount of his claim, that the balance of the $9,197.55 remaining after Briscoe's claim is deducted is available to the other lien holders *pro rata,* according to their several classes and rights.

A question not argued before us nor in the Court below, has been raised by my learned brother MARTIN, *viz.*: that the realization of a mechanic's lien by sale of the property is "execution" within the meaning of section 56 of the Public Schools Act. With deference, I am unable to agree in that construction of the section. Doubtless the term "execution" is an elastic one and may be used to describe a sale under the Mechanics' Lien Act, but that is not the point. The question is what did the Legislature mean by that term as used in said section 56? It seems to me that the best answer to that question is to be found in the latter part of the section itself. After declaring that school lands shall not be liable to be taken in execution,

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the Legislature proceeds to say: "but in case of any judgment being recorded against the Board of School Trustees" the money to satisfy the judgment shall be raised by special rate. The Legislature was dealing with judgments against the Board of School Trustees, that is to say, judgments *in personam.* The judgment in this case is not of that nature but is directed against the land and not against the Board of School Trustees. It seems to me, therefore, that when the Legislature used the term "execution" in the beginning of that section it had in mind an "execution" such as would be issued on a judgment of the kind mentioned in the latter part of the section, one that could be satisfied by the substituted remedy therein provided.

The Mechanics' Lien Act is a code in itself. It not only confers new rights upon mechanics but provides a summary mode of realization, all of which is carried out under the direction

of the County Court judge without resort to the Execution Act. When the Legislature took away the right to realize a personal judgment by the ordinary process of execution and substituted another process it cannot, in my opinion, be inferred that it intended to take away the right of a mechanic or sub-contractor, who might have no personal judgment against the owner, and leave him without any remedy at all.

MARTIN, J.A.: A preliminary question arises before us, as it did before the learned trial judge, as to whether or no "property acquired by the Boards of School Trustees or the Municipal Corporations for school purposes" (to quote section 56 of the Public Schools Act) is subject to mechanics' liens. Such property said statute declares,—

"shall not be subject to taxation, nor be liable to be taken in execution; but in case of any judgment being recorded against the Boards of School Trustees, they shall forthwith notify the Municipal Council of the amount thereof, and the Municipal Council shall levy and collect the same as in other cases provided for by this Act."

By these two sweeping exemptions, first from taxation (and consequent sale upon default), and second from taking in execution by curial process, the Legislature has clearly shewn its intention in the paramount public interest of education to free the public school property of this Province from the two great burdens of liability to taxation and execution which the ordinary citizen cannot escape from, the manifest object being that the education of the youth of this Province should not be interrupted by the closing of the schools because of legal difficulties, and the statute must be interpreted in the spirit in which it is enacted so that the exceptional privileges which it confers shall not be frittered away by technicalities.

In the case at bar the legal estate in the property stood in the name of the Municipality of Point Grey but it was held in trust for the School Trustees of Point Grey, who entered into the contract with defendant Lund for the erection of a fire proof school building for $64,000, so the true position of the matter, for the purposes of our adjudication is as though the property stood in the name of the trustees.

This general question of the exemption of Crown property, or as Lord Watson puts it in *Coomber* v. *Justices of Berks*

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(1883), 9 App. Cas. 61 at p. 74, of buildings which "have been erected for proper government purposes and uses, although the duty of providing and maintaining them has been cast upon county or other local authorities," has been often discussed in England and Canada in relation to schools and railways, but in view of our direct statutory provision above quoted, which is not to be found in other places where the point has come up in the cases cited to us, the question is narrowed down to one neat point, *viz.*: seeing that school property is "not liable to be taken in execution" are proceedings to enforce a mechanic's lien of that nature? If so, the property (in this case, land) is not subject to said lien.

In the case of *King* v. *Alford* (1885), 9 Ont. 643, a majority of the Court pointed out the difference between a vendor's and a mechanic's lien and Chancellor Boyd took the view, p. 647, that the Mechanics' Lien Act was

> "intended to be operative . . . . as giving a statutory lien issuing in process of execution of efficacy equal to but not greater than that possessed by the ordinary writs of execution."

Mr. Justice Ferguson, pp. 653-4, points out that a holder of a vendor's lien may have lands sold to satisfy it that an execution creditor could not have sold to satisfy his debt, though the former lien is "not of so high or stringent a nature" as the latter, which "much more closely resembles, in kind, the right of a holder of a mechanic's lien than does the latter (*i.e.*, mechanic's lien) resemble in kind the vendor's lien" which "is in the nature of a trust." This clearly regards a mechanic's lien as being one "in the nature of an execution" as the learned author observes in Holmested's Mechanics' Lien Acts (1899), 32. Then, there is the direct and high authority of Killam, J. in *McArthur* v. *Dewar* (1885), 3 Man. L.R. 72 at p. 80, wherein he quotes with approval Phillips on Mechanics' Liens in saying that "where property, as a public court house, is exempted by law from sale or execution, the lien (*i.e.*, mechanic's) is not enforceable against it," and says:

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> "An examination of such of the cases as are reported in the volumes of reports available shews the author to be correct in mentioning the non-liability of the property to sale under execution as in general the determining ground."

He gave effect to the lien in that case because the property in question was, under the Manitoba statutes, liable to be taken in execution. That decision recognizes that the working out of the lien by sale of the property is an "execution" and the judgment of the Supreme Court of New Brunswick *in banc* in *Trustees of School District Number Eight, Havelock, Kings County* v. *Connely et al.* (1912), 41 N.B. 374; 11 E.L.R. 473, proceeds upon the same assumption and treats the point as though it were beyond question. That this assumption is correct I have no doubt. "Execution" is a broad and varying term and has a much wider meaning and effect than "writ of execution" which has been recognized from very early times down to the present day. Thus Coke upon Littleton, 17th Ed., Vol. 1, p. 154a:

"Execution signifieth in law the obtaining of actual possession of any thing acquired by judgement of law, or by a fine executory levied, whether it be by the Sherife or by the entry of the party."

Blackstone's Commentaries, Lewis's Ed., Book 3, Cap. 26, p. 412, says:

"If the regular judgment of the Court, after the decision of the suit, be not suspended, superseded, or reversed by one or other of the methods mentioned in the two preceding chapters, the next and last step is the *execution* of that judgment; or putting the sentence of the law in force. This is performed in different manners, according to the nature of the action upon which it is founded, and of the judgment which is had or recovered."

This "performance" is well illustrated by our Supreme Court Order XLII., entitled "Execution," where the various ways of working out judgments against goods and lands are treated, and by rule 586 thereof it is prescribed that "in these rules the term 'writ of execution' shall include" certain specified writs, and then follows this apt definition: MARTIN, J.A.

"And the term 'issuing execution against any party' shall mean the issuing of any such process against his person or property as under the preceding Rules of this Order shall be applicable to the case."

Now, what is the "process" against this property which is "applicable to the case," of a judgment *in rem,* of which nature this is and may so be regarded in the circumstances of this case, though not, of course, to the same extent as, *e.g.,* judgments against ships and the sale thereof to satisfy liens, in the Admiralty Court? Under our Mechanics' Lien Act the

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only way that this lien can be enforced is by a sale "to realize such lien" after judgment: see sections 23, 24 (1), 28, 31, 32, 34, 36. And since the abolition in this Province of writs of *fi. fa. de terris* the only way that lands can be sold under judgments is first to obtain a "lien and charge" on the lands by registering the judgment (section 27) and then obtaining an order of the Court to enforce that charge under the group of sections 26 *et seq.* entitled "Execution against Lands" in the Execution Act, Cap. 79, R.S.B.C. 1911, which order directs a sale to be carried out by the sheriff of the county (sections 32, 37, 41, etc.) to satisfy said lien and charge, who gives a conveyance to the purchaser, which vests the lands in him (section 45, and Form C) "under and by virtue of an order for the sale of the land" issued on a judgment, etc. This "process" of sale to realize the "lien and charge" and subsequent vesting which is admittedly a "taking in execution," is in all respects essentially the same in principle as that to realize the lien under the Mechanics' Lien Act, the only difference in title being that, under the latter Act, the judge executes the vesting conveyance (section 31) instead of the sheriff: the other proceedings are governed by that section as follows:

"And, when not otherwise provided, the proceedings shall be, as nearly as possible, according to the practice and procedure in force in the County Court; and when these are no guide, the practice and procedure used in the Supreme Court shall be followed."

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The result of all this is that there is in the enforcement of the lien in question by the process of the Court under the Mechanics' Lien Act a "taking in execution" not only in the spirit but in the letter of the statute, and when that stage is arrived at there is an end of the matter because the rights of no private individual, however much he may have been favoured by the Legislature as against others, can infringe upon the special immunity given to a privileged class of property acquired by the School Trustees for school purposes. That this contemplated result may be defeated by simply filing a lien and allowing it to remain indefinitely as a charge upon the property is a contention that I have found nothing to support. It has been held in this Court that a lien cannot exist apart from the sum

for which judgment should be given—*Champion* v. *World Building Limited* (1914), 20 B.C. 156. There is no personal judgment here against the trustees, but only the declaration of a lien upon their property and there is no way of enforcing this judgment *in rem* except by sale of the land, which indeed is what in the respective plaints herein is prayed to be done, and the judgment has declared liens to be established for certain sums and has ordered payment of the amount thereof by the contractors, as set out in schedule 1, and in case of default has reserved "leave to apply for further directions as to what further proceedings may be taken for enforcing the said liens or any of them" which can and does mean, one thing only—a sale of the land, because, as above mentioned, there is no personal judgment herein against the School Trustees which can be "recorded" against them under section 56 and collected by levy as therein provided. I do not wish it to be understood that I am of the opinion that this lien could be sustained even if the circumstances were such that a rate could be levied under section 56. I express no opinion upon that point beyond saying it is obviously a very doubtful one from several points of view, one of which is, *e.g.*, that even if a rate could be levied it could not in the case of a bankrupt municipality (of which the Courts have had experience) be collected, and then there would be no other remedy than a sale to satisfy the lien, which it is clear cannot be had in the face of said section. A suggestion was made that the enforcement of the lien could be worked out by the appointment of a receiver, which is another doubtful point, but one that has no application to the present case because there are no annual or other rents or profits from this school house that could come into a receiver's hands, and in that respect it has been "struck with sterility," as Lord Justice Brett puts it in *Coomber* v. *Justices of Berks* (1882), 10 Q.B.D. 267 at p. 282, before the Court of Appeal.

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I have carefully examined all the cases to the contrary relied upon by the learned judge below, and cited to us, but they can all be distinguished either because of the absence of a section like ours, *e.g.*, *Trustees of School District Number Eight, Havelock, Kings County* v. *Connely et al., supra,* and *Lee* v. *Broley*

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(1909), 2 Sask. L.R. 288; or because of being decisions based on local statutes, or otherwise. In the last-cited case, indeed, the Court admits "frankly" that it was departing from the *ratio decidendi* of *King* v. *Alford*.

In *Connely's* case at p. 383, cited to us, there is an observation which I am unable to fully understand, wherein reference is made to a remark by Lord Blackburn in *Coomber* v. *Justices of Berks, supra,* that "I do not much doubt that, if the premises were taxable, means would be found for obtaining payment." Lord Blackburn was there speaking of the case before him, which was one wherein it was sought to make certain justices liable for income taxes which, it was contended, were assessable on certain buildings which had been erected for public purposes, *i.e.,* Assize Courts, etc., and the intent to which his Lordship's remark goes is that if somebody could be found who could be charged with the assessment then means would be forthcoming to collect it. But in the case at bar the point is that the statute declares that the property in question shall not be liable either to taxation or execution. Indeed *Connely's* case, when properly understood, is in favour of the present because it is clear that the decision would have been the other way if it involved the sale of the property (pp. 383-5) as it unquestionably does in this case. White, J. held that the New Brunswick Mechanics' Lien Act could be worked out without resorting to a sale by execution because of certain provisions in regard to the report of the trial judge which he regarded as equivalent "to a judgment obtained by ordinary suit in the ordinary way," *i.e.,* a personal judgment against the owner, which, as has been seen is precisely what cannot be obtained in the case at bar. I can, therefore, only come to the conclusion that on the facts of this case, the proceedings taken to enforce this lien have rendered the land in question "liable to be taken in execution" contrary to the statute hereinbefore set out. This result is unfortunate for the plaintiffs, the sub-contractors, but at least they have or had some one to look to, *viz.,* the contractor, with whom they made their bargain; and they are no worse off than was the contractor who built the school house in *Scott* v. *School Trustees of Burgess and Bathurst* (1859), 19 U.C.Q.B. 28.

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I only add that I have not overlooked the fact that this conclusion is supported by those of Proudfoot, J. in *Robb* v. *Woodstock School Board* (1880), Holmested's Mechanics' Lien Acts (1899), 30; and *cf.* HOWAY, Co. J. in *Vulcan Iron Works, Ltd.* v. *Corporation of New Westminster et al.* (1914), noted in 7 W.W.R. 151.

GALLIHER, J.A.: I confess the grounds taken by my brother MARTIN have not left me entirely free from doubt, owing to the particular wording of our statute, but on the whole I think the better view is that taken by the Chief Justice, in whose judgment I concur.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I am in entire agreement with my brother MARTIN and would allow the appeal.

MCPHILLIPS, J.A.

Appeal dismissed,
Martin and McPhillips, JJ.A. dissenting.

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

Solicitors for the various respondents: *Buchanan & Bull; Bourne & McDonald; S. A. Moore; Burns & Walkem; Lucas, Lucas, Bucke & Wood.*

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Assignment for benefit of creditors—Exemptions—A privilege that must be exercised in reasonable time—Homestead Act, R.S.B.C. 1911, Cap. 100, Sec. 17—Creditors' Trust Deeds Act, R.S.B.C. 1911, Cap. 13, Secs. 48, 49 and 64.

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The defendant, a fur vendor, assigned to the plaintiff for the benefit of her creditors all her property and effects which might be seized or sold or attached under execution, and delivered possession thereof without making any claim to exemption under the Homestead Act. The plaintiff then lent the defendant certain of the goods (implements for carrying on her work) for which he obtained a receipt. Subsequently she refused to return the goods, claiming them as an exemption. The plaintiff then applied for and obtained an order for replevin.

Held, on appeal (MCPHILLIPS, J.A. dissenting), that exemption under the Homestead Act is a special privilege which may be insisted upon or not at the option of the debtor, and the failure to make a claim within a reasonable time operates as an abandonment of the privilege.

APPEAL by defendant from an order of GRANT, Co.J. at Vancouver on the 4th of May, 1915, directing the sheriff to replevy certain goods and chattels of the defendant. Under a deed of assignment of the 2nd of February, 1915, the plaintiff was made assignee of the defendant's estate. The defendant was a vendor of furs and after the seizure the plaintiff lent her (the defendant) the goods seized on the understanding that they were to be returned, she giving a receipt. Later the plaintiff (by his agent) demanded possession of the goods and she refused to give them up. The goods were worth about $176 and consisted of implements required for making up furs. The plaintiff then sued for the recovery of the goods and an order for replevin was made. The appellant contended (1) that the goods taken by the order are exempt from seizure to the amount of $500; and (2) that an assignee must confine himself to the remedies given him under sections 48 and 49 of the Creditors' Trust Deeds Act.

Statement

The appeal was argued at Victoria on the 16th of June, 1915, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Steers, for appellant: The order for replevin should not have been made on the affidavit submitted. The action was originally one of trover and the affidavit only shews that a demand was made by one Boswell. There is no conversion of goods when a demand only is made and there is no repudiation by the owner: Pollock on Torts, 9th Ed., 369; *Clayton* v. *Le Roy* (1911), 2 K.B. 1031. The affidavit was on "information and belief," and did not declare the source of the information. It should not have been heard: see *The King* v. *Licence Commissioners of Point Grey* (1913), 18 B.C. 648; *In re J. L. Young Manufacturing Company, Limited* (1900), 2 Ch. 753. In the next place no such action lies as the plaintiff is governed by the provisions of the Creditors' Trust Deeds Act. [He referred to *Witsoe* v. *Arnold and Anderson, Ltd.* (1914), 15 D.L.R. 915; *Ex parte Campbell*; *In re Cathcart* (1870), 5 Chy. App. 703; *Parkes* v. *St. George et al.* (1882), 2 Ont. 342; *Diehl* v. *Wallace* (1905), 2 W.L.R. 24; *Smith* v. *Beal* (1894), 25 Ont. 368; *Dickinson* v. *Robertson* (1905), 11 B.C. 155.] Argument

W. C. Brown, for respondent: The cases referred to as to the contents of the affidavit upon which the order was made do not apply as this is a replevin action and the goods are in fact ours. Having once relinquished the goods without claiming exemption the defendant cannot now set up that right; she gave a receipt for the goods: see *In re Ley* (1900), 7 B.C. 94; *In re Sharp* (1896), 5 B.C. 117; *Pilling* v. *Stewart* (1895), 4 B.C. 94; *Yorkshire* v. *Cooper* (1903), 10 B.C. 65.

Steers, in reply: There is a distinction between an assignee and a sheriff.

Cur. adv. vult.

2nd November, 1915.

MACDONALD, C.J.A.: Defendant made an assignment to the plaintiff pursuant to the Creditors' Trust Deeds Act of all her property and effects "which may be seized or sold or attached under execution or the Execution Act, or attachment." She delivered possession thereof to the assignee without making any claim to exemptions under the provisions of the Homestead Act. The plaintiff subsequently lent the defendant certain of the goods and defendant signed a receipt therefor in a form

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which clearly acknowledges the loan. Several months thereafter she refused to return the goods, claiming them as an exemption which but for her ignorance of the law, it is contended, she would have made at the time of the assignment. The plaintiff obtained an order of replevin and from that order defendant appeals.

By amendment (B.C. Stats. 1873, No. 38, Sec. 1) of the Homestead Ordinance, 1867, it was declared that

"The following personal property shall be exempt from forced seizure or sale, by any process at law or in equity, or from any process in bankruptcy, that is to say; the goods and chattels of any debtor or bankrupt, at the option of such debtor or bankrupt, or if dead, of her personal representative, to the value of $500, the same not being homestead property under the provisions of the said Homestead Ordinance, 1867."

This section with certain modifications is now section 17 of R.S.B.C. 1911, Cap. 100. Standing alone it was construed to mean that if the debtor wished to take advantage of the option there given him of claiming an exemption he must make his demand upon the sheriff. In other words, his right to an exemption was declared to be a special privilege which he might insist upon or not at his option. If he insisted upon it then the sheriff must release the goods selected to the value of $500: *Sehl* v. *Humphreys* (1886), 1 B.C. (Pt. 2) 257. The statute was amended in 1890 by the addition of several sections which are now sections 18 to 23, both inclusive, of the revised Act. These sections provide the procedure to be followed in the selection of the goods, and in my opinion if anything were wanting to make the intention of the Legislature clear as to the meaning of the original section, these new sections supply it. It is plainly contemplated that the sheriff may seize all the debtor's goods without setting aside anything by way of exemption, and that if the debtor desires to take advantage of the provision in his favour he must do so within two days after the seizure or after notice thereof, whichever shall be the longest time. It is further provided that in case there should be no dispute as to the value of the goods selected the sheriff shall release the same to the debtor, but that if there shall be a dispute the value shall be appraised as pointed out in the Act, and when the dispute is adjusted the sheriff shall hand

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over to the debtor the goods awarded to him. The intention is clear that the debtor is to make his claim at once, and any dispute is to be summarily decided, so that the sheriff may proceed to execute his writ without uncertainty. The suggestion that it is made the duty of the sheriff in default of a claim by the debtor to set aside $500 worth of goods as an exemption in favour of the debtor finds no sanction in any part of the Act and is against the whole tenor of it. The right to claim an exemption as against an assignee for creditors is founded on the restrictive words used in the Act and in the instrument of assignment which adopts the words of the Act. What are assigned are the assignor's goods which may be seized and sold under execution. Now, all her goods might be seized and sold under execution unless the exemption were claimed in the manner set out in the Homestead Act. Hence, if the assignor wished to resort to that right, she should have done so at the time of delivery of possession to the assignee, or at all events within a reasonable time thereafter. It being her option to claim an exemption or not, her election not to do so would bind her. I think she elected not to claim the goods in question when she borrowed them, and thus recognized the assignee's final ownership of them. She must be presumed to have known the law, and therefore it is no excuse to say that at that time she was not aware of her rights.

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The construction I have placed upon the sections of the Homestead Act in question is consistent with the authorities from *Sehl* v. *Humphreys, supra,* down to the present time. It was the opinion of DRAKE, J. in *Pilling* v. *Stewart* (1895), 4 B.C. 94; and of MCCOLL, C.J. in *In re Ley* (1900), 7 B.C. 94; and inferentially of the Full Court in *Yorkshire* v. *Cooper* (1903), 10 B.C. 65.

I would therefore dismiss the appeal.

MARTIN, J.A.: It was first objected that the plaintiff, being an assignee, cannot resort to these proceedings in replevin to recover the goods assigned to him but must rely upon the special statutory remedies given him under sections 48 and 50 of the Creditors' Trust Deeds Act, Cap. 13, R.S.B.C. 1911, and

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we are asked to restrain him under section 64 from "continuing proceedings which are not in the interests of the estate," etc. I am unable to take this view, and can only regard said sections as providing special and summary methods before certain nominated persons (*In re Vancouver Incorporation Act* (1902), 9 B.C. 373) of recovering property and obtaining information, and subjecting the assignor and others to special penalties. These sections are of much value in certain circumstances, but there is nothing in the present case (which is one where the assignee is trying to get back from the assignor property which he loaned to her, as appears by her written acknowledgment and receipt) that would justify our ordering a discontinuance of this action, even if this Court of Appeal could in any event entertain such an application at this stage and in this manner, which I am of the opinion it could not.

Nor can I take the view that the assignee cannot commence an action of this description without obtaining the consent of the creditors: I find nothing in the sections to which we were referred which prevents him from doing so.

Then it was urged that the goods in question are "personal property . . . . exempt from forced seizure or sale by any process at law or in equity" under section 17 of the Homestead Act, which provides that "the goods and chattels of any debtor at the option of such debtor . . . . to the value of five hun-

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dred dollars" shall be exempt as aforesaid. But in my opinion that Act has no application to such a state of affairs as we have here because in any event the debtor must be deemed to have exercised her "option" and elected not to claim an exemption by conveying the goods to the plaintiff for certain specified purposes, under the Creditors' Trust Deeds Act, Cap. 13, R.S.B.C. 1911: *vide* MCCOLL, C.J. in *In re Ley* (1900), 7 B.C. 94, where he held that

> "The exemption is not an absolute right but a privilege and therefore may be waived as well as lost by laches, and that by the form of assignment the claimants in this case are precluded even if otherwise entitled."

The "form of assignment" is essentially the same in the case at bar, *viz.*:

> "All her real and personal property, credits and effects, which may be seized or sold or attached under execution or the Execution Act, or attachment."

That the goods herein could be seized and sold under section 10 of the Execution Act, Cap. 79, R.S.B.C. 1911, is clear, and therefore there is no distinction between the two cases and I think the decision of MCCOLL, C.J. should be followed. This view of the Act, that this dormant right of exemption is not an absolute exemption which prevents seizure and sale, but a matter of privilege dependable upon and exercisable "at the option of such debtor" (to quote the statute) and therefore the goods are liable to seizure and sale before the claim for exemption is made, is an old and long-established one in this Province, beginning with the decisions of GRAY, J. in *Johnson* v. *Harris* (1878), 1 B.C. (Pt. 1) 93; and *Sehl* v. *Humphreys* (1886), 1 B.C. (Pt. 2) 257, and continued by DRAKE, J. in *Pilling* v. *Stewart* (1895), 4 B.C. 94, where the exact point before us was raised by the debtor's counsel. Since the decision of Mr. Justice GRAY the Act has been twice specially considered by the Legislature and amended before the general revisions of 1897 and 1911, *viz.*: in 1890, Cap. 20, and in 1896, Cap. 23 (this being also later than the judgment in *Pilling's* case, *supra*) and so his view must be regarded as having received Legislative sanction and exposition according to the authorities cited by me in *Jardine* v. *Bullen* (1898), 7 B.C. 471 at p. 477; and *Sheppard* v. *Sheppard* (1908), 13 B.C. 486 at pp. 517-8, approved of by their Lordships of the Privy Council in *Watts and Attorney-General for British Columbia* v. *Watts* (1908), A.C. 573 at p. 579. Therefore the later inconclusive expressions in *Dickinson* v. *Robertson* (1905), 11 B.C. 155, should be disregarded. I note that *Pilling's* case escaped observation.

MARTIN, J.A.

I have not overlooked the fact that in that case DRAKE, J. said that the debtor "cannot after conversion make any claim," which observation was directed to the facts of that case where the claim was not made till after the assignee had sold the debtor's (assignors) goods under the assignment. It was not necessary for the learned judge to express his opinion upon the effect of the failure to make any claim at the time of the assignment whereby under section 4 of the Creditors' Trust Deeds Act all his property became "vested" in his assignee,

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excepting such as was exempt, and it has been seen that no personal property is exempt before claim made. But as hereinbefore stated that is the exact point decided, and I think rightly so, by Chief Justice MCCOLL. Moreover, such a conveyance and transfer of the debtor's property would be a "conversion" of it to carry out the main specified object of the deed of assignment, *viz.*: "upon trust, to sell and convey all the real and personal property of the assignor and with the proceeds to pay off all her debts, and the costs of the trust, and then to hand over the surplus to her." It is indeed unfortunate that the consequences of this decision should be those sad ones depicted by DRAKE, J. in *Pilling's* case, at p. 99, but the appellant here has the poor consolation of knowing that in the following year my equally unfortunate client in *Hudson's Bay Co.* v. *Hazlett* (1896), 4 B.C. 450, met the same unavoidable but none the less unhappy fate at the hands of the same learned judge and Mr. Justice MCCREIGHT.

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It follows that the appeal should be dismissed.

GALLIHER, J.A.: Though personally inclined to the view that the $500 exemption is not merely a privilege, the Courts of this Province and other Provinces have taken the latter view.

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In view of this and that the Legislature of this Province by subsequently legislating a fixed period within which the judgment debtor may make his selection may be taken to have adopted those decisions as the proper interpretation of the exemption clause, I am with reluctance forced to the conclusion that this appeal must be dismissed.

MCPHILLIPS, J.A.: This appeal involves the consideration of the exemption accorded to the assignor when making an assignment for the benefit of creditors under the Creditors' Trust Deeds Act (Cap. 13, R.S.B.C. 1911). The assignment in question in this appeal is in the words of section 4 of the Act, save that the word "her" is used instead of the word "my," *i.e.*, "All [her] real and personal property, credits and effects, which may be seized or sold or attached under execution or the

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Execution Act, or attachment." Now section 4 further reads that if the assignment is in the words of the Act or to the like effect, which is the present case, it "shall vest in the assignee all the real and personal estate, rights, property, credits, and effects whether vested or contingent, belonging at the time of the assignment to the assignor, except such as are by law exempt from seizure or sale under execution or certificate of judgment, however subject, as regards lands, to the provisions of the Land Registry Act." To find what are exempt we have to turn to section 17 of the Homestead Act (Cap. 100, R.S.B.C. 1911) which reads as follows:

"The following personal property shall be exempt from forced seizure or sale by any process at law or in equity; that is to say, the goods and chattels of any debtor at the option of such debtor, or, if dead, of his personal representative, to the value of five hundred dollars; Provided that nothing herein contained shall be construed to exempt any goods or chattels from seizure in satisfaction of a debt contracted for or in respect of such identical goods or chattels; Provided further that this section shall not be construed so as to permit a trader to claim as an exemption any of the goods and merchandise which form a part of the stock-in-trade of his business."

Then we have section 18 of the Act providing for the duty of officers seizing goods of any debtor under writ of *fi. fa.*, or any process of execution, and the selection of goods by the debtor to the value of $500.

It is clear that the assignee under an assignment is not an officer within the purview of the above-quoted section, and this section cannot apply. In the result the assignee is only vested with title to property in excess of $500, and at his peril will he proceed in denial of the statutory right in favour of the assignor and claimed in the assignment. The very document under which the assignee claims the right to any of the property of the assignor reads that the exemption is made. It may be said that to make matters workable some selection would have to be made. If that be conceded then it was matter for arrangement between the assignor and assignee whereby the assignor would make some selection, but that involves knowledge in the assignor that that procedure is necessary and apparently the assignor in the present case was unaware of this and of the statutory exemption given to her, that is, unaware of her right-

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ful legal position and the privilege granted by the Legislature, although it is true the document she signed so read. To debar the assignor from insisting upon this statutory and claimed right in the assignment itself it would be necessary to have evidence sufficient to establish an estoppel or waiver of this right. In the case of the sheriff or other officer acting under process of execution the duty is cast upon the officer by statute to allow the debtor to make the selection, and in my opinion he can only discharge that duty by apprising the debtor of this statutory right and then if the debtor does not exercise it that would constitute a sufficient estoppel and not to apprise the debtor would be a breach of duty upon his part. It was also the duty of the assignee to so apprise the assignor of this right of selection or to leave to the assignor personal property to the value of $500. This course was not adopted by the assignee; on the contrary he apparently took all the personal property of the assignor or attempted to possess himself of it all. In the course of things considerable stock-in-trade and personal property generally was taken belonging to the assignor and disposed of for the benefit of creditors, and there now remains the following personal property of the assignor valued at $176, being personal property set forth in a writing signed by the appellant—property which the assignee states he took possession of but allowed her to retain the possession of by way of loan. [His Lordship read the list of articles and continued].

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It is this particular property which is now in question and which the appellant (the assignor) refuses to deliver up, claiming that it is statutorily exempt, and exempt under the provisions of the assignment itself. The assignee failing to get possession of this property applied to MCINNES, Co.J. for an order by way of replevin and the learned judge made an order on the 7th of May in the terms following: [His Lordship read the order and continued.]

From this order the appellant appeals to this Court. It is impossible upon a careful examination of the evidence and proceedings to come, in my opinion, to any other conclusion than that the appellant, a married woman, engaged in business was over-reached, in that the attempt is to deprive her of a right

which the Legislature has accorded to all persons when making an assignment for the benefit of their creditors generally, and accorded to judgment debtors as well, the intention being that persons who by misfortune have become unable to pay their debts in full shall be left something and not be cast upon the community with nothing—penniless with the likelihood of becoming a public charge. The right of exemption must be construed favourably to the class which the Legislature plainly intends shall be protected from the undue rapacity of creditors and people are invited to come into the country—a new country—with this statutory guarantee held out to them—and it may be said in passing that the exemption accorded in this Province is slight indeed in comparison to that accorded in other Provinces of Canada. All that has taken place ear-marks the designing hand of some one conversant with the rightful legal position of the appellant and the attempt is to exploit this lady (the appellant) out of her just rights by having her sign the writing that the goods in question are to be returned. It is idle to contend for a moment that this was not the plain design as it cannot be assumed that the respondent was not aware of the right of exemption that existed and which the appellant claimed and reserved in the assignment under which he was presuming to act and under which only could he meddle with any of the property of the appellant. The respondent would appear to be an accountant and in some way connected with The Canadian Credit Men's Trust Association Ltd., and if that association in its business comports in any measure with what might be expected of its name, organic law affecting traders and debtors must be well known to it. In *McPherson* v. *Temiskaming Lumber Company, Limited* (1913), A.C. 145, Lord Shaw of Dunfermline, delivering the judgment of their Lordships dealing with the facts of that case, said at pp. 157, 159:

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"What happened in the present case was upon these lines, and, without entering upon the matter at large, their Lordships think that the whole series of transactions was simply a juggle to defeat the rights of the execution creditors of McGuire.

"In their Lordships' opinion, the whole circumstances are such as to shew that there has been an attempt to defeat the rights of the execution creditors, and that the respondents were aware of this attempt and have pursued a course of conduct with a view to its success."

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In my opinion like observations are applicable in the present case, being an attempt to defeat the rights of the appellant.

It now becomes necessary to consider some of the decisions in this Province dealing with the question of exemptions and it would not appear to me that to hold that the appellant is still entitled to insist upon her right is in any way concluded by authority; in any case there is no authority which is binding upon this Court. *Pilling* v. *Stewart* (1895), 4 B.C. 94, was a decision of DRAKE, J. (an able and painstaking judge whose judgments will always have the most careful attention) and it was a case where an assignment for the benefit of creditors and exemption thereunder was considered and it was there held (and the statute law was the same then as now) that the $500 exemption under the Act is not an absolute right but a privilege or option to be effectuated only by claiming it within a reasonable time in regard to the specific goods seizable or which may have been seized under execution, and does not apply to the proceeds of the goods after sale and conversion into money. At p. 99, the learned judge said:

"In my opinion, if the debtor neglects to notify the assignee who has lawfully taken possession of the goods assigned, he cannot after conversion make any claim under the statute, unless the acts of the assignee have been of such a nature as to prevent a claim being put in before conversion."

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In the present case there has been no conversion and the acts of the assignee are not capable of being approved, and to still admit of the exemption to the appellant will not be running counter to this decision. *Yorkshire* v. *Cooper* (1903), 10 B.C. 65, is a decision of the Full Court, but it is not a case of assignment for the benefit of creditors, but *Pilling* v. *Stewart, supra,* was referred to and DRAKE, J. at p. 72, said:

"The question is, was a claim made before the property was converted by sheriff's sale: *Pilling* v. *Stewart* (1895), 4 B.C. 94. Here a claim was made for exemption not only to the sheriff verbally before the seizure but also after the seizure. The sheriff knew perfectly well that a claim for exemption meant a claim for whatever the law allows."

No injury has occurred in the present case, there has been no sale of the goods in question, and the assignee knew at the

outset from the assignment itself that the exemption was claimed. DRAKE, J. also at the same page (72) said:

"The object is to give the debtor something to go on with after the judgment against such debtor has been realized out of his estate in excess of $500. In a country like this it is a very necessary thing that a person should not be thrown upon his friends for the purpose of his support, and this provides a means of obviating it."

That the appellant should have signed the writing to return the goods adds a strange feature to the situation. I have adverted to this, and in my opinion it should be given no weight whatever and in this connection I will quote what my brother IRVING had to say in *Yorkshire* v. *Cooper, supra,* where it was urged that the claim could not be set up as the claimant to the exemption had contended that the vessel was not his but that of a company. At p. 73 he said:

"In my opinion, a man who is of an excitable character, insisting upon an absurd proposition of law, should not lose his rights. And that is the way I regard the statement that he insists upon making, *viz.*, that the ship is the property of the Glenora Steamship Co."

The appellant in the present case, upon the facts, should not lose her rights. My brother MARTIN, in the same case, at p. 73, said:

"I concur with what my learned brothers have said in disposing of this matter, that it should be decided upon the construction of our own statute; and I concur with them also that our judgment should be based upon the application of the statute to the peculiar requirements of this country, to which it is well suited."

And see the judgment of HUNTER, C.J. in *Dickinson* v. *Robertson* (1905), 11 B.C. 155 at p. 156.

Upon the whole therefore I am of the opinion that the right to exemption upon the facts of the present case is absolute and that that right still exists, and even were I wrong in this and it were a privilege only, that privilege could be exercised in a reasonable time or at any time before conversion, and that reasonable time would be when affected with knowledge of the right to the exemption and the need to make a selection and as in this case the appellant at the time of the taking possession of the goods in question was unaware of the right to the exemption the giving of the writing to return the goods cannot avail to establish estoppel or waiver, and that upon the facts the claim made by the appellant was within a reasonable time.

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It follows that in my opinion the appeal must be allowed and the order of the learned judge reversed and set aside with costs to the appellant here and below.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellant: *William Steers.*
Solicitors for respondent: *Ellis & Brown.*

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EDDY v. CANADIAN PACIFIC RY. CO.

EDDY v. THE CANADIAN PACIFIC RAILWAY COMPANY

Practice—Court of Appeal—Application to put case on list—Before whom application must be made—B.C. Stats. 1913, Cap. 13, Sec. 4.

Judgment—Application to strike out—Judicial discretion—County Courts Act, R.S.B.C. 1911, Cap. 53, Sec. 110.

An application affecting the list of appeals should be made to the Court when the Court is sitting but when not sitting to a judge in Chambers.

Where an application was made to set aside a judgment under section 110 of the County Courts Act by reason of the applicant's solicitor being at fault, and the judgment is set aside *ex dubito justitiæ* on the ground of irregularity of the judgment:—

Held, on appeal, that as there was no exercise by the judge below of his judicial discretion as required under said section the order should be set aside.

Statement

APPEAL by defendant Company from an order of THOMPSON, Co. J., of the 8th of October, 1914, striking out the entry of judgment for the defendant in this action and giving the plaintiff leave to proceed with the action to trial. The action was first called for hearing in the County Court at Fernie, on the 14th of September, 1911, and WILSON, Co. J. put the following words in his notes: "Eddy *versus* C.P.R. stands until next Court, if plaintiff not then ready to go on action to stand dismissed." There was no mention of the case in the

judge's notes for the next Court in October, but on the registrar's docket or list of cases dated the 26th of October, 1911 (which is on file), opposite the case Eddy v. C.P.R. and under the column "Remarks for Judge" the following appears in WILSON, Co. J.'s handwriting: "Action dismissed without prejudice to a new action." On the 27th of October, 1911, the registrar had in his book the words "judgment entered" and on the 28th of October, the words "costs taxed." A copy of the formal order of the 26th of October, 1911, dismissing the action was found amongst the defendant's solicitor's papers and was produced to the Court when the application to reopen the case was made on the 8th of October, 1914, and judgment was reserved until the 31st of December, 1914, when the order was made reopening the case and from which this appeal was taken. On the 26th of March, 1915, the defendant moved to extend the time to appeal before MACDONALD, C.J.A. in Chambers. On this application the original order of the 26th of October, 1911, which in the meantime, *i.e.,* 10th March, 1915, had been found in the office of the agents of the defendant's solicitor in Fernie, was produced in evidence. An order was made extending the time for appeal until the 1st of June, 1915, when a further order was made by MACDONALD, C.J.A. extending the time for appeal until the 2nd of November, 1915.

Statement

The appeal was argued at Vancouver on the 10th of November, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

J. H. Lawson, for appellant, applied to set the case down on the list and referred to section 4, B.C. Stats. 1913, Cap. 13.

Per curiam: It is the concensus of opinion of the Court that where it is intended to interfere with the list of the Court while it is sitting, counsel should make their motion to the Court. When the Court is not sitting they may make it to a judge in Chambers. We think that is comprehensive enough to cover it, although we do not decide that a judge in Chambers would not make such an order while the Court were actually sitting, that is, that a case should be put on that list, because that seems to us would be holding in the face of this amend-

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ment of 1913; but we put it in that general way, that the profession ought to come to the Court when the Court is sitting to make any motion that may interfere with the list. When the Court is not sitting then the application may be made in Chambers, if counsel so desire.

[MARTIN, J.A. referred to the following cases on the point: *Paulson* v. *Beaman et al.* (1902), 32 S.C.R. 655; 2 M.M.C. 1 to 4; *Haley* v. *McLaren* (1900), 7 B.C. 184; *Kettle River Mines* v. *Bleasdell* (1901), 8 B.C. 350; *Mecredy* v. *Quann* (1902), 9 B.C. 117; *Raser* v. *McQuade* (1904), 11 B.C. 169; *Hanna* v. *Morgan et al.* (1904), 2 M.M.C. 142.]

Lawson, on the merits: The action was for damages, some horses of the plaintiff's having been killed on the Canadian Pacific Railway track in March, 1911. The action was dismissed formally in 1911, by WILSON, Co. J. and there is no jurisdiction to make this order. Under section 110 of the County Courts Act the judge's discretion must be exercised judicially, and in this case it was not properly exercised. The words in the section "if he shall think fit" mean if he thinks just according to law. A litigant must not be deprived of a judgment except upon very solid ground, and there is no evidence to uphold this judgment: see *Brown* v. *Dean* (1910), A.C. 373.

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A. H. MacNeill, K.C., for respondent, contended that under section 110 of the Act there was jurisdiction to make the order and cited *King* v. *Sandeman* (1878), 26 W.R. 569; *How* v. *London and North Western Railway Co.* (1892), 1 Q.B. 391.

Lawson, in reply.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal should be allowed. one naturally has sympathy for a man in circumstances of this kind who lost his property by what might turn out to be the negligent act of the Railway Company; but in the first place his own conduct, in my opinion, amounts to an abandonment of his right of action. We are asked here to exercise our discretion, our judicial discretion as to whether he should have a new trial or not, because the learned judge below did not exercise his discretion. He put his judgment upon a different

ground. He might have exercised his discretion and said in the circumstances of this case I ought to grant the indulgence which the plaintiff asks and order a new trial on the ground that it was the fault of his solicitor that the matter had got into its present position; but the learned judge does not do that, he puts it expressly on the ground of the irregularity of the entry of judgment, and he sets it aside *ex debito justitiæ*. Therefore it did not become necessary for him to exercise his discretion at all, and when it comes up before us on the additional evidence, or even on the same evidence, we find it impossible to agree to the ground that the learned trial judge put it on, because of the production of the original judgment, which makes it perfectly clear that the learned judge was wrong. Then we have to look at the other branch of it and decide whether or not, in the exercise of our judicial discretion, we ought to sustain the order which has been made. Now, I think, looking at the affidavit of the respondent himself and his own conduct in connection with the matter, that it would be unjust to open the matter up after three years, in the face of conduct such as the plaintiff's was, amounting in my opinion to abandonment.

MACDONALD, C.J.A.

IRVING, J.A.: I think the appeal should be allowed. The matter seems perfectly clear if we read the notice of motion in which the judge is asked to set aside the judgment by reason of the fact that the solicitor was at fault. It was an appeal to his discretion. The judge heard the application, reserved judgment some time, and I think must have lost sight of some of the facts, because instead of either granting or refusing the appeal in his discretion, he made an order that the judgment should be set aside, *ex debito justitiæ* when no foundation had been laid for the application which had been made. There has been no exercise by him of his discretion. I do not think we should now, at this stage, in the circumstances disclosed in the affidavit, allow the defendant to reopen a case which was virtually barred by the statute some three years ago.

IRVING, J.A.

MARTIN, J.A.: I would allow the appeal.

MARTIN, J.A.

GALLIHER, J.A., agreed in allowing the appeal.

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MCPHILLIPS, J.A.: I agree. I may say that my brother IRVING used the exact words I intended to use, that the learned judge in the Court below proceeded upon the premise that he was entitled to set this judgment aside *ex debito justitiæ* and that was palpably an error on his part. The order produced demonstrates that beyond question, and therefore the learned trial judge was not proceeding in the way of discretion at all. Further, I might say, that the Statute of Limitations intervening, it would not be in accordance with the application of right principles of justice that an action so stale should be now reinstated.

Appeal allowed.

Solicitor for appellant: *J. E. McMullen.*
Solicitors for respondent: *Macneil & Banwell.*

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A. MACDONALD & CO. v. FLETCHER

A. MACDONALD & COMPANY v. FLETCHER AND FLETCHER.

Guarantee—Essentials of an agreement—Names of parties—Statue of Frauds, Sec. 4.

A. MACDONALD & CO. v. FLETCHER

The defendant wrote the following memorandum on a leaf of a ledger in the plaintiff's office: "I hereby guarantee the account of W. G. Fletcher successor to Fletcher and Jackson covering past and future purchases to the value of $750. (Signed) Emma Fletcher." There was no writing on the ledger to shew to whom it belonged. In an action by the guarantee:—

Held, that as the name of the plaintiff did not in any way appear upon the document there was no sufficient agreement or memorandum or note of an agreement within the fourth section of the Statute of Frauds and the plaintiff cannot recover.

Williams v. *Lake* (1859), 29 L.J., Q.B. 1 followed.

Per MACDONALD, C.J.A.: Where there is nothing in the document to indicate that the account which was guaranteed was the account of the plaintiff, parol evidence cannot be given to prove that it was the plaintiff's account.

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APPEAL by defendant Emma Fletcher from the decision of GRANT, Co. J., of the 20th of September, 1915, in an action against the defendant W. G. Fletcher for the price of groceries sold and delivered, and against the defendant Mrs. Emma Fletcher as guarantor of W. G. Fletcher's account. The plaintiffs had been advancing goods to W. G. Fletcher, a retail grocer at Gibbon's Landing, British Columbia, since January, 1913, and from time to time payments were made by Fletcher to the plaintiffs on account. The plaintiffs claimed the sum of $456.19 as still due them. On the 21st of January, 1913, Mrs. Fletcher (W. G. Fletcher's mother) wrote the following memorandum on a leaf of a ledger in the plaintiff's office: "I hereby guarantee the account of W. G. Fletcher, successor to Fletcher and Jackson, covering past and future purchases to the value of $750. (Signed) Emma Fletcher." There was no writing on the ledger to shew that it belonged to the plaintiffs. The trial judge gave judgment against both the defendants. Mrs. Fletcher appealed on the ground that the fourth section of the Statute of Frauds had not been complied with in respect of the alleged contract of guarantee and oral evidence was wrongly admitted at the trial supplementing the alleged written memorandum of guarantee.

Statement

The appeal was argued at Vancouver on the 11th of November, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Woodworth, for appellant: Mrs. Fletcher is sued as guarantor for goods advanced by the plaintiffs to her son, a retail grocer. We say there was not a sufficient memorandum of the guarantee to satisfy the Statute of Frauds, and we rely on the case of *Williams* v. *Lake* (1859), 29 L.J., Q.B. 1.

Gillespie, for respondents: As long as there is some inference to be drawn from or reference in the document formal evidence is admissible to prove the parties. In this case the writing was in the plaintiffs' ledger and it was written in the plaintiffs' office: see *Pulford* v. *Loyal Order of Moose* (1913), 5 W.W.R. 452; *Plant* v. *Bourne* (1897), 2 Ch. 281 at p. 288; *E. W. Savory, Limited* v. *The World of Golf, Limited* (1914), 2

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Ch. 566 at p. 573; *Newberry* v. *Brown* (1914), 20 B.C. 483; (1915), 8 W.W.R. 1283; *Carr* v. *Lynch* (1900), 1 Ch. 613; *Colori* v. *Andrews* (1906), 12 B.C. 236 at p. 251; *Champion* v. *Plummer* (1805), 1 Bos. & P. (N.R.) 252; 127 E.R. 458; 8 R.R. 795.

Woodworth, in reply.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal should be allowed. In my opinion there is nothing in the document to indicate that the account which was guaranteed was the account of A. Macdonald & Company. In the absence of something of that kind, parol evidence cannot be given, no matter how clearly the facts might be provable by parol evidence.

IRVING, J.A.

IRVING, J.A.: I agree. The case of *Williams* v. *Lake* (1859), 29 L.J., Q.B. 1, is exactly in point. It seems to me to be proper to suggest that when a case is cited before the judge below, it should be looked up in the text-books to see how it is regarded by writers of authority. Had that course been adopted here, the opposition to this appeal would have been abandoned.

MARTIN, J.A.

MARTIN, J.A.: I agree. The case is directly covered by *Williams* v. *Lake*.

GALLIHER, J.A.

GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree.

Appeal allowed.

Solicitors for appellant: *Woodworth, Fisher & Crowe.*
Solicitor for respondents: *W. D. Gillespie.*

HILL v. THE CANADIAN HOME INVESTMENT COMPANY, LIMITED.

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HILL v. CANADIAN HOME INVESTMENT CO.

Appeal—Leave to—Order in winding-up proceedings—"Future rights"—Application of term—Winding-up Act, R.S.C. 1906, Cap. 144, Sec. 101.

The words "future rights" in subsection (a) of section 101 of the Winding-up Act apply only to rights that arise in the future and do not include present existing rights that may be the subject of determination in the action at a later date. In the circumstances the judge has no power to grant leave to appeal under the section.

APPEAL by plaintiff from an order of GREGORY, J., of the 12th of June, 1915, refusing the plaintiff's application for leave to proceed with the action notwithstanding the making of an order winding up the defendant Company on the 4th of January, 1915. By order of the 15th of October, the plaintiff was granted leave to appeal. Counsel for respondent took the preliminary objection that the learned judge had no power to grant leave to appeal under section 101 of the Winding-up Act. The plaintiff, who was the holder of an investment contract in the defendant Company, brought action in April, 1914, on behalf of himself and the other contract holders, for an account of a loan reserve fund held in trust by the defendant for the contract holders, for a declaration that the scheme or system of business carried on by said Company was impracticable, for the appointment of a receiver and for such relief as the case necessitated. An *interim* receiver for the loan reserve fund of the Company was appointed on the 2nd of October, 1914. Judgment was given in the action in favour of the plaintiff on the 23rd of December, 1914, when a permanent receiver was appointed. On the 4th of January, 1915, an order was made winding up the defendant Company and a provisional liquidator was appointed. On the 25th of January, 1915, an order was made discharging the permanent receiver which on appeal to the Court of Appeal was set aside on the 29th of April, 1915. On the 4th of February, an order was made directing the *interim*

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receiver to transfer the loan reserve fund to the liquidator. The plaintiff then applied for leave to proceed with the action which was refused. The plaintiff appealed from the refusal of said order, having first obtained leave from the learned judge to do so.

The appeal was argued at Vancouver on the 11th of November, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

J. A. MacInnes, for appellant.

St. John, for respondent, raised the preliminary objection that the judge below had no power to grant leave to appeal under section 101 of the Winding-up Act, R.S.C. 1906, Cap. 144. The appeal is from the order of the 12th of June, 1915, dismissing plaintiff's application to proceed with the action and leave to appeal was obtained by the order of the 15th of October, 1915. Leave to appeal cannot be granted in this case under section 101 of the Winding-up Act: see *Frechette* v. *Simmoneau* (1900), 31 S.C.R. 12 at p. 13; *Re Cushing Sulphite Fibre Co.* (1906), 37 S.C.R. 173 and 427; *Donohue* v. *Donohue* (1903), 33 S.C.R. 134; *Stephens* v. *Gerth* (1895), 24 S.C.R. 716. The words "future rights" in the Act apply to rights that arise in the future: see *Chamberland* v. *Fortier* (1894), 23 S.C.R. 371 at p. 374. A future right of the plaintiff must be raised before leave can be granted.

Argument

MacInnes, contra: This objection should not be taken as a preliminary objection. This is a matter of removing the stay to the action and the liquidator cannot get control of the assets without an order of the Court: see *Aston* v. *Heron* (1834), 3 L.J., Ch. 194. There is a substantial question to be determined and leave was properly granted: see *Valin* v. *Langlois* (1879), 3 S.C.R. 1; 5 App. Cas. 115. As to the question of future rights we have a judgment *in rem*: see Halsbury's Laws of England, Vol. 13, p. 327, pars. 459-60. The Court did not determine any rights but appointed a receiver. It is a right in the future to have an accounting under the judgments. The rights are rights that will be determined in the future although they are continuing rights.

MACDONALD, C.J.A.: I think this preliminary objection is well taken, and that the learned judge had no authority to give leave to appeal in a case of this kind, and therefore the appeal must be quashed.

IRVING, MARTIN and GALLIHER, JJ.A., agreed with MACDONALD, C.J.A.

MCPHILLIPS, J.A.: In agreeing that the appeal be quashed I wish to make it plain again, that my opinion as expressed was, and I am still of that opinion, because I do not understand that this Court held to the contrary, that when there are winding-up proceedings, there shall only be one custodian of the assets of the company. The statute provides that the liquidator shall have control of the assets; shall have power to take the assets; and in effect is authorized to go throughout the whole of the Dominion of Canada to take the assets.

Appeal dismissed.

Solicitors for appellant: *Affleck & MacInnes.*
Solicitors for respondent: *St. John & Jackson.*

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HILL v. THE CANADIAN HOME INVESTMENT COMPANY, LIMITED. (No. 2.)

Practice—Costs—Chamber application—Drawing brief—Not allowed.

There is no provision in the tariff of costs for briefs on interlocutory proceedings in Chambers.

HILL v. CANADIAN HOME INVESTMENT CO.

APPEAL by the liquidator of the Canadian Home and Investment Company, Limited, from an order of MACDONALD, J., of the 15th of October, 1915, refusing the liquidator's application for an order that the taxation by the registrar of the liquidator's costs under an order of GREGORY, J. made at Chambers on the 12th of June, 1915, be reviewed in respect of a charge of $15 for drawing papers for brief used in the application. The registrar had struck the item out. The liquidator appealed on the grounds that the item is covered by the tariff of costs in Appendix M of the Rules of the Supreme Court under item 129; that it should have been allowed under Order LXV., r. 27 (marginal rule 1002), subsection (29), and that the work covered by the said item was necessary and proper to properly instruct counsel.

Statement

The appeal was argued at Vancouver on the 15th of November, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

F. A. Jackson, for appellant: This item is chargeable under tariff of costs items 129 and 140, Supreme Court Rules, 1912: see also marginal rule 1002, subsec. (29); *Warner* v. *Mosses* (1881), 19 Ch. D. 72; 51 L.J., Ch. 86; marginal rule 983; item 232 of the tariff of costs; and *In re Ermen* (1903), 2 Ch. 156. In item 107 of the tariff of costs there is express provision for a brief.

Argument

[He was stopped by the Court.]

J. A. MacInnes, for respondent, not called upon.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The Court is against you, Mr. *Jackson.* I do not think you need proceed any further. I would dismiss

the appeal. I think the tariff makes no provision for a brief in Chambers, and I also think the point taken by my learned brother MCPHILLIPS is very well taken, that where no fiat has been obtained from the judge for a counsel's fee on a Chamber motion, it could not in any event be said that there could be a brief. I would dismiss the appeal on the broad ground that there is no provision made in the tariff for briefs in interlocutory proceedings in Chambers. Rule 107 provides for briefs in certain cases, all of which are set out there, and this case does not fall within that rule.

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

MARTIN, J.A.: I agree. There is no certificate for counsel here and therefore there can be no brief for counsel. MARTIN, J.A.

GALLIHER, J.A.: I dismiss the appeal. GALLIHER, J.A.

MCPHILLIPS, J.A.: I agree. I think the appeal was ill-advised. It lacks merit and is not maintainable. MCPHILLIPS, J.A.

Appeal dismissed.

Solicitors for appellant: *St. John & Jackson.*
Solicitors for respondent: *Affleck & MacInnes.*

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LOCKWOOD v. NATIONAL SURETY COMPANY.

Judgment—Application for on admissions—Order XXXII., r. 6.

On application for judgment upon admissions under Order XXXII., r. 6 (marginal rule 376) the defendant Company set up that the money sued for was claimed by third parties under a foreign jurisdiction. An order was made directing the payment of the amount claimed into Court, but that there be no order for payment out until notice of application therefor be served on the foreign claimants and that the motion for judgment be disposed of at the same time. The foreign claimants were duly served with notice but they did not appear on the motion and judgment was given for the plaintiff with an order for the payment out to him of the moneys in Court.

Held, on appeal (MARTIN and MCPHILLIPS, JJ.A. dissenting), that as the foreign claimants had been notified and given an opportunity to appear and prove their claims but did not do so, the order appealed from should be affirmed.

LOCKWOOD v. NATIONAL SURETY CO.

APPEAL from the decision of MACDONALD, J., of the 14th of June, 1915, permitting the plaintiff to sign judgment on the pleadings for $4,900 paid into Court by the defendant Company by order of HUNTER, C.J.B.C., of the 1st of March, 1915: 21 B.C. 249. The plaintiff 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 Seattle against two officers of the said Company, A. D. Baker, its agent at Portland, and R. C. Oeder, its agent at Tacoma. They were released on bail, bonds being furnished by the defendant Company whose head office is in New York and is licensed to carry on business in British Columbia. The bond for Baker was $3,000, and for Oeder $5,000. When furnishing the bonds the defendant Company demanded and received from the National Mercantile Company a cash deposit of $8,000 as security against loss. On 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

Statement

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 that they were entitled to retain $100 as a premium for furnishing the bond and that it had received notice from Oeder that the $5,000 was appropriated by the National Mercantile Company for his defence and was paid to one John W. Roberts, his attorney for that purpose, that Roberts claimed it was paid to him for such purpose and both Oeder and Roberts refuse to release the Company from the obligation of the bond, and demand the $5,000. The defendant Company also allege that it was cited to appear 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 money be paid into Court, HUNTER, C.J.B.C. directed 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. Upon the motion for judgment coming on for hearing Oeder and Roberts did not appear, although duly notified in compliance with said order. The defendant Company appealed from the judgment of MACDONALD, J., on the grounds that there was no clear and unequivocal admission of liability on the part of the defendant, that the Court had no jurisdiction over the funds claimed, and assuming there was jurisdiction, it should not be exercised without regard for the action of the Courts in the State of Washington.

Statement

The appeal was argued at Vancouver on the 15th and 16th of November, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

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Bird, for appellant: There was no clear admission of liability on the part of the defendant. The statement of defence admits the first five paragraphs of the statement of claim but denies all the other paragraphs. The money is actually in the United States and this Court has no jurisdiction to deal with it: see *Rex* v. *Lovitt* (1912), A.C. 212 at p. 218; *Royal Bank of Canada* v. *The King* (1913), A.C. 283 at pp. 294-5.

Walkem, for respondent: The pleadings shew the money was paid from the British Columbia office and the $3,000 paid for Baker was refunded to the British Columbia office.

Argument

Bird, in reply: The admissions must be clear and unequivocal: see *Gilbert* v. *Smith* (1876), 2 Ch. D. 686 at p. 688; *Landergan* v. *Feast* (1886), 34 W.R. 691. The pleadings may be amended when admissions are made by mistake: see *Hollis* v. *Burton* (1892), 3 Ch. 226.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal. I do not see how anything can be gained by allowing it, unless we adopt the principle that we should wait until the matter shall be tried in the Courts of the State of Washington, and then accept the result as they find it. The claimants have been given an opportunity to appear and prove their claims. The Surety Company has paid the money into Court with the suggestion that others are claiming it. These have been notified and given an opportunity of interpleading here to test their claims. They have not done so. They do not submit to the jurisdiction of this Court. The position would be exactly the same if the case went to trial; there is no suggestion that they will submit to the jurisdiction of the Court then. There is nothing to delay final judgment unless we are prepared to say that the Court cannot deal with the matter until the Courts of the State of Washington have done so, and to this suggestion I cannot agree.

IRVING, J.A.

IRVING, J.A.: I concur.

MARTIN, J.A.

MARTIN, J.A.: I am of the opinion this is not a class of case where an order for payment should be made. The admissions here are not enough.

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

MCPHILLIPS, J.A.: This is essentially a case which should go to trial. There is the allegation that other parties are interested, foreigners to our jurisdiction, and it is arguable whether there is jurisdiction. Without submission and attornment to the jurisdiction there can be no judgment binding upon foreigners, mere service of notice upon them accomplishes nothing.

If this action be permitted to go to trial it might be determined, that no cause of action is capable of being established in this Province, *i.e.*, the *situs* of the subject-matter might be held to be in the State of Washington. The judgment should be set aside, being entered upon insufficient admissions, and the appeal allowed.

MCPHILLIPS, J.A.

Appeal dismissed,
Martin and McPhillips, JJ.A., dissenting.

Solicitors for appellant: *Bird, Macdonald & Ross.*
Solicitors for respondent: *Burns & Walkem.*

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MACDONALD v. BANK OF VANCOUVER.

Banks and banking—Indorsement of share certificate in blank—Effect of as to transmission of title—Fraudulent hypothecation by party in possession—Estoppel.

Evidence—Witness recognizes initials on book but does not recollect transaction—Accepted as evidence of transaction.

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When the form of transfer on the back of a share certificate has been signed by the registered owner, but the space for the name of the transferee is left blank, delivery of the certificate so signed by the owner, or on his authority, transmits the title to the shares, both legal and equitable. Where therefore the owner of a certificate so signed delivers it to another party, he is estopped from asserting his title as against a person to whom such party has disposed of it, and who has received it in good faith and for value.

Where a witness recognizes his initials written against an entry in the books of a bank at the time of the transaction referred to in the entry, it may be accepted as evidence of the transaction even in the case of his having no recollection of the actual transaction.

ACTION tried by MACDONALD, J. at Vancouver on the 3rd of May, 1915, for the recovery of certain shares in the stock of the Jenckes Machine Company, Limited, held by the defendant Bank. The stock certificate for the shares had been indorsed in blank by the plaintiff who was the registered owner, and deposited by him with the A. G. Brown-Jamieson Company, Limited, as security for certain advances. The stock certificate was subsequently delivered by the A. G. Brown-Jamieson Company, Limited, to the defendant Bank as collateral security for their benefit. The facts are set out fully in the judgment.

Statement

McTaggart, for plaintiff.

G. A. Grant, for defendant.

14th August, 1915.

MACDONALD, J.: Plaintiff is the owner of thirty-seven shares in the capital stock of the Jenckes Machine Company, Limited, of the par value of $100 each, represented by a certificate

Judgment

for that amount. To secure an advance he deposited the share certificate with the Traders Bank at Vancouver, B.C., and subsequently, in order to repay the loan from such bank, obtained the assistance of the A. G. Brown-Jamieson Company, Limited. He received the certificate and delivered it to such company as security for the accommodation afforded. This transaction took place about the 4th of March, 1911. On the 24th of March, 1911, the certificate came into the possession of the defendant Bank, and, according to its books, was deposited as collateral security for the benefit of the said A. G. Brown-Jamieson Company, Limited. Gillies, the secretary of such company, says that the certificate was not deposited as a security, but came into the possession of the defendant Bank through his taking it to the Bank, for the purpose of making inquiry as to the value of the shares and that the Bank on subsequent demand refused to redeliver the certificate. He did not disclose such state of affairs to the plaintiff and could not give any reasonable excuse why he did not do so. It was not to be expected that Ronald, the accountant of the Bank, who verified the entry in the bank-book as being in his handwriting, would be able to recollect the particular circumstances under which this security was received. He apparently had no doubt as to having honestly made the entry and that it was a correct record of the transaction. Ronald was in much the same position as the witness, who gave evidence which was held sufficient, in *Maugham* v. *Hubbard* (1828), 8 B. & C. 14. On seeing his initials affixed to the entry of payment he said:

Judgment

"The entry of £20 in the plaintiff's book has my initials, written at the time; I have no recollection that I received the money; I know nothing but by the book; but seeing my initials, I have no doubt that I received the money."

I cannot accept the story as told by Gillies. I am strengthened in this conclusion not only by the improbability of the occurrence as related by Gillies, but also by his failure to tell the truth when inquiry was made as to the share certificate, when the plaintiff became entitled to its return. If the Bank had retained such certificate in the manner indicated, there was every incentive for him to inform the plaintiff to that effect, so that he might take immediate steps to recover posses-

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sion of his property. According to his account of the delivery of the certificate to the Bank, he was in no way to blame and should have had no reluctance in giving the plaintiff a correct account of what had taken place. There was also some discrepancy as to the dates, between the evidence on the part of the plaintiff and that afforded by the bank-book. I am satisfied as to the correctness of the latter.

When the action was launched, it was alleged in the statement of claim that the share certificate was "in fraud of the plaintiff and without his knowledge or consent deposited by the said A. G. Brown-Jamieson Company, Limited, with the defendant." I believe that the Bank received this certificate as security in due course from the A. G. Brown-Jamieson Company, Limited, as its customer and held same at first under a general hypothecation and then under a specific hypothecation limiting the security to the amount of $2,000. Such deposit was made in fraud of the plaintiff.

When plaintiff retired the notes at the Traders Bank, he was entitled to receive the certificate. This was in July, 1911, but he was satisfied as to the honesty of the officials of the company with which he was then connected and accepted the statement of Gillies that the certificate was then in the company's safe. The fact was, that some time previously it had been fraudulently delivered to the defendant Bank. Plaintiff had indorsed this share certificate in blank, previously to depositing it as security with the Traders Bank, and it remained in this condition when delivered by him to the Brown-Jamieson Company and also when received by the defendant. He was content to allow this indicia of property to remain out of his possession in this condition.

Judgment

A. R. Fuller was examined at Seattle on behalf of the defendant and it is contended that a portion of his evidence, if accepted, shewed the plaintiff was willing to have such shares, represented by said certificate, held by defendant Bank as security for an indebtedness by him to the A. G. Brown-Jamieson Company, Limited, and its successors. I had the opportunity of considering the demeanour of the plaintiff as a witness and forming an opinion as to his credibility. It was a favourable

one. I accept his evidence and believe that he did not consent to these shares being held by the Bank in any way as a security. He may have been guilty of laches in not asserting his position at an earlier date. As to this phase of the matter I shall deal later. The question then arises whether the defendant is entitled to retain this share certificate in the circumstances. See the judgment of the Earl of Selborne, L.C. in *France* v. *Clark* (1884), 26 Ch. D. 257 at pp. 262-3.

The facts in that case were very similar to those in the present case. France had deposited with Clark certain certificates of shares as security for an advance and had also at the same time delivered to him an instrument in the form of a deed of transfer, leaving the date, consideration and name of the transferee in blank. Then Clark, without the knowledge of France, handed the certificates in the same state in which he had received them to Quihampton as security for money due him by Clark.

Aside from whatever effect the conduct of the plaintiff, after he became aware of the change in possession of the certificate, may have had, his right to recover the share certificate should exist or, at any rate, his ownership in the shares would be unimpaired, if the decision in *France* v. *Clark* has not been affected by subsequent cases.

Judgment

In *Colonial Bank* v. *Cady and Williams* (1890), 15 App. Cas. 267, *France* v. *Clark, supra,* was cited but is not referred to specifically in the judgment of the House of Lords. Lord Halsbury, referring to the effect of the indorsement of a share certificate, at p. 274, says:

> "Undoubtedly a document may by usage become so well understood in a particular sense that a person may be well estopped from denying that when he issues it to the world it must bear the sense which usage has attached to it . . . . and that brings one to inquire whether it is true that the issue of this document to the world in this form would shew that the person signing had intended to give a complete title to anyone into whose hands it should come."

In that case the indorsement in blank on the certificate was defective and thus was not "in order," so as to operate and give title to the holder even under American decisions. See *per* Lord Watson in same case, at pp. 277-8. Lord Watson, after

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referring to the evidence of Mr. Carter, one of the legal experts, that the decisions were founded on estoppel, adds, that the principles of America appear to be in harmony with principles of English law and the true owner of such documents of title is not held to have parted with his interest in them, except where he so intended or where "by reason of some act or omission he has estopped himself from saying that he did not intend to pass it." In that case it was held that as the transfer was executed by executors it could not be regarded as "either in law or by custom equivalent to a certificate and transfer, executed by the registered owner himself." It is quite clear that in this case if the certificates of shares had been signed by J. M. Williams, the registered owner, and not by his executors, that the banks would have obtained a good title to them. This is evident from the following portion of the judgment of Lord Herschell, who, after referring to the certificates with blank transfer not being negotiable instruments, at p. 285, then says:

"If the owner of a chose in action clothes a third party with the apparent ownership and right of disposition of it, he is estopped from asserting his title as against a person to whom such third party has disposed of it, and who received it in good faith and for value. And this doctrine has been held by the Court of Appeals of the State of New York to be applicable to the case of certificates of shares, with the blank transfer and power of attorney signed by the registered owner, handed by him to a broker who fraudulently or in excess of his authority sells or pledges them. The banks or other persons taking them for value, without notice, have been declared entitled to hold them as against the owner. As at present advised I do not see any difference between the law of the State of New York and the law of England in this respect. If in the present case the transfer had been signed by the registered owner and delivered by him to the brokers, I should have come to the conclusion that the banks had obtained a good title as against him, and that he was estopped by his act from asserting any right to them."

Judgment

In *Fry* v. *Smellie* (1912), 3 K.B. 282, an agent who had received certificates of shares pledged them with defendant in violation of his instructions. The case of *France* v. *Clark, supra,* was distinguished and that of *Brocklesby* v. *Temperance Building Society* (1895), A.C. 173 applied. It was held that the defendant Smellie could retain the shares improperly placed in his possession. *Colonial Bank* v. *Cady and Williams, supra,* was referred to and portions of the judgments cited at length, shewing the state of the law as

opposed to *France* v. *Clark* which had been followed by the trial judge.

In *Fuller* v. *Glyn, Mills, Currie & Co.* (1914), 2 K.B. 168, Pickford, J. discussed the authorities without referring to *France* v. *Clark, supra,* though cited by counsel. He decided that where stockbrokers, holding certificates of shares for a customer, had in breach of trust deposited such certificates with their bankers that the customer could not recover the certificates as there was nothing to put the defendants, as bankers, on inquiry and that they had been received in good faith. The case of *Colonial Bank* v. *Cady and Williams, supra,* was applied and its effect stated to be as follows (pp. 174-5):

"If they took the shares in good faith and without notice of the plaintiff's title, I think the case is concluded by authority. It is true that the exact point has not been decided. . . . . The same doctrine which would apply to the shares in that case [*Colonial Bank* v. *Cady and Williams*] would apply to those in the present case. The act of signing the form of transfer on the back of the certificate does not make that document a negotiable instrument in the strict sense, but any one who signs the transfer and then hands the document to another person knows that he is putting into the power and disposition of that person a document which carries with it an apparent authority to that person to deal with it."

The learned judge considered that *Colonial Bank* v. *Cady and Williams* would apply unless there was some difference between the facts in that case and the one that he was then deciding. It appeared that the plaintiff had not signed the transfer himself. If he had done so, such authority would apparently have been immediately applied, without discussing at length the reasons, why it should be followed. This is clear from a portion of such judgment of Pickford, J. at p. 177:

Judgment

"In my view the plaintiff, though he did not actually sign the transfer himself, gave rise to just the same mischief as if he had affixed his signature himself. The present case is therefore covered by the principle of the cases I have mentioned, and there must be judgment for the defendants."

The defendant Bank received this certificate of shares in the ordinary course of its business and the custom of accepting securities of this nature is thus referred to by Lord Watson in *Colonial Bank* v. *Cady and Williams, supra,* at p. 278:

"According to the custom of bankers and and stockbrokers, both in this country and America, a certificate, with the indorsed transfer executed in

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the manner already described, is regarded as being 'in order'; and its delivery, in exchange for value received, is understood to be sufficient to pass the full title of the registered owner."

Kekewich, J. in his judgment in the same case (1887), 36 Ch. D. 659 at pp. 670-71 refers to the manner in which such a custom is to be ascertained and established, as follows:

"The question is not as to the custom or usage in a particular place, but what is the custom or usage of the monetary world. For that purpose proof of the usage of a large capital such as London is sufficient to shew that of the whole world unless it is contradicted. . . . . Therefore I think I am bound to hold that according to the usage of the monetary world these documents have for a long time past been accepted as securities to bearer, on which bankers make advances."

On this point, if evidence were required to prove that this custom prevails amongst bankers in Canada, it was supplied to my satisfaction by Mr. H. H. Morris, superintendent for the Bank of Commerce in this Province. The defendant Bank in thus accepting the certificate in question, as security, followed a usage in vogue amongst banks. There is no evidence on the part of defendant as to any conversation when the security was deposited in March, 1911, but I do not think that under the later decided cases it was incumbent upon the Bank to prove that it made at that time any inquiries. I might add that it is to be presumed that the Bank was aware that its customer was dealing in the goods of Jenckes Machine Company and it would not seem unreasonable for shares of such company to be offered as security.

Judgment

While the defendant Bank may not, at the time of the receipt of the certificate, have made any loan on the strength of such security, still I am satisfied that later on, it gave further advances, and felt entitled to do so relying upon the worth of these shares which had a face, if not actual value, of $3,700. The situation then is as between two innocent parties. Who is to bear the loss occasioned by the fraud of the A. G. Brown-Jamieson Company, Limited? In the light of subsequent decisions, I do not think that the judgment in *France* v. *Clark* prevents the defendant Bank from successfully contending that such loss should, in the circumstances, be borne by the plaintiff. It follows that he is not entitled to a return of the certificate, except upon payment of the claim of defendant thereon.

There is to my mind a further defence to plaintiff's claim for a return of the certificates of shares. His conduct, after discovering that this property was in the hands of the Bank, was such as to estop him from now setting up a right to its return, free from any incumbrances that he, by his neglect, had allowed to be created in the meantime. It was his duty when he found that the certificate was not in the safe, where it had been represented to be, but had come into the possession of the Bank, to find the cause of the change and how it was held. He should not have been satisfied with the statement of anyone connected with a company which had thus failed to retain custody of the document. Arthur G. Brown, president of the Brown-Jamieson Company, Limited, gave evidence that prior to August, 1912, he had conversations with the officials of the defendant Bank as to the certificate of shares and the retention of same by the Bank. He fully understood that the Bank was holding the certificate as security and he so informed the plaintiff prior to August, 1912. This statement in effect is contradicted by the plaintiff, who states that in February, 1912, when he was leaving the Brown-Jamieson Company, Limited, he suggested the certificate of shares should be returned to him. He was asked where he supposed it was at the time and answered "Well, I never gave it a thought; I naturally supposed it was in the safe still." Mr. Brown then informed him "it was up at the Bank" and plaintiff presumably having some knowledge of the business of the Company naturally inquired "if it had been hypothecated," and he (Brown) stated "No, it was just there, the Bank had it." The plaintiff then added "That is all there was to it. They hung on to it." He then started to work for the Jenckes Machine Company on a salary basis and is still so employed. He did not at the time take any steps to recover his property. He talked the matter over with Brown, who said they would get the certificate some day and give it to him, and Brown further stated that the certificate "was not hypothecated, it was in care of the Bank." He seemed satisfied with this state of affairs and it was not until March, 1914, that a letter was written the defendant demanding the return of the shares and this action was commenced in

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February, 1915. He was so careless of his rights and displayed such negligence as might almost lead one to the conclusion that he had actual knowledge as to the Bank holding the certificate as security. Adoping the remarks of Lord Blackburn in the course of the argument in *The Queen* v. *Williams* (1884), 9 App. Cas. 418 at pp. 419-20, "Is not negligent ignorance as bad as knowledge?" No matter how the defendant became possessed of the shares, could it not subsequently assume that the right to deposit them had been properly exercised? In the meantime the defendant had emphasized its right to treat the shares as security by receiving a specific hypothecation limited in amount to $2,000. Still there was no objection from the plaintiff and it was not until the time mentioned that he saw fit to declare his intentions and take steps to recover his property. I think he lay on his oars too long and cannot now contend that the Bank is not entitled to hold the certificate as security.

Judgment

Action is dismissed with costs.

Action dismissed.

MACDONALD, J. (At Chambers)

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DEISLER v. SPRUCE CREEK POWER CO.

DEISLER v. SPRUCE CREEK POWER COMPANY, LIMITED, *ET AL.*

Judgment—Appeal—Reference—Interest from date of judgment.

A judgment for damages for trespass will carry interest from the date of judgment and the defendants who appealed, thereby delaying the finding of the amount due by the registrar, should not reap any benefit from such delay.

Ashover Fluor Spar Mines, Limited v. *Jackson* (1911), 2 Ch. 355 distinguished.

Statement

APPLICATION by the plaintiff from an order that he be entitled to legal interest on the amount found due him by the

registrar on a judgment obtained by him in the action from the date of the judgment, heard by MACDONALD, J. at Chambers in Vancouver on the 2nd of October, 1915.

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DEISLER v. SPRUCE CREEK POWER CO.

S. S. Taylor, K.C. (*W. P. Grant* and *Dockerill,* with him), for plaintiff.

Bodwell, K.C. (*E. M. N. Woods,* with him), for defendants.

19th October, 1915.

MACDONALD, J.: Plaintiff recovered judgment against defendants on the 30th of April, 1914. The order for judgment was in part as follows:

"It was adjudged and declared that the 'Sunflower' placer claim was a valid existing placer claim, and that the plaintiff was the owner of and entitled to all the ground within the boundaries thereof; that the 'Speculator' placer claim was an invalid location and that the defendants had no interest in or title to or right to go in or upon the ground covered by the 'Sunflower' placer claim.

"It was further adjudged that the defendants had wilfully trespassed upon the 'Sunflower' placer claim and that plaintiff should recover against the defendants the value of the gold contained in the auriferous ore deposits of the said 'Sunflower' placer claim, on the 4th of October, 1906, whether the value of the gold contained therein was recovered by the defendants or any of them or not and that it be referred to the district registrar of this Honourable Court at Vancouver, B.C., to inquire into and find damages sustained by the plaintiff by reason of the loss of the said gold and the said trespasses."

Judgment

Defendants appealed from this judgment but were unsuccessful and the inquiry was then proceeded with and upon the report of the registrar being filed, both plaintiff and defendants moved to vary the same. The matter came before me for consideration and I reduced the amount found to be due to the sum of $14,490. Plaintiff claims legal interest on this sum from the date of judgment, *viz.,* 30th April, 1914, and relies upon *Borthwick* v. *Elderslie Steamship Company* (*No. 2*) (1905), 2 K.B. 516. Defendants contended that this decision is distinguished, under a similar state of facts to those existing here, in *Ashover Fluor Spar Mines, Limited* v. *Jackson* (1911), 2 Ch. 355, and that the latter case is an authority in support of their position that the plaintiff is not entitled to interest on the amount of damages so ascertained. I think that in principle there is no reason why the defendants should not pay interest

MACDONALD, J. (At Chambers)

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DEISLER v. SPRUCE CREEK POWER CO.

upon the amount which was found to have been due by them at the time judgment was pronounced. I could have inquired and ascertained such amount, but in accordance with the general convenient practice, it was deemed advisable, after deciding the question of liability, to refer the amount of such liability to the registrar for determination. Defendants should not obtain the benefit derived from delay in proceeding with the inquiry, as it arose out of their appeal already referred to, and naturally pending the decision of such appeal the inquiry was not proceeded with. I think the form of the order and facts of the case differ from *Ashover Fluor Spar Mines, Limited* v. *Jackson, supra.* From the outcome of the litigation it has been decided that the defendants were on the 30th of April, 1914, liable to the plaintiff for damages in the sum of $14,490.

Judgment

This liability arose out of a wilful trespass or what is commonly called a "jumping" of the plaintiff's claim by the defendants. The trespass was committed in 1906, and all the valuable ore at that time, within the plaintiff's claim, was appropriated, some of which was shipped and returns obtained therefrom. In my opinion, judgment should be entered in favour of the plaintiff as of the 30th of April, 1914, for $14,490, so that it will carry interest from that date.

Judgment accordingly.

REX v. BELA SINGH *ET AL.*

COURT OF APPEAL

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REX
v.
BELA
SINGH

Criminal law—Conviction for attempt to commit an indictable offence—Stated case—Dismissed by Court of Appeal—Application for another stated case on new grounds—Criminal Code, Secs. 873, 1014, 1019.

On motion to the Court of Appeal by a prisoner convicted of an offence, following the refusal of a case stated by the Court below, on a second application where new grounds were raised for the consideration of the Court:—

Held (IRVING, J.A. dissenting), that the practice of successive appeals should not be encouraged, and in this case where certain objections to the conviction by way of case stated had been decided against the prisoner and some months later he seeks another case stated on a new point that is in its nature technical, his application should be refused.

Per MARTIN, J.A.: It is unknown in law that there should be more than one appeal from the same trial in the same criminal case.

MOTION to the Court of Appeal upon the refusal of MCINNES, Co. J. to reserve a case in the County Court Judge's Criminal Court. Four Hindus, Bela Singh, Seva Singh, Baghat Singh and Nana Singh, were, on the 12th of June, 1915, tried and convicted of assault on another Hindu with intent to commit an indictable offence. At the time of the conviction the trial judge on the application of counsel for the prisoners reserved a case for the opinion of the Court of Appeal, which was subsequently dismissed by that Court. This second application for a stated case raising a point not referred to on the first application was made on the 5th of November, 1915. The charge against the prisoners had been preferred by *W. M. McKay,* Crown counsel, and the question now raised is, whether he had authority to prefer a charge. Counsel for the prisoners submitted that the following questions be included in a stated case:

Statement

"(1) Was W. M. McKay, Esquire, Crown counsel, authorized in law to prefer a charge against the above named Bela Singh, Seva Singh, Baghat Singh and Nana Singh under Part XVIII. of the Criminal Code of Canada, 55 & 56 Vict., Cap. 29?

"(2) In law is W. M. McKay, Esquire, Crown counsel (as such) invested with the same powers, authority, and duties as the prosecuting officer

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mentioned in Part XVIII. of the Criminal Code of Canada, 55 & 56 Vict., Cap. 29?

"(3) Have all the formalities of the law whereby the said Bela Singh, Seva Singh, Baghat Singh and Nana Singh were charged before His Honour William Wallace Burns McInnes, Judge of the County Court Judge's Criminal Court of the County of Vancouver on the 4th day of June, A.D. 1915, under Part XVIII. of the Criminal Code of Canada, 55 & 56 Vict., Cap. 29, been complied with and were the said Bela Singh, Seva Singh, Baghat Singh and Nana Singh ever in law so charged with an offence?"

The motion was heard at Vancouver on the 23rd and 24th of November, 1915, by MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Eyre, for the accused: The authority for asking a second time for a stated case is section 1014 of the Criminal Code: see *The King* v. *The Justices of Yorkshire* (1790), 3 Term Rep. 776; *Reg.* v. *Studd* (1866), 14 W.R. 806. The Crown counsel is not authorized to prefer a charge against the prisoner under Part XVIII. of the Criminal Code. He is not invested with the same powers and duties as a prosecuting officer so that the requirements of the law have not been complied with: see *In re Criminal Code* (1910), 43 S.C.R. 434; *Rex* v. *Roach* (1914), 23 Can. Cr. Cas. 28 at p. 30; *Rex* v. *Phinney* (*No. 1*) (1903), 6 Can. Cr. Cas. 469; *Reg.* v. *Monaghan* (1897), 2 Can. Cr. Cas. 488.

W. M. McKay, for the Crown, not called upon.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the application must be dismissed. By a former appeal the accused took certain objections to his conviction which were decided against him. Now, several months later, he seeks another stated case on new grounds. If we have the power, and I entertain some doubt as to whether we have it or not, I think it undesirable to encourage the practice of successive appeals particularly when the objection is technical as it is here.

IRVING, J.A.

IRVING, J.A.: As I understand it, leave was refused by this Court in June, and the application now being made is on a different ground. Section 1014 is relied upon. That section gives power to hear an appeal formerly refused. I think this Court having been given that power, we should not now refuse to hear the application without investigating the merits.

MARTIN, J.A.: There is a principle at stake here, whether or not under the provisions of our Code there can be more than one appeal in the same criminal case. It is, to my mind, something which is absolutely startling, and unknown in law, that there should be more than one appeal in the same criminal case from the same trial which is something entirely distinct from a subsequent appeal if a new trial has been granted in the same case. There is nothing in the Code to warrant it. The Code says that "an appeal" may be taken (*cf.* sections 1012, 1013, 1023 and 1024), but does not say successive appeals may be taken at various times. Section 1014 provides when and how the said appeal shall be taken, *viz.*, by way of a question reserved "either during or after the trial," and if reserved "a case shall be stated for the opinion of the Court of Appeal" (Subsec. 6). There is nothing whatever to warrant the inference that the statute contemplates the extraordinary spectacle of an endless succession of cases stated for appeals in the same case and arising out of the same trial, to this Court and thence from us to the Supreme Court of Canada under section 1024. Otherwise it would mean this, nothing more and nothing less, that every convict, in every Court, in every gaol in this country has got the right to come to a Court of Appeal every term day he chooses, either with a fresh case stated on every new point his counsel may discover after the lapse of days, months, or years, or with an application under section 1015 "for leave to appeal" on any imaginable point, good, bad or indifferent—in other words, a continuous appeal to us and other like Courts of criminal appeal. No such procedure has ever existed in our Courts, and there is always the "application to the mercy of the Crown" and to the Minister of Justice under section 1022 for a new trial to meet extraordinary cases. The prospect of it is more than startling.

MARTIN, J.A.

GALLIHER, J.A.: In view of counsel not being able to give me any assistance on one point on which I might entertain a possible doubt, I concur in refusing the application.

GALLIHER, J.A.

MCPHILLIPS, J.A.: In my opinion it does not become necessary to determine the question of whether there is jurisdiction

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to hear the case after an application has been once refused. I would hesitate to give an opinion, unless compelled to do so, because where the life and liberty of a subject may be at stake, the exigency of the occasion might be such that this Court ought not to hamper or trammel a prisoner, unless expressly inhibited by the statute. It is clear that, no matter how long a time has elapsed, an application may be made. It is true there are not to be successive appeals, yet the mistake of a counsel may be rectified, and it would be rather extraordinary that a Criminal Court of Appeal could not intervene where the life and liberty of a subject may be at stake, and a prisoner affected by some mistake or error on the part of counsel. However, this particular case is without merit and, even if heard, I do not hesitate to say I would affirm the conviction, because no miscarriage of justice has taken place.

2nd December, 1915.

Argument

Eyre, for the accused, moved to reopen the case on the ground of having obtained further authority on the question of making a second application to the Court for a reserved case. [He referred to *Rex* v. *Blythe* (1909), 19 O.L.R. 386; 15 Can. Cr. Cas. 224.]

McKay, for the Crown, was not called upon.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: As far as I am concerned, I do not wish to hear you any further, Mr. *Eyre.*

IRVING, J.A.

IRVING, J.A.: I remain of the same opinion that I was when the previous application was made, that there was jurisdiction and we ought to go into the merits; I know nothing about the merits as I was not in the case when it came up in June.

With reference to the propriety of making to us this second application, I think Mr. *Eyre* is quite right in doing so. As he had not been able on the previous argument to lay his hands on the authority he wanted, he owed a duty to his client to bring the matter up before us again.

The renewal of his application to us, notwithstanding our refusal, last week, to go into the merits, raises a nice point as to the duty of counsel to his client. I think he was justified in

informing us that before doing so he had consulted the leaders of the bar and that they thought it was his duty to bring the matter to our attention once more.

MARTIN, J.A.: I see no reason why this Court should recede from the position it took the other day. I think once a case has been cited to us and upon examination it turns out that it is clearly distinguishable, as *Rex* v. *Blythe* is, it should not be again pressed upon us as an authority in favour of the position taken by counsel. I agree that this Court should not lend itself to this application which would result in giving judgment one day and abandoning it the next day. As to the opinion of certain un-named "leaders of the bar," so called, on the conduct or merits of this appeal, even if it could have been ascertained, should not have been mentioned to us for the purpose of influencing our views, or otherwise.

MARTIN, J.A

GALLIHER, J.A.: I refuse to entertain the application.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I remain of the opinion expressed before. I am impelled the more by the fact that there is no merit in the application. In a proper case we might have to exhaust the wells of knowledge to determine whether or no there is jurisdiction. Even were the application one possible to agree to, and even were it to be determined that there was an irregularity or error in law, section 1019 would have to be borne in mind, and, in my opinion, the conviction could not properly be quashed as no miscarriage of justice has occurred.

MCPHILLIPS, J.A.

Appeal dismissed, Irving, J.A. dissenting.

GREGORY, J. (At Chambers)

SMITHSON v. SMITHSON.

1915

Nov. 3.

Will—Probate—Executor—Alien—Provision in will appointing executors —Discretion to override to be exercised sparingly.

SMITHSON v. SMITHSON

It is within the discretion of the Court to override the express provision in a will naming the executors, but it should be exercised very sparingly. Probate will be granted an alien executor who comes within the jurisdiction and takes the executor's oath.

Statement APPLICATION for probate made before GREGORY, J. at Chambers in Vancouver on the 2nd of November, 1915.

Wallbridge, for plaintiff.
O'Dell, for defendant.

3rd November, 1915.

GREGORY, J.: Notwithstanding the many cases cited by defendant's counsel in support of his contention that the defendant only is entitled to probate, I cannot agree. The ordinary method of appointing an executor is by express designation in the will: Halsbury's Laws of England, Vol. 14, p. 136. This will expressly appoints three persons as executors and I cannot override this provision. In only one of the cases Judgment cited had an executor been named in the will: *In the Goods of Wakeham* (1872), L.R. 2 P. & D. 395, and in that case the executor, or executrix rather, was appointed only "for all property not named in the will" and Lord Penzance refused probate saying, p. 396:

"This Court cannot grant probate to an executor, who is precluded from dealing with the property which passes under the will."

In my opinion none of the cases referred to has the slightest bearing upon the case before me.

It is also objected that in any case probate cannot be granted to Hattie L. Marshall because she is an alien. This objection in my opinion also fails. She has come to this jurisdiction and taken the oath of an executrix and in such case the practice in British Columbia has always been to grant probate. It is also done in England.

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The Court unquestionably has some discretion in the matter, but it is a discretion which should be exercised very sparingly. I see no special reason for exercising it in this case. The estate is well protected, there are two other executors residing within the Province, all three are, it is admitted, entitled to hold the office of trustee; it is not contended that at the time of the making of the will the deceased did not know the lady's nationality (American) and residence and he apparently deliberately selected her with the others, therefore probate must be granted to all three.

Judgment

As to the costs, there is ground upon which I could direct them to be paid by the defendant, but in all the circumstances of the case I think justice will be done by directing that all costs be paid out of the estate, which I do.

Order accordingly.

IN RE GEORGE McCORMICK, DECEASED.

MACDONALD, J.

1915

Nov. 4.

IN RE GEORGE McCORMICK, DECEASED

Will—Specific modes of investment designated—Investment as authorized by Trustee Act—Not excluded by inference—R.S.B.C. 1911, Cap. 232, Sec. 12.

The setting out in a will of specific modes of investment does not operate to prevent the executors investing trust funds in the securities referred to in section 12 of the Trustee Act.

APPLICATION by the administrator of the estate of George McCormick, deceased, for a declaration as to whether the stipulation in the will of the deceased directing that all moneys arising from the sale of his real and personal estate be invested in the savings bank department of the Dominion Bank or in the Government Savings Bank, would operate so as to prevent trust funds from being invested in the securities mentioned in section 12, Cap. 232, R.S.B.C. 1911,

Statement

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heard by MACDONALD, J. at Chambers in Vancouver on the 2nd of November, 1915.

D. Donaghy, for the administrator.
Dickie, for Mrs. McCormick.

IN RE GEORGE MCCORMICK, DECEASED

4th November, 1915.

MACDONALD, J.: Under the provisions of the will of George McCormick, the executors were directed as soon as conveniently might be, but not so as to sacrifice the same, "to sell and convert all the real and personal estate and the proceeds or sums of money so arising, to invest in the savings bank department of the Dominion Bank or in the Government Savings Bank." The advice of the Court is sought, by the administrator with will annexed, as to whether this stipulation as to investment is such, as to prevent trust funds being invested in the securities mentioned in section 12, Cap. 232, R.S.B.C. 1911, *viz.*:

"Trustees having trust money in their hands which it is their duty to invest at interest or in the purchase of real estate shall be at liberty, at their discretion, unless expressly forbidden by the instrument (if any) creating the trust,—

(*a.*) To invest the same in any of the parliamentary stocks or public funds of Great Britain or Canada, or in Dominion or Provincial Government securities, or municipal debentures, the interest and payment whereof is guaranteed by Government, or on mortgage of real estate:

(*b.*) To call in any trust funds invested in any other securities than as aforesaid, and to invest the same on any such securities as aforesaid:

Judgment (*c.*) From time to time, at their discretion, to vary any such investments as aforesaid for others of the same nature:

Provided always that no such original investment as aforesaid, and no such change of investment as aforesaid, shall be made where there is a person under no disability entitled in possession to receive the income of the trust fund for his life, or for a term of years determinable with his life, or for any greater estate, without the consent in writing of such person."

This is an enabling statute and a similar enactment in England has received the favourable construction applied to legislation of that nature. It is clear that an investment in such securities is not "expressly forbidden" by the will; but does the designation of specific modes of investment operate inferentially, as a prohibition against any other course being pursued by the administrator in dealing with the trust funds.

In *In re Burke* (1908), 2 Ch. 248, the will provided that

the trustees should keep the trust estate and invest the same by leaving it on deposit with a particular bank. Neville, J., referring to the Act, enabling trustees to invest trust funds, said that:

"The words of the Act require not only a direction that the trustees shall invest in certain investments, but an express prohibition of any of the investments permitted by the Act which the testator wishes to exclude."

After referring to the judgment in *Re Maire* (1905), 49 Sol. Jo. 383, he then adds:

"It would in my opinion be wrong to introduce nice distinctions as to the application of the Act, because it was intended to give trustees a plain and safe guide."

In *Re Maire, supra,* the will provided for sale and conversion of trust funds and investments of proceeds in 3 per cent. consolidated bank annuities. Farwell, J. held that the trustees were entitled to change the investment of the trust fund and that the statutory provisions as to investment could be applied.

In *In re Dick* (1891), 1 Ch. 423, Kay, L.J. at p. 430 refers to the object of the statute, "speaking generally, being to enlarge the powers of trustees even under existing trusts as well as under trusts created in future."

In *Ovey* v. *Ovey* (1900), 2 Ch. 524, the will provided that the trust funds should be invested in 3 per cent. consolidated bank annuities "and no other securities." Cozens-Hardy, J. in refusing to follow *In re Wedderburn's Trusts* (1878), 9 Ch. D. 112, said "it would be a strong thing to set aside the express direction." This case was cited in *In re Burke, supra,* but doubtless from the prohibitive nature of the wording in the will, was not referred to nor can it be considered as affecting the judgment in the latter case.

Judgment

In my opinion as negative words were not used in the will in question, the authorities based on a similar statute apply and should be followed. The wider scope afforded by the British Columbia statute for investment can be properly adopted. There can be, as it were, read into the will the words of said section 12. The trust funds may thus, subject to the proviso, be invested in the manner indicated.

Application granted.

MACDONALD, J.

1915

Nov. 24.

RE THE LAND REGISTRY ACT. LOMIS v. ABBOTT.

Practice—Foreclosure proceedings—Judgment—Jurisdiction—Court order —Order XXVII., r. 11.

RE LAND REGISTRY ACT.

LOMIS v. ABBOTT

All judgments under Order XXVII., r. 11, must be made by a judge "in Court."

A local judge of the Supreme Court has therefore no jurisdiction to grant a judgment for foreclosure or supplement the same by an order absolute.

Statement

APPLICATION under the Land Registry Act for a direction to the registrar of titles, at Prince Rupert, to register a title to land, based on a judgment for foreclosure in this action granted by YOUNG, Co. J. a local judge of the Supreme Court, at Prince Rupert, heard by MACDONALD, J. at Chambers in Vancouver on the 12th of November, 1915.

H. C. Hanington, for plaintiff.
McTaggart, for defendant.

24th November, 1915.

MACDONALD, J.: This is an application under the Land Registry Act, for a direction to the registrar of land titles, at Prince Rupert, to register a title to land, based on a judgment for foreclosure in this action, granted by His Honour Judge Young, as a local judge of the Supreme Court.

Judgment

In the petition it is stated that such judge on the 13th of May, 1915, by his order "decreed that the defendant do stand absolutely debarred and foreclosed of and from all right, title, interest and equity of redemption" in certain lands therein described. This order resulted from and was founded on a judgment or order *nisi* made at Chambers by such local judge. This involves the question as to whether a local judge has jurisdiction to grant a judgment for foreclosure and supplement the same by an order absolute. He must necessarily have proceeded under Order XXVII., r. 11.

The judge of every County Court in the Province, with certain exception, has power

"in all actions brought in his county to do all such things, and transact all such business, and exercise all such authority and jurisdiction in respect to the same as by virtue of any statute or custom or by the rules of practice of the Supreme Court are now done, transacted, or exercised by any judge of the said Court sitting at Chambers."

Assuming then that a local judge of the Supreme Court has thus, with such exceptions, the same jurisdiction as a judge of the Supreme Court sitting at Chambers, has the latter judge jurisdiction at Chambers to give judgment under said Order XXVII., r. 11? This rule is similar to the English rule and is as follows:

"In all other actions than those in the preceding rules of this Order mentioned, if the defendant makes default in delivering a defence, the plaintiff may set down the action on motion for judgment, and such judgment shall be given as upon the statement of claim the Court or a judge shall consider the plaintiff to be entitled to."

It is contended that the words "or a judge" in this rule give jurisdiction to a judge, sitting at Chambers, to exercise the powers conferred by the said rule. No assistance in determining the point can be obtained from a similar rule in Ontario, as in that Province the words "or a judge" are omitted from the rule. It was thus deemed necessary, under these circumstances, to have a special rule providing for judgment for redemption, foreclosure or sale, where infants were defendants, being made at Chambers, subject to certain evidence being supplied. There is no doubt that in England the words "or a judge" have been decided as being usually applicable to a judge, sitting at Chambers: see Kay, L.J. in *In re B——* (*an alleged Lunatic*) (1892), 1 Ch. 459 at p. 463; *Baker* v. *Oakes* (1877), 2 Q.B.D. 171; *Freason* v. *Loe* (1877), 26 W.R. 138; *Dallow* v. *Garrold* (1884), 14 Q.B.D. 543 at p. 546. In *Smeeton* v. *Collier* (1847), 1 Ex. 457 a portion of the head-note is as follows:

Judgment

"Where a statute, in general terms, and without any special limitation, either express or to be inferred from its terms, gives any power to one of the Superior Courts, that power may be exercised by judge at Chambers as the delegate of the Court."

This may be taken as a fair summing up of the judgment in

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Judgment

that case, though the statement is not borne out in exact terms. Assuming this to be a correct exposition of the law, then are the words "or a judge" in the rule in question, so controlled by the context and other rules as to indicate that the usual meaning attached thereto is not to be adopted, but that the power to give judgment thereunder is restricted to a judge in Court? None of the cases referred to in the notes, appended to this similar English rule in the Annual Practice, indicate that the proceedings were instituted at Chambers, but on the contrary any judgments rendered were in Court. Neither is there any statement in such notes that the motion may be made at Chambers; it may have been considered so plain and the practice so well established, that this course could not be pursued, that it was deemed unnecessary to refer to it. This is emphasized by the fact that such Annual Practice states that an application for "final order for foreclosure absolute" is usually made at Chambers, whether the proceedings were commenced by writ or originating summons. Before dealing with the other rules and decisions thereon, which have a bearing on the rule in question, I think a consideration of the words contained in the rule, indicate that the procedure is not applicable to an application at Chambers. It speaks of "setting down the action on motion for judgment." This is a practice similar to that adopted with respect to trials. If it were intended to allow the application to be made at Chambers different wording would have been used. Now in addition to setting down the action on motion for judgment, the plaintiff is required to serve notice of motion by Order LII., r. 5. There may be "at least two clear days between the service of a notice of motion and the day named in the notice of hearing the motion" unless the Court or a judge gives special leave to the contrary. Then the provisions for setting down, outlined in the Annual Practice, to which I will presently refer, are absolutely inapplicable to a Chamber application, thus indicating that the construction placed upon this rule in England is that the judgment is to be obtained from a judge in Court. That Order LII., r. 1 governs the procedure under Order XXVII., r. 11, being the rule in question, is shewn by the note to the similar English rule, which refers to such rule being

applicable to Order XL., r. 1, being the same as the British Columbia rule and reading as follows:

"Except where by the Acts or by these Rules it is provided that judgment may be obtained in any other manner, the judgment of the Court shall be obtained by motion for judgment."

The notes to this rule in the Annual Practice (1915), p. 714 state that

"This Order provides for judgment being obtained in actions:—I. Where there are no issues raised, *e.g.*, (*a*) on default of defence, where the claim is not within O. 27, rr. 2-9, whether the defendant has appeared, or has made default of appearance as well as defence."

It would thus appear to be clear that if "Judgment of the Court" is sought under Order XXVII., r. 11, it is to be obtained by motion for judgment. It was decided in *Salomon* v. *Hole* (1905), 53 W.R. 588, that where a plaintiff was entitled to have a defence struck out, for non-compliance with an order to answer interrogatories, that a motion for judgment in default of defence, might be joined with the motion to strike out the defence for such non-compliance, but the motion for judgment must be set down and two separate orders made. The notes in the Annual Practice to Order XXVII., r. 11, outlining the procedure in England, in setting down a motion, are inapplicable to a Chamber application. Two copies of the minutes of "proposed judgment" must be left on setting down the motion, and the notice of motion should ask for judgment in accordance with such minutes. If no minutes of judgment proposed are filed, then the notice of motion should set forth the precise words of the judgment asked for. Even where the usual judgment is asked, the minutes or form of words of the judgment asked for, must be left with the judge. This is the practice in the Chancery Division and differs only slightly from that pursued in the King's Bench Division. As to the proof of plaintiff's case, see Annual Practice (1915), p. 459. At a meeting of the judges a majority decided that the Court could not receive "any evidence in cases under this rule but must give judgment according to the pleadings alone": see *Smith* v. *Buchan* (1888), 58 L.T.N.S. 710; *Young* v. *Thomas* (1892), 2 Ch. 134 at p. 135. It is apparent that upon the hearing of the motion the Court is required to consider the form of the pleadings and decide upon the judgment that should be given.

Judgment

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It has discretion to refuse to adjudicate and may refer the action for trial or it may give an interlocutory judgment and refer the case to a referee to ascertain what amount the plaintiff is entitled to.

"Motions for judgment are not brought on as ordinary motions, but are set down in the cause-book in Room 136": see Annual Practice (1915) p. 715.

The motion is treated as a "cause" to be heard, and the Court fee charged is £2, being the amount fixed by the tariff as chargeable "on entering or setting down . . . . a cause or matter for trial or hearing in any Court in London or Middlesex or at any Assizes."

The forms, to which reference is made in the Annual Practice, clearly indicate that the judgment is rendered in Court and not at Chambers, *e.g.*, see form of notice of motion in Chitty's K.B. Forms, 14th Ed., 417, "That this Honourable Court will be moved that judgment be entered herein for plaintiff . . . . pursuant to R.S.C., Ord., XXVII., r. 11"; also form of judgment given in Seton on Decrees, 6th Ed., Vol. 1, p. 178.

In England by Order LIV., r. 12, a jurisdiction similar to that given to our local judges of the Supreme Court is conferred upon the master in the King's Bench Division and upon the registrar in the Probate, Divorce and Admiralty Division, as follows:

Judgment

"In the King's Bench Division a master, and in the Probate, Divorce and Admiralty Division a registrar, may transact all such business and exercise all such authority and jurisdiction in respect of the same as under the Act or these rules may be transacted or exercised by a judge at chambers, except in respect of the following proceedings and matters."

Motions for judgment under Order XXVII., r. 11, do not come within the exceptions referred to in this rule 12, still it would hardly even be suggested that a "master" or "registrar" in England could hear a motion for judgment or exercise any jurisdiction under Order XXVII., r. 11.

I am, therefore, of the opinion that all judgments given under Order XXVII., r. 11, require to be made "in Court." While the presiding judge at Chambers may for convenience, deal with motions under this rule, he at the time acts as a judge in

Court and not at Chambers. The result is that a local judge of the Supreme Court has no jurisdiction under this rule and the judgment of foreclosure in question is of no effect. I have no doubt as to my conclusion being correct, but as the matter is one of great importance I naturally feel a desire that it should be considered by the Court of Appeal. There will be no costs.

Application refused.

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ELLIOTT v. HOLMWOOD & HOLMWOOD, LIMITED.

MACDONALD, J. (At Chambers)
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ELLIOTT v. HOLMWOOD & HOLMWOOD

Practice—Examination for discovery—Past officer of company—"Officer," definition of—Scope of examination.

Where it is sought to examine a person for discovery as a past officer of a corporation said person should, even although he denies he was an officer of the corporation, attend and be examined as to the position he occupied with respect to the corporation, the powers he was entrusted with, and the duties he had to perform.

The "officer" of a company for the purposes of examination for discovery may be an employee of a sort usually termed a "servant" as distinguished from "official."

APPLICATION to examine for discovery one John Brydges as a past officer of the defendant Company, heard by MACDONALD, J. at Chambers in Vancouver on the 5th of November, 1915.

Statement

Stockton, for plaintiff.
A. D. Wilson, for defendant.

11th November, 1915.

MACDONALD, J.: Plaintiff seeks to examine for discovery John Brydges as a past officer of the defendant Company. The affidavit in support of the application states that Brydges was managing director of the Company in British Columbia and this statement is met by a flat contradiction on the part of Brydges. He also states in his affidavit that he was not, at any time, "a director or an officer of the defendant Company."

Judgment

MACDONALD, J. (At Chambers)

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Cross-examination on this affidavit has taken place and the deponent having refused to answer certain questions, the matter is brought before me for consideration. I think that counsel for the defendant has taken too narrow a view of the position that must be occupied by a person, in order to come within the provisions of the rule and thus be examinable as an officer. Our rules, as to discovery by oral examination, are taken from the Ontario rules and this particular rule, as to the examination of an "officer" of a company, has received judicial interpretation declaring that the word "officer" is a word of very wide signification. It has been given the liberal construction usually applied to such a remedial provision and may include employees of a company who are usually termed "servants," as distinguished from officials. It is not limited to the higher or governing officer only. The object of the rules is to discover the truth relating to the matters in question in the action, and the examination ought to be of such "officer" of a defendant company as is best informed as to such matters. Plaintiff contends that Brydges is such person and in support of this contention seeks to fully cross-examine him in that connection. The whole matter is discussed and other cases referred to in *Leitch* v. *Grand Trunk R.W. Co.* (1888), 12 Pr. 671; (1890), 13 Pr. 369.

Judgment

I think Brydges should attend and be further examined as to the position he occupied with respect to the defendant Company, the powers he was entrusted with, and the duties he had to perform. Such examination should be confined to these points and should not deal with matters in question in the action. Having expressed my views generally as to the enlarged scope of the further examination, I have not deemed it necessary to deal specifically with the question sought to be answered. It should not be required. As a result of such examination it may be possible to determine whether Brydges is examinable for discovery as a past officer of the defendant Company.

The costs of this application and examination are reserved.

Application granted.

IN RE DOMINION TRUST COMPANY AND HARPER.

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IN RE DOMINION TRUST CO. AND HARPER

Company law—Winding-up—Money given trust company for investment—Investment on mortgage—Insolvency of company—Application to assign over mortgage—Liquidator's right to retain—Winding-up Act, R.S.C. 1906, Cap. 144, Sec. 20.

Evidence—Statement by counsel—Should not be allowed.

The Dominion Trust Company loaned £1,000 for H. on mortgage security taken in the name of the Company in trust for H. at 7 per cent. per annum. The Company guaranteed H. repayment of the principal with interest at 4½ per cent. per annum, and retained as its remuneration the remaining 2½ per cent. The Company became insolvent and went into liquidation. Application was made for an order that the liquidator assign and hand over the mortgage to H.

Held, on appeal, affirming the order of MURPHY, J. (MCPHILLIPS, J.A. dissenting), that the liquidator was entitled to resist the demand as he had a substantial interest in the mortgage which in the interest of the bankrupt estate he was bound to protect.

Per curiam: It is a mistake to allow the loose practice of supplying evidence to the Court below by statements of counsel.

APPEAL by Mrs. E. M. L. Harper from an order of MURPHY, J. of the 23rd of April, 1915, dismissing her application for an order directing the liquidator of the Dominion Trust Company to deliver up all documents of title relating to a mortgage of the 7th of October, 1912, made by one Arthur Brenchley to the Trust Company in trust for Mrs. Harper; and that the liquidator execute an assignment thereof to Mrs. Harper. On the 19th of August, 1912, Mrs. Harper gave to Horatius Stuart (the Dominion Trust Company's agent in Scotland) £1,000 for investment, the money being later sent by Stuart to the Company's office in Vancouver. On the 6th of September, 1912, the Company issued to Mrs. Harper a mortgage investment certificate guaranteeing the repayment of the principal and interest at 4½ per cent. On the 7th of October, 1912, the £1,000 was lent to Brenchley at 7 per cent. per annum, a mortgage being given as security on a lot in Vancouver, the Trust Company being named as the mortgagees "in

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trust for Mrs. Harper." The principal was due and payable on the 7th of October, 1917, with interest at 7 per cent. An order was made on the 9th of November, 1914, for the compulsory winding up of the Dominion Trust Company and on the 30th of December following, Andrew Stewart was appointed permanent receiver. The Company was in default in paying interest to Mrs. Harper on the 7th of October, 1914, 7th January and 7th April, 1915. On the 31st of March, 1915, Mrs. Harper's solicitors applied to the liquidator for a transfer of the mortgage but was refused. Mrs. Harper then applied for an order that the liquidator execute an assignment of the mortgage in her favour which was refused.

Statement

The appeal was argued at Victoria on the 1st, 4th and 7th of June, 1915, before MACDONALD, C.J.A., IRVING, MARTIN and MCPHILLIPS, JJ.A.

Sir C. H. Tupper, K.C., for appellant.

Martin K.C., for respondent, applied under marginal rule 868 for leave to put in evidence by affidavit of what happened since the order appealed from was made.

[The Court granted the liquidator leave to file affidavits, and Mrs. Harper in reply, and adjourned the hearing of the appeal to the 4th of June.]

4th June, 1915.

Argument

Tupper: The first four paragraphs and part of the 5th of the liquidator's affidavit refer to matters prior to the order appealed from. The matter came on for hearing on the 23rd of April. The statement that $100 interest was collected on the mortgage should not be allowed in as it was collected the day before the order appealed from was made.

Martin: The fact that this payment of interest was made came to my knowledge during the argument on the 23rd of April, when I mentioned it to the Court, and no question was raised when I did so.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: As to the affidavit of Andrew Stewart, sworn on the 31st of May, 1915, objection was taken by *Sir Charles Hibbert Tupper* to its admissibility, particularly as to the $100 mentioned in paragraph 5. Counsel for the

liquidator had become aware of the payment of it, and hence as to that sum the evidence offered in the affidavit was not evidence which had come into existence since Mr. Justice MURPHY's decision and was not admissible on this appeal as of right under the rule.

Mr. *Martin* has made a statement to the Court that he became aware of the payment during the argument on the 23rd of April, and had mentioned the matter to the Court and no question had been raised about the matter.

I think therefore that we ought to admit the affidavit, the whole of paragraph 5, as well as the following paragraphs on that statement of Mr. *Martin,* which is not controverted.

I must say I think it is a great mistake to allow a loose practice of making statements to the Court. Such a practice does prevail to a considerable extent in this Province. I never did approve of it; it is liable to lead to exactly the result we have here.

MACDONALD, C.J.A.

While we have admitted this, as I think in justice we ought to have done, I must deprecate the practice of supplying evidence to the Court below by statement of counsel. I am not reflecting on counsel, but it is a practice which would lead to misunderstanding.

IRVING, J.A.: I agree.

IRVING, J.A.

MARTIN, J.A.: I quite agree.

MARTIN, J.A.

MCPHILLIPS, J.A.: I would like to give an explanation of the view I have arrived at. Whilst I in no way question the statement made by Mr. *Martin,* I think it would give rise to uncertainty to admit evidence in this way. Under the rule we are only permitted to admit evidence which is new evidence, and I cannot satisfy myself as to this being new evidence. I would therefore strike out the first part of paragraph 5.

MCPHILLIPS, J.A.

Tupper, on the merits: There was no order giving this liquidator authority to carry on Mrs. Harper's business. He was appointed for the purpose of winding up the Company. The life of the Company is continued as far as is necessary

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to the beneficial winding up of the Company. We are not bound to continue with them. The guarantee of the Company comes to an end on its insolvency and they cannot delegate another trustee for the one we agree to. The liquidator is an officer of the Court to carry on the Company as far as is necessary for the beneficial winding up of the Company: see Masten's Company Law of Canada, 619; *In re Wreck Recovery and Salvage Company* (1880), 15 Ch. D. 353 at p. 360; *Ex parte Emanuel; In re Batey* (1881), 17 Ch. D. 35 at p. 39; *Ex parte Simmonds* (1885), 16 Q.B.D. 308; *In re Tyler* (1907), 1 K.B. 865. On the question of authority to collect interest on the mortgage see Palmer's Company Precedents, 11th Ed., Part II., p. 300; *Wells* v. *Wells* (1914), P. 157 at p. 163.

Martin: There is no fraud in the case, it is entirely a question of law. Mrs. Harper obtained an investment certificate. She was to receive 4½ per cent. and the Company 2½ per cent. interest on the money invested. The liquidator is entitled to the 2½ per cent. and has a right to proceed and collect the interest under section 20 of the Trustee Act.

Argument

Tupper, in reply: The test is as to Mrs. Harper's right to obtain the security. We say they have no interest in that mortgage: see *Bainbrigge* v. *Blair* (1839), 1 Beav. 495; *Harris* v. *Harris (No. 1)* (1861), 29 Beav. 107; *In re Barker's Trusts* (1875), 1 Ch. D. 43; *In re Adams' Trust* (1879), 12 Ch. D. 634. The Company was a bare trustee of this property and being insolvent the contract has come to an end.

Cur. adv. vult.

2nd November, 1915.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I do not find it necessary to discuss at length the rights of the liquidator to carry on the business of the Trust Company for the beneficial winding up thereof. There is nothing in the evidence to shew the impropriety of his doing so, and there is ample in the provisions of the Winding-up Act to authorize him to do so perhaps without, but certainly with the approval of the Court.

The Trust Company undertook to invest £1,000 of appellant's money in a mortgage security. The mortgage was taken to

the Company who agreed to hold it in trust for the appellant to the extent of appellant's interest therein, and here arises the only point in the case. The trust was one coupled with an interest. The appellant was to find £1,000 and the Company was to find the investment and guarantee the repayment of the same with interest at 4½ per cent. per annum, and to retain as its remuneration for the management of the transaction the difference between 4½ per cent. and the 7 per cent. reserved by the mortgage.

It is quite apparent that the Company was not a bare trustee and that the appellant at least while the Company's affairs were normal was not entitled to call upon the Company to hand over to her the mortgage security. The Company is now in liquidation. The liquidator was appointed by the Court. The principal sum will not be due until 1917. The liquidator resists the demand of the appellant to hand over the mortgage to her and claims the right to carry through, to the end, the transaction entered into between her and the Company, collecting and paying the appellant her interest from time to time. Now it is of importance to note what it is that the appellant demands. It is not the removal of a dishonest or bankrupt trustee and the appointment of another in his stead, nor yet the appointment of a receiver to protect the interests of both parties, but it is that the liquidator shall be ordered to deliver to the appellant, or what is the same thing, to the appellant's solicitors, the mortgage and other securities and execute an assignment thereof to her.

MACDONALD, C.J.A.

Apart altogether from the question to which I have referred of the right of the liquidator to carry on the business, I think the appellant's claim to the relief sought is not well founded. The liquidator has a very substantial interest in the mortgage which in the interest of the bankrupt estate he is bound to protect and make the most of. If for any reason it were right to determine his control of the mortgage, it would in my opinion be manifestly wrong to do so by compelling him to assign the mortgage and the control thereof unconditionally to the appellant without regard to the estate's interest therein.

We were told from the bar that this is one of a large num-

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ber of cases involving in the aggregate a very large sum of money which would become available to the creditors of the insolvent Company by reason of that Company's interests in mortgages and transactions of the kind in question. The winding-up may take years; in these circumstances, with a competent and honest liquidator, as I must assume him to be, and with the protection afforded by the Court, it would, it seems to me, be in the interests of none, and greatly to the detriment of all, if instead of one agent or trustee charged with the carrying to completion of all the very numerous transactions of this class involved in the liquidation, and thereby protecting at a minimum expense the interests of the estate, each transaction should become the subject of a special trusteeship.

I would dismiss the appeal.

IRVING, J.A.

IRVING, J.A. concurred in dismissing the appeal.

MARTIN, J.A.

MARTIN, J.A.: In my opinion section 20 is sufficient authority for the order appealed from. There was no fraud in the original transaction, and the security was admitted before us to be sufficient, so no danger arises from the inadequacy of the guarantee, which in any event would only partly fail as some dividend will be paid. No good reason has been adduced for depriving the creditors of the benefits of the large profits, about $14,000 per annum, which the estate will derive from this and similar arrangements being safely carried out by the liquidator, an officer of this Court, whatever may be said of the state of affairs which existed before his appointment.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: It would appear that the applicant (appellant) placed on the 6th of September, 1912, with the Dominion Trust Company the sum of £1,000 sterling for investment upon approved real estate in Vancouver, and a mortgage was obtained from one Arthur Brenchley of Vancouver on the east half of lot 9 in block 57, subdivision of district lot 185, group 1, Vancouver District, securing $4,850 (the equivalent to £1,000 sterling) bearing 7 per cent. per annum, the mortgage being of date the 7th of October, 1912, and what is termed as the "Investor's Back Letter," issued by

the Company to the applicant under date the 22nd of November, 1912. Under the terms of the guarantee issued by the Company under date the 6th of September, 1912, to the applicant the mortgage security was to be taken in the name of the Company in trust for the applicant and to be so ear-marked in the Company's books, which would appear to have been done. The guarantee extended to both principal and interest, but the rate of interest guaranteed was at 4½ per cent. per annum only, the excess interest over the 4½ per cent. per annum to go to the Company for remuneration for such guarantee and management, the principal sum to be payable at the Bank of Scotland in London, England, on the 11th of November, 1917, together with interest at the rate of 4½ per cent. per annum on the 15th of May and the 11th of November in each year on presentation and surrender of the interest warrants which were issued—Investment Certificate No. 235 containing the guarantee. On the 27th of October, 1914, a petition was presented for the compulsory winding up of the Company, and winding-up proceedings are now going on, a permanent liquidator having been appointed.

It is alleged and not denied, in fact it may be taken as admitted, that the Company received deposits and kept in hand no liquid assets to meet withdrawals and made investments in speculative assets requiring advances to protect the securities held, funds of the Company and trust funds being intermixed and generally misappropriation of trust and other securities, and counsel before us admitted that the shareholders would get nothing. In fact it would appear that the Company is in a hopeless state of insolvency, yet notwithstanding this condition of affairs the liquidator resists the application made for the transfer of the mortgage to the applicant and proposes to continue in the management of the trust, although it would not appear upon the evidence before us upon this appeal that any order has been made authorizing him to carry on the business of the Company, and it is to be remarked that any order that could be made could not extend beyond the carrying on of the business of the Company so far as is necessary to the bringing about of the beneficial winding up of the business (see section

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34 (*b*) Cap. 144, R.S.C. 1906). It would further appear that the liquidator proposes to go on and collect in, interest upon mortgage securities and make a *pro rata* distribution thereof. This course is wholly wrong and improper when it is considered that the applicant has as is proved a specific security to which she is entitled and of which she is really the sole beneficiary. It is well-settled law that the *cestui que trust* may compel the trustee to put him in possession of the estate (Lewin on Trusts, 12th Ed., 867; *Brown* v. *How* (1740), Barnard. Ch. 354; *Attorney-General* v. *Lord Gore, ib.* 145 at p. 150, *per* Lord Hardwicke; *Watts* v. *Turner* (1830), 1 Russ. & M. 634).

It is contended that as the Company is interested to the extent of the difference between 4½ and 7 per cent. per annum that it is not a proper case for direction that the mortgage be assigned to the applicant notwithstanding that the Company is in an insolvent condition and the liquidator proposes to pursue a course of collecting in the interest upon the mortgage securities held for investors and paying same out amongst the class generally by way of a *pro rata* distribution (*In re Barker's Trusts* (1875), 1 Ch. D. 43; *In re Adams' Trust* (1879), 12 Ch. D. 634; *In re Hopkins* (1881), 19 Ch. D. 61, 63). This is a course which cannot be approved. The Company has really no beneficial interest in the mortgage held for the applicant save that in consideration of management and the guarantee given the difference in interest is allowed to the Company, but what is the position of the Company with regard to future management and what is the value of the guarantee? With regard to management that is really now not within the power of the Company, unless possibly the liquidator should be held to be entitled to do this in view of section 20 of the Winding-up Act which in part reads as follows:

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> "The company, from the time of the making of the winding-up order, shall cease to carry on its business, except in so far as is, in the opinion of the liquidator, required for the beneficial winding-up thereof. . . . ."

Then as regards the guarantee, that it is apparent is now valueless, in view of the situation that presents itself, the beneficiary has the right to consider the trust as broken and the right to insist upon the security being transferred to her. The course proposed to be pursued by the liquidator would consti-

tute a breach of trust. Further, the Company is in an insolvent condition and being wound up, and not properly capable of management and incapable of performing the guarantee. In effect the winding-up proceedings have put an end to and determined the trust and the Company cannot nor can the liquidator be admitted to be entitled to hold adversely to the *cestui que trust.* By way of analogy *Ex parte Emanuel; In re Batey* (1881), 50 L.J., Ch. 305 may be referred to. In that case James, L.J. at p. 307 said:

"It is quite clear to my mind that the Legislature never intended that a trustee in bankruptcy should carry on a business as a going concern for the purpose of making profits. It seems to me that the affidavits of the trustees shew that they were not carrying on the business for the purpose of obtaining a beneficial winding-up of the estate, but with the object of making profits. In my opinion, therefore, the resolution . . . . . was *ultra vires* . . . . . In other words, the creditors thereby purported to give themselves power to carry on the business generally for an indefinite period."

It would seem to me something similar is in the present case being attempted, notwithstanding that there has been default in paying the interest upon the mortgage and notwithstanding that the guarantee both as to principal and interest is valueless and notwithstanding that the Company is being compulsorily wound up, which renders management by the Company impossible. The liquidator is insisting upon carrying on the business indefinitely and proposes to collect the interest upon a mortgage security which has still some two or more years to run before maturity and without the assent of the *cestui que trust.* This is a course which cannot be approved nor do I think it can be at all supported by authority. In *Measures Brothers (Limited)* v. *Measures* (1910), 26 T.L.R. 488, an injunction was refused, it being held that the winding-up order operated as a discharge or dismissal of the defendant as director, and applying the decision in *General Billposting Company, Limited* v. *Atkinson* (1908), 25 T.L.R. 178; (1909), A.C. 118, the defendant was held to be no longer bound by the covenant not to carry on business in competition with the company. And see *per* the Master of the Rolls at p. 490. In the way of analogy what the Master of the Rolls said in the *Measures* case is applicable here. The company cannot in the future give the consideration

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called for—the management and the guarantee. The trust is broken, there is impossibility of performance, the winding up of necessity extinguishes the trust. It may be said that there is no decided case that so holds and that may be so, but in that connection we have the following language of Lord Macnaghten in *Keighley, Maxsted & Co.* v. *Durant* (1901), 70 L.J., K.B. 662 at pp. 664-5:

"And when your Lordships are told that there is no actual decision, nor even any carefully considered expression of opinion in favour of the view which the Master of the Rolls took to be settled law, I cannot help recalling the observation of a great judge. 'The clearer a thing is' said Lord Justice James, 'the more difficult it is to find any express authority or any *dictum* exactly to the point.'—*Panama and South Pacific Telegraph Co.* v. *India-Rubber, Gutta-Percha and Telegraph Works Co.* (1875), 45 L.J., Ch. 121; 10 Chy. App. 515, 526."

It may well be said that the trust has in the circumstances terminated. It was stated at the bar upon the argument of this appeal that the security is not quarrelled with but that the *cestui que trust* is satisfied with it, and ready and willing to accept it and ready and willing to release the Company from its obligations in respect of the management and guarantee should the Court deem that a proper order to make. Now with respect to the mortgage security in question, can it really be said to have in any way passed under the absolute control of the liquidator? Viewing matters by way of fur-

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ther analogy in England it has been held that the trust estate does not pass to the trustee in bankruptcy of the trustee (*Scott* v. *Surman* (1742-3), Willes, 402). Under the provisions of the Winding-up Act it is true the liquidator is entitled to take into his custody or under his control all the property, effects and choses in action to which the Company is or appears to be entitled, and he shall perform such duties in reference to winding up the business of the company as are imposed by the Court or provided by the Act, but the mortgage security cannot be applied in any way to the payment of the Company's debts save to the extent that the Company has any interest therein. The insolvent condition of the Company and its being wound up has operated to extinguish that interest, but even were it to be admitted that the Company has still an interest in the mortgage security, the *cestui que trust* should

be a consenting party to the continuance of the trust by the liquidator (*In re Hopkins, supra*) and of course the approval of the Court should also be obtained. Upon the view that an interest may still exist in the Company in the mortgage security that interest as we have seen is the difference only between 4½ and 7 per cent. per annum, being the interest the Company had (*Ex parte Barber* (1880), 28 W.R. 522) and to that extent only could the liquidator be entitled to an interest. Should such an interest be allowed to stand in the way of the right which exists in the *cestui que trust* to be put in possession of the mortgage security? In my opinion it should not. Therefore, whether existent, or non-existent, the *cestui que trust* should be placed in possession of the mortgage security to which she is entitled.

In Lewin on Trusts, 12th Ed., 868, it is stated:

"The rule which gives the *cestui que trust* the possession is applicable only to the simple trust in the strict sense, for where the *cestui que trust* is not exclusively interested, but other parties have also a claim, it rests in the discretion of the Court whether the actual possession shall remain with the *cestui que trust* or the trustee, and if the possession be given to the *cestui que trust*, whether he shall not hold it under certain conditions and restrictions: *Jenkins* v. *Milford* (1820), 1 J. & W. 629; *Baylies* v. *Baylies* (1844), 1 Coll. C.C. 537; *Denton* v. *Denton* (1844), 7 Beav. 388; *Pugh* v. *Vaughan* (1850), 12 Beav. 517; *Hoskins* v. *Campbell* (1869), W.N. 59; *Etchells* v. *Williamson* (1869), W.N. 61."

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It therefore does not follow that even if there still be an existent interest in the Company in the mortgage security that the mortgage security should remain vested in the Company and be under the control of the liquidator. What course then was the *cestui que trust* entitled to take finding the liquidator in the way and adverse to her and refusing to transfer the mortgage security to her? In Palmer's Company Precedents, 11th Ed., Part II., it is stated at p. 316:

"The proper course for a person whose rights are prejudiced by the appointment, or wrongfully impeded by the possession of the liquidator, is to apply to the Court: *Russell* v. *East Anglian Railway Company* (1850), 3 Mac. & G. 104 at p. 117; *In re Henry Pound, Son, & Hutchins* (1889), 42 Ch.D. 402."

Fry, L.J. at p. 422 in the *Henry Pound* case, said:

"Now, where property is in possession of an officer of the Court, and there are legal or equitable rights in that property not vested in the parties to the action or the persons who are before the Court, which legal

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or equitable rights are not the subject of the administration then going on, then the Court requires that the person who claims to enforce those rights shall apply for leave to enforce them. The right may be a right to take possession, or a right to bring an action, or a right to do various other things; but the Court requires an application to be made to it."

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It was stated upon the argument that no relief was being asked under the provisions of the Trustee Act (Cap. 232, R.S.B.C. 1911). It is not an application for change of trustee but really an application to the Court to have it directed that the liquidator do transfer to the *cestui que trust* the mortgage security to which she is entitled. The appeal was argued upon the premise that in a proper case the order asked for might be made and without exception being taken that the procedure was not proper or that the application should be one for leave to bring an action to compel a transfer or assignment of the mortgage to the *cestui que trust,* and I do not think that now it would be in the interests of justice to merely grant that leave as in my opinion the position is one of the greatest clearness. Therefore upon the whole I would allow the appeal and the order should be that the liquidator should by a good and sufficient deed transfer and assign the mortgage to the applicant who is the *cestui que trust* and entitled thereto.

MCPHILLIPS, J.A.

Appeal dismissed, McPhillips, J.A., dissenting.

Solicitors for appellant: *Tupper, Kitto & Wightman.*
Solicitors for respondent: *Cowan, Ritchie & Grant.*

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD v. EMERSON.

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Fire insurance—Premium—Liability of mortgagee to whom loss is made payable.

The Scottish Canadian Canning Company took out an insurance policy on their plant in which a clause was inserted making it payable in case of loss to the defendant who held a mortgage on the plant. When issued the policy was delivered to the mortgagee. The Insurance Company took a note from the Scottish Canadian Canning Company for the premium, and the note not being paid at maturity the Insurance Company cancelled the policy and sued the mortgagee for the earned premium.

Held, on appeal (reversing the decision of McINNES, Co. J.), that as there was no privity of contract between the Insurance Company and the mortgagee, the mortgagee could not be held liable for the premium.

APPEAL from the decision of McINNES, Co. J., of the 30th of June, 1915. On the 15th of November, 1914, the plaintiff Company through its Vancouver agents issued a fire-insurance policy to the Scottish Canadian Canning Company for $42,000 on their plant. The defendant Emerson held a mortgage on said plant and in January, 1915, one C. S. Windsor, the manager of the Scottish Canadian Canning Company, arranged with the plaintiff Company's agent whereby the $42,000 policy was to be cancelled and two new policies were to issue dated as of the date of the original policy; one for $25,000 and another for $17,000 there being attached to the former a mortgage clause making the loss payable to Emerson to whom the policy was handed over when issued. The plant had been insured in November for $60,000 altogether and the note of the Scottish Canadian Canning Company for $1,400 was accepted by the agents for the premiums on the different policies. $300 was paid on account of the premiums in February, but the note not being paid on the 13th of April following, when it was due, the policies were cancelled. The plaintiff Company sued the mortgagee for the earned premium on the $25,000 policy from

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the 15th of November, 1914, to the 15th of April, 1915. The trial judge held that the mortgagee was liable for the earned premium and gave judgment accordingly. The defendant appealed on the ground that there was no privity of contract between the Insurance Company and himself.

The appeal was argued at Vancouver on the 11th of November 1915, before MACDONALD, C.J.A., IRVING, GALLIHER and MCPHILLIPS, JJ.A.

Argument

J. W. deB. Farris, for appellant: There is no dispute on the facts; it is purely a question of legal liability. Emerson was the mortgagee of the property insured. The policy was made payable to the mortgagee, and it was given to the mortgagee who held it. The owners had given a note for the premium but did not pay, and the Insurance Company then cancelled the policy and sued the mortgagee for the amount of the premium up to cancellation. Emerson had never undertaken to pay the premium. There was no privity between him and the Insurance Company: see *Maritime Bank* v. *Guardian Assurance Co.* (1879), 19 N.B. 297.

A. D. Taylor, K.C., for respondent: The policy was first taken out in November, 1914. In January Emerson conceived the idea of getting a policy himself and the old policy was cancelled and a new one made out payable to Emerson and dated back to the date of the cancelled policy. The change was engineered by one Windsor, the managing director of the Canadian Canning Company, who we say made the change at the instance of Emerson and as his agent.

Farris, in reply: On the question of agency see *Grand Trunk Railway Company of Canada* v. *Robinson* (1915), A.C. 740.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal should be allowed. It is quite apparent to me that there is no privity of contract between the Insurance Company and Emerson. Emerson was simply insisting upon what he had a right to, under his covenant in the mortgage. He was insisting that the mortgagor should fulfil that contract by taking out the policy, not as his agent, but on its own account as mortgagor, thus complying with its covenant in the mortgage. That is what the Company

did. It did not purport to do anything else. The Insurance Company must have understood quite well what it was doing.

IRVING, J.A.: I agree.

GALLIHER, J.A.: I agree with what has been said, at least I will modify that by saying that I agree with part of what has been said. I am inclined to follow Mr. *Taylor* to a certain extent, and the only reason I think I cannot give effect to it, is, that I do not think the circumstances peculiarly applicable, which are present in this case, would warrant me in saying that Emerson must have been taken to have read the document, or to have accepted it so as to be bound by it. I know there are cases where, no doubt, that would apply, but I think the circumstances here remove it from that field.

MCPHILLIPS, J.A.: I agree in allowing the appeal. I do not consider there was any privity of contract. Viscount Haldane, L.C. in the case of *Grand Trunk Railway Company of Canada* v. *Robinson* (1915), A.C. 740 at p. 747, says in very terse language, on the question of agency:

> "Such agency will be held to have been established when he is shewn to have authorized antecedently, or by way of ratification the making of the contract under circumstances in which he must be taken to have left everything to his agent."

If it had been that Windsor was Emerson's agent to go out and place insurance, and, being that agent, obtained a policy containing a clause such as we have before us, and that when Emerson was handed that policy he put it in his safe, without reading it, then I think he would be indebted to the Company. There was no such agency, and there was no privity of contract, because privity of contract would have to be established through agency.

Appeal allowed.

Solicitors for appellant: *Farris & Emerson.*
Solicitors for respondent: *Hulme & Meredith.*

MACDONALD, J.

1915

Nov. 17.

DOIG v. MATHEWS

DOIG *ET AL.* v. MATHEWS *ET AL.*

Company—"Members"—Not entitled to vote—Are included to form quorum.

Members of an incorporated company who are not entitled to vote may be counted in order to form a quorum at a meeting of the shareholders.

Statement

MOTION for an injunction to restrain the defendants from acting as directors of the Port Edward Townsite Company, Limited, on the ground that there was not a proper quorum present at the meeting of the shareholders at which they were elected, heard by MACDONALD, J. at Vancouver on the 11th of November, 1915. The facts are set out fully in the reasons for judgment.

A. D. Taylor, K.C., for plaintiffs.
J. H. Lawson, for defendants.

17th November, 1915.

Judgment

MACDONALD, J.: Plaintiff, suing on behalf of himself and other shareholders of the Port Edward Townsite Company, Limited, other than the defendants, applied for an *interim* injunction to restrain such defendants from acting as directors. The validity of their election was questioned and such a doubt was raised in the mind of counsel for the defendants, that I was asked to adopt the course indicated in *Harben* v. *Phillips* (1883), 23 Ch. D. 14. The necessary undertaking was given on the part of the defendants and the application for injunction was then adjourned so that the validity of the election of directors might be settled by "a proper and undoubted meeting of the shareholders and to leave the shareholders their undoubted right of settling in their own way what is to be their policy and how their business is to be carried on."

An extraordinary general meeting of the shareholders of the Company has accordingly been held. Such meeting practically confirmed the result of the previous meeting and again elected

the defendants as a board of directors. This meeting is now attacked on the ground that there was not a proper quorum present, and thus the election of such directors was invalid. The Company is governed by Table A of the Companies Act, except to certain modifications, which do not affect the point in question. Article 51 of Table A provides that:

"No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business; save as herein otherwise provided, three members personally present shall be a quorum."

It appears there were eight shareholders present at the meeting, but only the defendants Mathews and Johnston were qualified to vote and they alone exercised such right in the election of the directors. The other six shareholders present were disqualified from voting under article 63, which provides that:

"No member shall be entitled to vote at any general meeting unless all calls or other sums presently payable by him in respect of shares in the company have been paid."

The question is, did they or any one of them, notwithstanding their inability to vote, constitute, with Mathews and Johnston, the requisite quorum at the time when the meeting proceeded to business? The election is sought to be upheld on the ground that a shareholder may be in arrears for calls and still be one of the "members" referred to in article 51. In other words, he might be debarred from voting and still be entitled to be present at the meeting and assist in forming the quorum. Counsel state that there is no direct authority, to assist me in arriving at a conclusion as to whether this contention is tenable. On first consideration it seems a startling proposition. It would mean that if the meeting had been called by the directors, through a requisition signed only by shareholders entitled to vote, it might be attended by persons of a different class, *viz.*, those not entitled to vote at such meeting. There is no doubt however that weight is given to the defendants' contention by some of the sections of the Act in which a "subscriber" even, is declared to be a "member," as well as those who have by agreement become members on the register of the Company. Then on the contrary, the article outlining proceedings at the general meeting provides for a

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vote being taken by a show of hands, and poll may be demanded "by at least three members." This could not be accomplished if there were only two shareholders present entitled to vote, unless the curious anomaly took place of all persons entitled to vote, calling in a third person who had no vote, to obtain a poll of votes, in which such third person could not himself take part. Then article 60 states that:

"On a show of hands every member present in person shall have one vote. On a poll every member shall have one vote for each share of which he is the holder."

Article 58 provides that where there is an equality of votes, whether on a show of hands or on a poll, the chairman of the meeting shall be entitled to a second or casting vote. The chairman of the meeting, under consideration, was not entitled to vote as he was one of those in arrear for calls upon shares, so if the event outlined in this article occurred, it could not have been consummated. Article 59 contemplates that a poll may be taken on the election of the chairman of the meeting. This could not be accomplished, unless the three members required for that purpose included a person not entitled to vote, as previously indicated. I might have come to the conclusion that under these circumstances the election of directors was invalid, were it not for the remarks of Kekewich, J. in *Young* v. *South African and Australian Exploration and Development Syndicate* (1896), 2 Ch. 268 at p. 277. This learned judge, with great experience in company law, in discussing the necessary three-fourths majority to pass a special resolution, said:

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"I say nothing here about the distinction between 'members' and 'members entitled to vote.' The distinction is certainly to be found in the face of the Act, and it may be, though I do not pause to consider it further, that members who are not entitled to vote may be members who are entitled to form a quorum. This seems a practical absurdity, but I pass it for the present purpose."

This case was referred to in Halsbury's Laws of England, Vol. 5, p. 254, note (*a*), as follows, that "members not entitled to vote may possibly be entitled to form a quorum." Sir Henry Buckley, in his work on Company Law, 9th Ed., p. 607, referring to this case and its bearing on article 51, says "whether under this article the members to form the quorum must be members entitled to vote, *quære*."

The fact of this distinguished judge thus referring to the question in his valuable work is an indication that the point was well worthy of consideration. It is to be noted that he does not express any contrary view. From Palmer's Company Precedents, 10th Ed., 642, it would appear that in order to remove any doubt as to the matter under discussion, it was deemed advisable by special article 82, to provide that no member should be entitled to be present at a meeting "or be reckoned in a quorum" whilst any call was due by him to the company, thus removing the doubt created under article 51 of Table A.

The granting or withholding of an *interim* injunction under the circumstances here presented, is a matter of discretion. It is generally applied, in order to enable matters to remain in *statu quo* until the trial of the action. Even although the plaintiff and those associated with him may be the minority shareholders, I should of course not hesitate to interfere, if I were satisfied that a clear legal right was affected or that they were being oppressed by the majority. The matter is not however in such position. The trial judge may, or may not, follow the remarks of Kekewich, J. I am not required upon this application to express a decided opinion on the point. I think that in view of the *dicta* and authorities referred to, I should not interfere and restrain the directors from further acting. I have not dealt specially with the matter of the chairman of the meeting, not being entitled to vote, as this was not raised in argument before me.

Judgment

The injunction is refused and the action may proceed to trial—costs reserved.

Injunction refused.

MACDONALD, J.

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Nov. 18.

HUCKELL v. GALE & WILLIAMS.

Practice—Default judgment—Application to set aside—Delay—Prejudice to plaintiff—Leave granted to shew that payment was made.

HUCKELL v. GALE & WILLIAMS

The defendants moved to set aside a judgment obtained in default of appearance, alleging they had not been personally served and that they had a good defence. The motion was not disposed of and was delayed until the plaintiff died. Over two years later administration was taken out by the wife of the deceased plaintiff and she proceeded to revive the action. She was notified by the defendants that if she proceeded they would bring on their application to set aside the judgment. Upon the defendants' application being later heard:—

Held, that as the good faith of the defendants as to personal service not being effected was evinced before the death of the plaintiff they should be allowed to defend only as to proving that the amount claimed in the action had been paid, and the judgment should remain in force as security for the plaintiff until the action be disposed of.

Statement

APPLICATION by defendants to set aside a judgment obtained in default of appearance for $442.25 being the balance due the plaintiff for work and service performed for the defendants, heard by MACDONALD, J. at Chambers in Vancouver on the 15th of November, 1915. The facts are set out fully in the reasons for judgment.

Bucke, for plaintiff.
Walkem, for defendants.

18th November, 1915.

Judgment

MACDONALD, J.: Plaintiff on the 12th of October, 1911, issued a writ of summons herein and by his statement of claim, attached to the writ, alleged that the defendants were indebted to him for work and services rendered in the sum of $800, less certain credits, leaving a balance of $442.25.

The writ of summons, according to affidavits of service on file, appears to have been served at Telkwa, B.C., on the 9th of November, 1911, upon the defendant Gale and also upon such defendant for the firm of Gale & Williams. In default of appearance, judgment was signed against defendant Gale and

the partnership on the 1st of December, 1911. On the 6th of February, 1912, such defendant made an affidavit stating that he had discovered the writ of summons in his office on the 30th of November, but that it had never been served on him personally and he had not become aware of it until that day. He then gave instructions to his solicitors to enter an appearance. An affidavit was also filed by the defendant Williams stating that the plaintiff had been paid for all services which he had rendered and, as a matter of fact, had been overpaid. In passing, I might remark that this latter statement does not coincide with the subsequent affidavit of the same deponent in March, 1912, in which he states that in the spring of 1911 the said firm of Gale & Williams dissolved partnership and at that time he interviewed the plaintiff and in making up his account "I ascertained that after giving him credit for the sum of $800 above mentioned there was a balance due him of approximately $240, which amount I offered to pay him and which he refused." Later on, in the same affidavit, he refers to this $240 as being offered as a "gratuity." In addition to this there is a slight discrepancy between Williams and Gale as to when the firm dissolved, as defendant Gale says it was in July, 1912. Defendants on these affidavits launched an application, but did not succeed in getting the judgment set aside before the plaintiff died, in March, 1912. The application was allowed to drift, the excuse given being that it was expected, that the wife of the plaintiff would take out administration. She did eventually become administratrix of her husband's estate, but no active steps were taken to set aside the judgment or revive the action until June, 1914. Motion was then made for an order substituting Mrs. Huckell, administratrix, in lieu of the plaintiff and notice was given that the defendants intended to proceed with the application to set aside default judgment "as set out in Chamber summons, dated the 20th of February, 1912." This application was not pressed to a conclusion and lapsed. Then in the present month the matter is again revived and the same application is sought to be proceeded with. While there might have been some reason for delay, after the death of the plaintiff, I think there is no valid excuse for the matter

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not having been proceeded with in the latter part of 1913 and 1914 and up to the present of the current year. This continued delay has not been satisfactorily accounted for. If the substitution takes place and the action is allowed to proceed to trial without any conditions the plaintiff's claim would, I think, be seriously handicapped. The affidavit of defendant Williams while admitting a promise to pay off $800, asserts that this was only by way of a "gratuity" and suggests that from a legal standpoint it could be withdrawn. He claims that the services were not for himself and partner but for one Fredrickson. If any liability existed against Fredrickson in the spring of 1909, it would now be outlawed. The delay which has thus taken place would not only in this respect prejudice the administratrix for the plaintiff, but would render it more difficult to support the claim. As to delay and consequent prejudice to plaintiff being a ground to refuse application to set aside a judgment see *Regina Trading Co.* v. *Godwin* (1908), 7 W.L.R. 651; also on same point of delay see *Tait* v. *Calloway* (1884), 1 Man. L.R. 102, and *Union Bank* v. *McDonald, ib.* 335 and cases there referred to. Defendants have seen fit to allow the judgment to remain in force for a great length of time. I do not think, in the circumstances, that it would be unjust to refuse *in toto,* to open up the judgment at this late date. The good faith of the defendants, as to personal service not being effected, was evinced however before the death of the plaintiff and this influences me in allowing the defendants an opportunity of proving what is practically their defence, *viz.,* that they have paid the $800 and in fact overpaid the plaintiff. The substitution sought for is granted and the defendants allowed to defend only as to proving payment of the sum of $800, but the judgment will remain in force as security of the plaintiff. Proceedings under the judgment are stayed pending a speedy trial of the action. Considering the small amount involved I think the action should be transferred to the County Court at Prince Rupert, if such Court is considered convenient to the parties. Costs of this application reserved.

Judgment

Order accordingly.

REX v. MAGNOLO.

COURT OF APPEAL

1915

Nov. 25.

REX v. NAGNOLO

Criminal law—Forgery—Having tickets printed, resembling those of the genuine maker—Genuine tickets having face value at maker's store—Corroboration—Criminal Code, Sec. 1002, Subsec. (e).

P., a grocer, sold tickets to his customers on which were printed the words "good for 25 cents, L. Politano, 317 Powell Street" and P.'s signature was on the back of each ticket in his own handwriting. The tickets were good for their face value for the purchase of goods at P.'s store. The prisoner had printed a number of tickets (through a boy, to whom he gave a genuine ticket for the purpose, who ordered and received them from a printer's office for the prisoner) in imitation of those of P.'s only leaving out P.'s signature on the back. Four men other than the prisoner attempted to use the spurious tickets for the purchase of goods at P.'s store.

Held, per IRVING and GALLIHER, JJ.A., that there was a forgery.

Per MACDONALD, C.J.A. and MCPHILLIPS, J.A.: That the essentials required to establish a forgery were not in evidence.

Held further, that as the evidence lacked the corroboration required by section 1002, subsection (*e*) of the Criminal Code the prisoner should be discharged.

CRIMINAL APPEAL by way of case stated from a conviction by GREGORY, J. at the October (1915) Assizes at Vancouver. The accused was charged with forging a certain document, to wit, a ticket in the words and figures following, that is to say: "Good for 25 cents, L. Politano, 317 Powell Street," the said document being intended by him to be used as genuine, also that he did unlawfully utter the said forged document as if it were genuine. The accused was convicted on the first count of the indictment and judgment on the conviction was postponed until the following questions which were reserved for the opinion of the Court of Appeal be answered: Statement

"(1) Was there sufficient evidence adduced at the trial to convict the accused of the crime of forgery?

"(2) Is there any evidence of corroboration as outlined by section 1002 of the Criminal Code, subsection (*e*)?"

L. Politano, a grocer, carried on his business at 317 Powell Street, Vancouver. He issued 25-cent tickets for the convenience of his customers who on buying them could at any time

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receive their amount in goods at the store. On the front of the ticket was printed the words "good for 25 cents, L. Politano, 317 Powell Street" and in Politano's handwriting on the back was written his name "L. Politano." The accused had bought these tickets on a number of occasions and used them at the store. It appeared from the evidence of Ralph B. Fathers, a boy of fourteen years, that the accused met him on the street in January, 1915, and handing him a ticket asked him to have 250 tickets like it printed for him. Witness had the tickets printed at Evans & Hastings, printers, on Seymour street, and brought them to the accused, who gave him $1.50 for them. Three weeks later Fathers again saw the accused, who told him he had lost the tickets he had received from him before and wanted another "lot." Fathers had another "lot" printed but on bringing them for delivery the accused said he did not have the money to pay for them. Fathers then took them back to the printers. In May, 1915, L. Politano had four Russians arrested for attempting to buy goods in his store with tickets that were not issued by him. These tickets were the same as the genuine tickets issued by Politano, except that they did not have his name written on the back. The accused on being arrested was brought to the police station, when on being confronted by the four Russians he jumped at one of them and said "You stole my thing."

Statement

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

Robinson, for the accused: The accused was convicted of forgery. I contend, first, he was not guilty of forgery as the evidence does not justify the conviction; the document is not a forgery: see *Reg.* v. *John Smith* (1858), 27 L.J., M.C. 225. Secondly, there is no corroboration as required by section 1002 of the Code and therefore no forgery.

Argument

A. H. MacNeill, K.C., for the Crown: There was corroboration, first in the fact that three weeks after Fathers was asked to get the tickets printed for accused the accused again approached him to get another "lot" of tickets from the printer;

secondly, when accused was arrested and taken to the station where he saw the four Russians who were uttering the tickets, he jumped at one of them and accused him of stealing his thing.

Robinson, in reply.

Cur. adv. vult.

25th November, 1915.

MACDONALD, C.J.A.: I would answer the questions in favour of the accused.

IRVING, J.A.: I would answer the second question in favour of the accused. I think there was a forgery.

IRVING, J.A.

MARTIN, J.A.: I would answer the second question in favour of the accused. Without expressing any opinion on the very doubtful question of forgery, *solus,* the corroboration, it seems to me, does not go to the length required by the statute, in the lack of identification by the young boy, and in regard to the tickets that were given to him to be printed. But of course it follows that, failing corroboration, there was not sufficient evidence of forgery.

MARTIN, J.A.

GALLIHER, J.A.: I would answer the first question against the accused and the second question in favour of the accused.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I would answer both questions in favour of the accused. In my opinion the essentials required to establish forgery under the Code were absent, but if I am in error in this, the evidence lacks the corroboration required.

MCPHILLIPS, J.A.

Conviction quashed.

CLEMENT, J.

1915

ESQUIMALT & NANAIMO RAILWAY v. MUNICIPALITY OF THE CITY OF COURTENAY.

Nov. 25.

ESQUIMALT & NANAIMO RY. v. CITY OF COURTENAY

Constitutional law—Incorporated town—Subsequent exemption of railway from taxation—Exemption not to apply to portion within town—Taxation Act, R.S.B.C. 1911, Cap. 222, Secs. 193 and 196.

Ten days after the date of letters patent incorporating the defendant Municipality an order in council was passed under section 196 of the Taxation Act exempting the plaintiff Railway for 10 years from taxation under section 193 of the Act, in respect of a portion of the plaintiff's line including, *prima facie*, the portion lying within the bounds of the defendant Municipality.

Held, that the Crown will do nothing in derogation of the grant of corporate powers; and any subsequent Act of the Crown will be treated as done without intent to break faith with those benefited by the earlier grant. The order in council was therefore construed as not intended to apply to that portion of the plaintiff's line which lies within the defendant Municipality. Construed otherwise the order in council would be *pro tanto* void.

Alcock v. *Cooke* (1829), 7 L.J., C.P. (o.s.) 126 followed.

ARGUMENT on a point of law raised in the defence, heard by CLEMENT, J. at Victoria on the 1st of November, 1915. On the 29th of September, 1914, the defendant Municipality was incorporated by Letters Patent issued pursuant to the Municipalities Incorporation Act. On the 9th of October, 1914, the Lieutenant-Governor in Council pursuant to the power contained in section 196 of the Taxation Act passed an order in council exempting for ten years from the 31st of July, 1914, from the assessment and tax imposed under section 193 of said Act, that portion of the plaintiff Railway between Parksville Junction and Courtenay. The railway was assessed for the year 1915 for one and a quarter miles of railway right of way and ten acres of land that was within the defendant Municipality and taxed for $233.22, said right of way and land being included in the exemption under the order in council aforesaid. The point of law raised in the defence was that the statement of claim disclosed no cause of action as subsequently to the incorporation of the defendant Municipality the Taxation Act and

Statement

all matters and things transacted and done in pursuance thereof had no application to any real property of the plaintiff Railway situate within said Municipality.

Maclean, K.C., for plaintiff.
Mayers, for defendant.

25th November, 1915.

CLEMENT, J.: The defendant Municipality was incorporated by Letters Patent dated the 29th of September, 1914, issued pursuant to the Municipalities Incorporation Act, R.S. B.C. 1911, Cap. 172. The incorporation was to take effect on the 1st of January, 1915. This is the allegation made in the statement of defence; but it should be noticed that the above Act contains no provision which in terms contemplates the fixing of a date later than that of the Letters Patent for the incorporation taking effect. Nothing was made of this, however, on the argument. In my view a more material consideration is this, that there is no *locus penitentiæ* for the Crown; in other words, there is no power to arbitrarily recall or cancel the Letters Patent. In my opinion the honour of the Crown was thereby engaged to do nothing in derogation of the grant of corporate powers; and any subsequent act of the Crown will be treated as done without intent to break faith with those benefited by the earlier grant. This I think is the principle of *Alcock* v. *Cooke* (1829), 7 L.J., C.P. (o.s.) 126, and that class of cases dealing with grants to private parties. That the principle applies, *a fortiori,* in the case of a grant of such rights of local self-government as are conferred by municipal incorporation seems to me clearly established by the well-known decision of Lord Mansfield and his brethren in *Campbell* v. *Hall* (1774), Lofft 655. In that case the facts were that a Royal Proclamation, issued after the Treaty of Paris in 1763, had announced that a legislative assembly would be established in the conquered island of Grenada and in the other colonies acquired under the same treaty—Canada, it may be noted, was one of them—"so soon as the state and circumstances of the said colonies will admit." The commission to Robert Melville, appointing him Governor of Grenada, contained instructions to

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CLEMENT, J.

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ESQUIMALT & NANAIMO RY. v. CITY OF COURTENAY

the like effect. It was considered that by the proclamation and commission "the King had immediately and irrevocably" parted with all legislative power over the Island, that is to say, with all power to legislate by order in council; and, accordingly, an order in council promulgated after the date of the commission to Governor Melville but prior to the establishment of an assembly, for laying a tax upon exports from the Island was held of no effect.

What happened in the case now before me was this: on the 9th of October, 1914, that is to say, ten days after the date of the Letters Patent incorporating the defendant Municipality, an order in council was passed under section 196 of the Taxation Act, R.S.B.C. 1911, Cap. 222, exempting the plaintiff Railway Company for ten years from taxation under section 193 of the Act in respect of a portion of the Company's line including, *prima facie,* the portion lying within the bounds of the defendant Municipality.

I may say that upon consideration I see no reason to change the view which I expressed upon the argument that had the dates of these instruments been reversed, the plaintiff Company would be entitled to the exemption claimed. But, for the reasons above indicated, I hold the later order in council inoperative—perhaps I should say I construe it as not intended to apply—as to that part of the Company's line which lies within the defendant Municipality. To construe it otherwise would be to infer an intention upon the part of the Crown to do itself dishonour, to break faith—in a trifling matter, perhaps, and *per incuriam,* but nevertheless a clear breach of faith—with the inhabitants of the defendant City. This, as I understand, His Majesty's Courts will never do. Rather they will hold the Crown misled and the instrument wholly or *pro tanto* void.

Judgment

The plaintiff Company's action, therefore, is dismissed with costs.

Action dismissed.

THE KING v. THE "DESPATCH."

MARTIN, LO. J.A.

1915

Dec. 2.

THE KING v. THE "DESPATCH"

Admiralty law — Ship — Order suspending proceedings — The Admiralty Court Act, 1861 (24 Vict., Cap 10), Sec. 34—Rule 228—"Cross-cause," definition of—English practice.

Section 34 of The Admiralty Court Act, 1861, "gives or defines the right" to vary or rescind proceedings in admiralty, being one of the more extensive powers conferred upon the High Court of Admiralty which it did not formerly possess and the Exchequer Court of Canada falls heir to the same jurisdiction.

Assuming said section 34 is not applicable to this case, the necessary jurisdiction is conferred by rule 228 of the Rules in Admiralty.

There cannot be a "cross-cause" unless at least one of the plaintiffs in the original action is a defendant in the cross-cause. When, therefore, the Crown is taking proceedings *in rem* against a ship for damages to a king's ship caused by a collision, and the defendant has commenced proceedings *in personam* against the master of the ship for negligence causing the same collision, but whose actions the Crown has repudiated, there is no cross-cause to justify the making of such an order as was made in *The King* v. *The "Despatch"* (1915), 21 B.C. 503.

MOTION by plaintiff under rule 84 of the Admiralty Rules to vary or rescind an order made in this action by MARTIN, Lo. J.A. on the 18th of June, 1915. Heard by MARTIN, Lo. J.A. at Victoria on the 9th of September and the 7th of October, 1915. Statement

Moresby, for plaintiff.
Bodwell, K.C., for defendant.

2nd December, 1915.

MARTIN, Lo. J.A.: Under rule 84 the plaintiff moves to "vary or rescind" the order made herein on the 18th of June last, reported in (1915), 21 B.C. 503; 32 W.L.R. 13, on the ground of lack of jurisdiction to make the same. This objection was not raised upon the former motion which, as is noted in the reasons, was only opposed on the one point therein mentioned: pp. 504, 506; 14, 16, and in an ordinary case it would not be proper to reopen the matter, but as a question of jurisdiction is Judgment

MARTIN, LO. J.A.

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now raised which could be raised at the trial, it is conceded that in the circumstances of this case it would be convenient and desirable to dispose of it at the outset, and the defendant offers no opposition to this being done.

It is first objected that section 34 of The Admiralty Court Act, 1861, has no application to this Court because it is submitted to be a section relating to practice only and one which does not confer jurisdiction, with respect to which it is conceded that this Court possesses the same as the High Court of Admiralty, "to extend the jurisdiction and improve the practice" whereof is stated in the preamble to be the object of the said Act of 1861. Assuming the matter to be one of practice, it is urged that since, in our rules (made under section 7 of the Colonial Courts of Admiralty Act, 1890, and section 25 of The Admiralty Act, 1891) there is none corresponding to said section 34, therefore there is nothing empowering this Court to exercise the practice jurisdiction conferred thereby. In my opinion, however, that section is one which "gives or defines the right" (as Lush, L.J. puts it in *Poyser* v. *Minors* (1881), 7 Q.B.D. 329 at p. 333) now under consideration, which is one of those "more extensive powers conferred upon the" High Court of Admiralty which it did not formerly possess—Williams and Bruce's Admiralty Practice, 3rd Ed., 370-1 and cases there cited, particularly *The Seringapatam* (1848), 3 W.Rob. 38, and *The Rougemont* (1893), P. 275—and therefore this Court falls heir to the same jurisdiction. It is no objection to the conferring of jurisdiction that the statute which does so, at the same time "denotes the mode of proceeding by which [the] legal right is enforced": *per* Lush, L.J. *supra,* at p. 333.

Judgment

But if I should be wrong in this and the matter is to be considered as one of practice then reliance is placed on our Rule No. 228 as follows:

> "In all cases not provided for by these Rules the practice for the time being in force in respect to Admiralty proceedings in the High Court of Justice in England shall be followed."

In my opinion this covers the case and I am justified in this view by the decision of my learned predecessor in this Court in *Williamson* v. *The "Manauense"* (1899), 19 C.L.T. 23, and in *Williamson* v. *Bank of Montreal* (1899), 6 B.C. 486.

Then the further objection is taken, secondly, that in any event said section 34 is inapplicable to the present situation because in the true sense of the expression, the defendant has "not instituted a cross-cause" against the plaintiff. This also is a change of front on the part of the Crown since the order now complained of was made, because then the matter was argued and disposed of on the obvious assumption that the Crown in Canada was following the established practice of the Crown in England of assuming responsibility in the Admiralty Court for the act of its servant (McDougal), the master of its ship, under circumstances similar to these, as set out in the cases cited in my judgment. The Crown now takes the position that as there is no action here against it, either *in personam* or *in rem,* but only one *in personam* against its servant, the master, whose actions even if negligent it is not liable for, and now repudiates, on the authority of *Paul* v. *The King* (1906), 38 S.C.R. 126, and *cf. Imperial Japanese Government* v. *P. & O. Co.* (1895), A.C. 644, consequently there is no "cross-cause," and so it is in strict law a stranger to the proceedings of the defendant against said McDougal. Such an unusual position required corresponding consideration, and after the examination of a large number of authorities, I am forced to the conclusion that the objection must prevail. The expression "cross-cause" has been often considered, *e.g.,* in *The Rougemont, supra,* wherein the scope of the section is in one respect defined and wherein there is a very instructive argument: *The Charkieh* (1873), L.R. 4 A. & E. 120; and see Williams and Bruce's Admiralty Practice, *supra,* and whatever else may be said of it, it is clear, to my mind, that there cannot be a "cross-cause" unless one at least of the plaintiffs in the principal cause is a defendant in the cross-cause. On the other hand, the mere fact that a party is a co-plaintiff does not of itself entitle the defendant in the cross-cause to obtain security, as is shewn by *The Carnarvon Castle* (1878), 3 Asp. M.C. 607, wherein the owners of the cargo, who to save multiplicity and expense had joined in an action with the owners of the ship, were absolved from liability to give bail. It must be borne in mind that, as Lord Watson said in *Morgan* v. *Castlegate Steam-*

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ship Company (1893), A.C. 38 at p. 52, "every proceeding *in rem* is in substance a proceeding against the owner of the ship." The contention that the section applies only to cases where both the principal and cross-cause are *in rem* was rejected in *The Charkieh, supra.* The exact point raised herein has not come up before; at least no similar case has been cited, and I have been unable to find any. In, for example, *The Charkieh,* the cross-cause was instituted by the Foreign Sovereign Prince, and in *The Newbattle* (1885), 10 P.D. 33, the action was brought by "the owners, master, and crew of the Louise Marie," and though that ship was admittedly the property of the King of the Belgians, yet the question was raised by a counterclaim in the same action, and in such circumstances the point now in question did not require consideration. Lord Justice Cotton said, p. 35:

> "It is a reasonable principle that a plaintiff whose ship cannot be seized, and against whom a cross action has been brought, shall put the defendant in the same position as if he (the defendant) were a plaintiff in an original action," etc., etc.

This brings out the force of the objection now taken: *viz.,* that in fact no cross action has been brought against the plaintiff herein.

The result is that as the case now presents itself the order which was properly made on the facts then before me must now be rescinded as it appears the case is not within said section 34.

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I am fully alive to the injustice which it was strongly pressed upon me might result from this refusal of the Crown to adhere to "the well-established practice in England" in cases of this description (*cf. Eastern Trust Company* v. *Mackenzie, Mann & Co., Limited* (1915), A.C. 750 at p. 759, on the duty of the Crown in general to ascertain and obey the law) but in the face of the decision in *Paul* v. *The King, supra,* I am powerless to adopt any other course, though my attention has been directed to the apt remarks of Idington, J. at p. 136 of that case:

> "It certainly seems at this time of day unsatisfactory to find that one of the vessels, the property of which is in the Crown, engaged in the business of the Crown, can destroy through grossest negligence the property of

a subject and he have no remedy at law unless against the possibly penniless man who has been thus negligent."

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With respect to the costs of this motion, the plaintiff must pay them in any event of the cause, because the application has been made necessary solely by the omission of the plaintiff to raise these new questions at the outset, and an unusual indulgence was granted in opening up the matter. In the very unusual circumstances it is impossible now to dispose of the costs of the original motion upon any fixed principle, so I think the most appropriate course to adopt is not to make any order regarding them.

Judgment

Order accordingly.

SIMMONS v. ROYAL BANK OF CANADA.

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SIMMONS v. ROYAL BANK OF CANADA

Husband and wife—Undue influence—Action to set aside mortgage—Acknowledgment of signature to instrument—Taken over telephone—Land Registry Act, R.S.B.C. 1911, Cap. 127.

A wife, at the request of her husband, executed a mortgage in favour of a bank in order to relieve the husband from pressure by the Bank for payment of a debt. The evidence disclosed that there was no undue influence exercised by the husband but she signed the instrument without obtaining any independent advice. In an action to set aside the mortgage:—

Held, that a mortgage executed in the circumstances was binding upon the maker.

Acknowledgment of a signature to an instrument taken by a solicitor over the telephone is not in compliance with the provisions of the Land Registry Act.

ACTION tried by MURPHY, J. at Vernon on the 24th of November, 1915. The circumstances under which the action arose are that the plaintiff's husband, John F. Simmons, transferred lots 10 and 11, in block 11, in the town of Vernon, to

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the plaintiff on the 29th of December, 1913, the husband at the time being indebted to the defendant Bank. On the 26th of February, 1914, the defendant Bank brought action against John F. Simmons and on the 11th of March following obtained judgment for $2,207.07. It was then arranged between the Bank and Simmons that he should pay $100 a month on account of the judgment and that he should obtain from his wife a mortgage for the amount of the judgment on the lands in question in favour of the Bank to secure his indebtedness. At the husband's request the plaintiff executed the mortgage in the Bank's favour on the 18th of April, 1914. The plaintiff executed the mortgage in her husband's presence only, a solicitor taking an acknowledgement of the signature over the telephone. The plaintiff claimed that the transfer of the property in question by the husband to herself was made in consideration of an indebtedness of $1,200, being the total amount of a number of advances of money she had made from time to time to her husband. On the 20th of August, 1914, the Bank advertised the lands in question for sale under the power of sale contained in the mortgage. The plaintiff then brought this action for an injunction to restrain the defendant Bank from selling the lands and for an order declaring the mortgage null and void. The defendant Bank counterclaimed for a declaration that the mortgage is a valid and subsisting one or in the alternative that the conveyance of the land in question by Simmons to his wife be set aside as against the Bank and his other creditors.

Statement

R. L. Maitland (*Heggie,* with him), for plaintiff.
Buckingham (*A. O. Cochrane,* with him), for defendant.

2nd December, 1915.

MURPHY, J.: I found at the trial that the deed from Simmons to his wife was a voluntary conveyance. I am further of the opinion that the transaction was not *bona fide* in the sense defined by *Koop* v. *Smith* (1915), 51 S.C.R. 554. It was therefore voidable at the suit of creditors. I find that whilst there was no independent advice there was no undue influence exercised on the wife either by her husband or the

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solicitor. I find that she was aware that she was giving a mortgage to the Bank on the house but that she was not aware that by its provisions default might occur almost immediately enabling the Bank to proceed to realize the security. I find that there was no misrepresentation or concealment in connection with the execution of the mortgage and that she was sufficiently intelligent and informed to have gathered a sufficient knowledge of the purport of the mortgage by a perusal of it to at least have led her to seek legal advice as to when it would become enforceable. She did not read it, but, in my opinion, that does not give her a ground for having it set aside when she was aware of its nature though not of all of its provisions. I find she knew it must be signed otherwise the Bank would take further proceedings against her husband, though I think I cannot hold it proven that she knew these would take the form of attacking the transfer from him to her. I find she executed it because she desired that such further pressure be not exerted by the Bank and that consequently there was consideration for such execution as the Bank did stay its hand for a time and altered its position. In other words, I hold she did not know exactly what the Bank was to do but she did know execution by her of the mortgage would enure to her husband's benefit as a result of some action or stay of action by the Bank and this benefit she desired to secure for him. I find that the acknowledgment was taken by the solicitor over the telephone at a time when her husband was in the house and probably within hearing. In my opinion such acknowledgment was not taken in accordance with the provisions of the Land Registry Act but whatever may be the effect of this I hold it does not make out the cause of action set up in these proceedings. In this view of the facts I hold on the decision of *Bank of Montreal* v. *Stuart* (1911), A.C. 120, that her action must be dismissed. The counterclaim is set up alternatively and counsel for the defence, as I understood him, desired it dismissed if he succeeded in the defence. The action is dismissed with costs and the counterclaim dismissed without costs.

Judgment

Action dismissed.

MORRISON, J.

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FOULGER v. LEWIS AND LEWIS.

Contract—Misrepresentation—Sale of timber area covered by prior licence —Lack of consideration.

FOULGER v. LEWIS

The plaintiff purchased certain timber licences from the defendants, there being prior licences in good standing at the time covering the same area of which the defendants had or ought to have had knowledge.

Held, that even if the misrepresentation were innocent the plaintiff is entitled to rescission of the contract.

ACTION tried by MORRISON, J. at Victoria on the 18th and 19th of May and the 17th and 18th of June, 1915, for rescission of a contract for the purchase of certain timber licences covering areas in the Sechelt watershed in British Columbia. The facts are set out fully in the reasons for judgment.

Statement

Lennie, and *J. A. Clark*, for plaintiff.
Bodwell, K.C., and *Mayers*, for defendants.

4th December, 1915.

MORRISON, J.: The plaintiff, at the time of the issue of the writ herein, was a farmer residing at Duncans, B.C., and owned certain lands in Alberta. The defendants were brokers residing in Seattle and apparently dealt largely in the acquiring and selling of timber areas situate in British Columbia. On or about the 19th of June, 1911, the plaintiff desiring to acquire timber areas in British Columbia entered into an agreement with the defendant Lewis on the 19th of June, 1911, whereby the defendants agreed to assign, set over and transfer to him certain timber licences covering areas in the Sechelt Watershed, and issued by the Government of British Columbia. The consideration for this agreement was the sum of $50,000, the terms of payment being certain cash payments at stated periods and a conveyance of certain real estate of the plaintiff's situate in the Province of Alberta.

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Pursuant to this agreement the plaintiff paid $7,500, and also conveyed the parcels of land in question. It turned out,

however, that the licences aforesaid covered timber over which it appears, as the matter at present stands, the Government had had already issued licences to a third party. After a great deal of correspondence and controversy the parties got at arm's length and the plaintiff commenced the present proceedings claiming a rescission of the agreement, a return of the money paid and a reconveyance of the Alberta property, alleging misrepresentation on the defendants' part, inducing the contract.

I am satisfied that the plaintiff entered into the transaction on the footing, and under the influence of the belief that the proposition, to use a timbermen's phrase, was a logging proposition, and that the licences transferred were the only licences issued over those areas. I find that it was not a logging proposition and that it was so known to the defendants. I also find that unknown to the plaintiff at the time he entered into the agreement, substantially all the timber area or limits, which he bargained for had been covered by prior licences to one W. H. Whittaker. I am satisfied that had the plaintiff known, or even suspected, that the licences so transferred to him were not the first and only licences he would not have entered into this particular agreement. I also find that the defendants knew, or ought to have known, that the licences in question were not the only licences covering this property at that time.

Judgment

I am not meaning hereby to determine whether the Whittaker licences are good and valid licences. That may be a matter for future determination in another action. But I do mean to say that I think it was the furthest thing imaginable from the plaintiff's mind when he signed the agreement, that he would be involved thereby in a contest with a third party as to the priority of his licences. A careful search would have disclosed to the defendants the true situation, and a search in order to be a search in the eye of the law must be a careful one. It is the only kind of search that is of any possible ultimate value. For the defendants to base a solemn transaction on anything less is to do so at their peril. There was therefore a failure of consideration; or perhaps it may be more nearly correct to say there was no consideration.

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In the view thus briefly stated which I take of the facts, it might be unnecessary for me to decide whether the consideration of the agreement is an executed or executory one. However, I think it is, if anything an executory contract—one in which a right *in personam* to a fulfilment of its terms are created. Apart from that it seems to me that the parties did not contract *ad idem*.

The plaintiff alleges fraudulent representations against the defendants. Fraud is proved when it is shewn that a false representation has been made with knowledge of its falsity. And it is good law that one who makes a representation recklessly and regardless of whether it is true or false, can have no real belief in the truth of what he states: *Derry* v. *Peek* (1889), 14 App. Cas. 337; *Newbigging* v. *Adam* (1886), 34 Ch. D. 582; *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1.

It was contended for the defendants that the misrepresentations in any event were innocent. Assuming they were innocent representations however much it might help them in an action for deceit, which this is not, it can avail them very little in an action based upon misrepresentation, failure of consideration and mistake which this is.

Judgment

An innocent misrepresentation of a material fact is ground for rescission: *Derry* v. *Peek, supra.* If there was a mistake here, it was of such a character as to prevent any real agreement from being formed. Putting the case on the most charitable ground, I find there was and that the subject of the mistake or the point misconceived was the cause of the agreement or at least had an important influence upon it: *Kennedy* v. *Panama &c. Mail Co.* (1867), L.R. 2 Q.B. 580.

So that taking the case in all its bearings and having regard to the parties hereto, there will be judgment for the plaintiff as claimed, other than his claim for damages.

Judgment for plaintiff.

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REX v. CARMICHAEL

Criminal law—Application to direct judge to state a case—Stealing and receiving—Criminal intent—Judge's charge—Charged and found guilty on two counts—Guilty on one not on other—Effect of on application.

The accused took a horse from a range at Vernon and drove it to Kamloops evidently not intending at the outset to steal it. A week later he took the horse to Alberta and after keeping it there for three weeks sold it. On the trial of the accused for theft the judge in his charge to the jury said, "It does not make any difference what time the prisoner got the guilty knowledge or determined to commit the theft." Later on in his charge he said "you might believe that was his belief all right when he left Vernon—that is the innocent belief that he had leave to take the horse—and when he got to Kamloops, but if you think that when he took that horse out of this country he knew very well that Harwood (the owner) would object to his doing it, and he had no right to do it, then he is guilty of theft."

Held, on appeal, that if the accused first conceived the guilty act in Alberta he could not be convicted of theft in British Columbia. The latter statement in the charge however qualifies the first sufficiently to make it a proper charge from which the jury could conclude that in order to find the accused guilty of theft they must find that he conceived the guilty intent before he took the horse out of this Province.

The prisoner was charged on two counts (a), that he did steal a horse; (b), that he did retain in his possession a horse knowing it to have been stolen. He was found guilty on both.

Held, that there was error in finding the prisoner guilty on both counts, but he was properly found guilty on the first count though not on the second, and as the case comes before the Court on an application to direct the judge to reserve questions, the application to so direct the judge will be refused as no injustice has been done.

CRIMINAL APPEAL from the refusal of MURPHY, J. to state a case on the trial of the accused at the Fall (1915) Assizes in Vernon. Accused was charged on two counts (1) for stealing a horse; (2) for receiving a horse knowing it to have been stolen. The facts are that the accused and one Maxwell, intending to go up the North Thompson River to look over certain land and requiring a horse for the purpose, went to the stables of one Harwood in Vernon to buy a horse on Saturday the 7th of August, 1915. Harwood's son was

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there, to whom accused offered $20 for a certain grey horse named "Prince" (which was at the time out on the range). The boy told him that he would have to ask his father. The accused did not see Harwood but going out on the range next day with Maxwell they caught a horse and brought it to town. On the following Thursday accused and Maxwell, without communicating with Harwood, started with the horse and a rig for Kamloops, where they arrived on Saturday; at Kamloops they were joined by three men, one of them named Burgess who had a team of horses and a democrat. The five men travelled in the two rigs for about eighty miles when, owing to the cold and lack of horse feed, they decided to turn back. The accused then drove with Burgess and the other three travelled in the rig with the one horse. When they got back as far as the Canadian Northern track Burgess and the accused decided, owing to information received from an Indian, to go in a side direction to look at some land about thirty miles away. Maxwell and the other two men proceeded towards Kamloops with the horse taken from Vernon. After Burgess and the accused had gone about half way on their journey, owing to unfavourable indications, they concluded to turn back and they caught up to the other three men shortly before their arrival in Kamloops. Upon reaching Kamloops Maxwell and the accused had a dispute over the horse and the local policeman intervened, taking the horse into his possession until he could reach Harwood in Vernon by telephone. Harwood on being advised of his horse being in Kamloops expressed surprise and said he did not know that his horse was taken away. The policeman then allowed the accused to take the horse to Burgess's ranch about eight miles away. A few days later the accused went to Stettler, Alberta, taking the horse with him. Three weeks later he sold the horse for $100. It was subsequently disclosed that the accused had not taken Harwood's horse from the range at Vernon, but one of much greater value belonging to a man named Bishop. The questions submitted by counsel for the accused were as follow:

"(1) As to whether His Lordship erred in charging the jury as follows: 'It does not make any difference what time he got the guilty knowledge or determined to commit the theft.'

"(2) There being a question on the evidence as to the circumstances under which the horse in question was taken by the accused from Vernon, B.C., to Kamloops, B.C., and from Kamloops to Stettler, Alberta, as to whether His Lordship erred in not instructing the jury that if they should find that the theft was committed in Alberta they could not convict.

"(3) Being charged on two counts and convicted on two counts should not the judge have directed the jury that they could only find him guilty on one count and not having done so there should be a new trial?"

The appeal was argued at Vancouver on the 9th of December, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

A. D. Taylor, K.C., for the accused: The accused was tried on two counts (1) stealing, and (2) receiving knowing it to have been stolen. The accused thought he had taken Harwood's horse and did not know it was Bishop's until he got into Alberta. The crime was committed in Alberta and not in British Columbia: see *Patrick and Pepper's Case* (1783), 1 Leach, C.C. 253; *Rex* v. *Martin* (1912), 21 W.L.R. 658 at p. 661. A man cannot be indicted in one county when the crime is committed in another. The indictment contained two counts and prisoner was found guilty on both. This cannot be done and the judge should have so charged the jury: see *Rex* v. *Lum Man Bow and Hong* (1910), 15 B.C. 22; *Reg.* v. *Lamoureau* (1900), 10 Que. K.B. 15. As to allowing a prisoner to suffer through errors by the jury see *Allen* v. *Regem* (1911), 44 S.C.R. 331.

Argument

R. L. Maitland, for the Crown: The accused was going to pay Harwood $20 for his horse, but he took one worth $150. Accused may be convicted on both counts: see *Reg.* v. *Hughes* (1860), 8 Cox, C.C. 278; Russell on Crimes, 7th Ed., 135; *Reg.* v. *Evans* (1856), 7 Cox, C.C. 151. There was a break, as for a time he did not have the horse in his possession. He got the horse later however and went to Alberta: see *Rex* v. *Dyer and Difting* (1801), 2 East, P.C. 767. If there is continual transaction you cannot have a dual position, but where there is a break such as there was here he not being in possession for a time he can be found guilty on both counts: see *Rex* v. *Theriault* (1904), 11 B.C. 117.

Taylor, in reply.

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MACDONALD, C.J.A.: I would dismiss the application. There are only two points involved in the case. The first is, were the following words in the learned judge's charge to the jury wrong in law: "It does not make any difference at what time he [meaning the prisoner] got the guilty knowledge or determined to commit the theft." Now I stop there for a moment to say that what appear to be the facts in this case are, that the prisoner took the horse from Vernon to Kamloops, innocently, as he claimed, intending to buy it and understanding that he had the leave of the owner's son to take it. After taking it to Kamloops he proceeded to the Province of Alberta and there sold it.

Now it is clear that if he took it innocently, and afterwards determined to steal it, it was important to know whether he came to that determination in the Province of British Columbia. If he came to that determination in the Province of British Columbia, then his offence was committed in the Province of British Columbia. If on the other other hand he first conceived the guilty act in the Province of Alberta he could not be tried in the Province of British Columbia and a jury could not convict him here. So that if we take the sentence I have just quoted from the learned judge's charge, standing alone, I think it was calculated to mislead the jury; but the learned judge went on to say: "You might believe that it was his belief alright when he left Vernon,"—that is to say the innocent belief that he had leave to take the horse—" and when he got to Kamloops, but if you think that when he took that horse out of this country he knew very well that Harwood would object to his doing it, and he had no right to do it, then he is guilty of theft."

The learned counsel for the Crown relies upon these words as qualifying the wider statement made in the first sentence I quoted, so as to make it on the whole a proper charge—a charge which would not mislead the jury. I think that there was a charge from which the jury might very well conclude that in order to find the accused guilty of theft, they must come to the conclusion that he conceived the guilty intent before he took the horse out of the Province. That is the inference that I

would draw from it and I do not think I should assume that twelve intelligent men, sitting as a jury in the case, would draw any other inference than that, from it.

With regard to the other point, I think there was error in finding the prisoner guilty on both counts, I think he was properly found guilty on the first count, but not on the second, for this reason, that unless in the special case referred to by the learned counsel for the Crown, of a break in the ownership of the article stolen, that is to say, where the thief had parted with it and had afterwards got it back—it is impossible to say that one person can be both the thief and the receiver or the retainer of the thing stolen. If it were so, then every thief is guilty of the double offence of stealing and retaining, or stealing and receiving. I do not think Parliament ever intended any such thing. When the section was amended, as it was some years ago, so as to cover retaining as well as receiving, that was done, as I think I pointed out in the case of *Rex* v. *Lum Man Bow and Hong* (1910), 15 B.C. 22, to meet cases of the receiver receiving the stolen property innocently, but afterwards retaining it guiltily. The section as amended now, makes a person guilty of receiving if he retain after guilty knowledge.

MACDONALD, C.J.A.

This case comes before us on an application to direct the learned judge to reserve questions, and therefore I have no right to say that I would quash the conviction on the second count. It is sufficient to say that I would not direct the learned trial judge to reserve these questions, because no good result would come from it. If they had been reserved and were before us now, I would quash the conviction on the second count, but that would not relieve the accused, as he was rightly convicted on the first count and no injustice will be done. His punishment has not been made heavier by reason of the jury's verdict on the second count.

IRVING, J.A.: I have nothing to add, I would refuse the application.

IRVING, J.A.

MARTIN, J.A.: That also is my view. I only have to add that the definition of the one continuing transaction, which is

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to be found in *Rex* v. *Dyer and Difting* (1801), 2 East, P.C. 767 at p. 768, excludes the distinction that counsel for the Crown drew, in regard to the break in possession, based upon Russell on Crimes and Misdemeanours. The authorities are collected in Roscoe's Criminal Evidence, 13th Ed., at p. 738.

To those references which have been cited, I add that made in the case that the Chief Justice referred to, *Rex* v. *Lum Man Bow and Hong,* to the case of *Rex* v. *Theriault* (1904), 11 B.C. 117. The Court (of which I was a member) there proceeded on precisely the same assumption that we give effect to now.

MARTIN, J.A.

GALLIHER, J.A.

GALLIHER, J. A.: I also agree for the reasons given by the learned Chief Justice.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree.

Application dismissed.

Solicitor for the accused: *J. A. Campbell.*
Solicitor for the Crown: *R. L. Maitland.*

REX v. JIM GOON AND WONG SING.

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REX v. JIM GOON

Criminal law—"Prosecuting officer"—Clerk of the peace—Charge signed by Crown counsel—Speedy trial—Jurisdiction—Omnia præsumuntur—Prisoner released on bail—Custody—Right of to elect for speedy trial—Criminal Code, R.S.C. 1906, Cap. 146, Secs. 823, 824, 827 (3) and 1019—Can. Stats. 1909, Cap. 9, Sec. 2.

The accused appealed from a conviction upon the ground that there was no proper "prosecuting officer" present at the trial to prefer the charge against him as required by section 827, subsection 3 of the Criminal Code. The point was not taken at the trial and the record merely contained a formal charge signed by the Crown counsel and the certificate of the clerk of the peace as to the conviction.

Held, that the doctrine of *omnia præsumuntur* applied and that from the certificates of conviction it must be assumed that the clerk of the peace was present in Court and discharged his duty in all respects.

Prisoners committed to trial and subsequently admitted to bail on condition that they are to appear within two weeks or whenever called upon to make their election under the speedy trials clauses of the Criminal Code can upon their voluntary appearance make that election and confer jurisdiction upon the judge.

Per IRVING, J.A.: In practice officers are usually appointed by the Province to take charge of all cases under the Act and appointments to prosecute may be made *ad hoc*; instructions to counsel by telegram or telephone to conduct a prosecution is sufficient authority for him to state to the judge that he appeared for the Crown, and for the judge to recognize his appointment as prosecuting officer, and to act upon the charge preferred by him.

Per MARTIN and MCPHILLIPS, JJ.A.: The signature of Crown counsel at the foot of the charge is improper and superfluous and contrary to all correct precedent, and the trial judge should have ordered it to be expunged as an unwarrantable innovation upon the record.

CRIMINAL APPEAL from the refusal of MCINNES, Co. J., on the 18th of November, 1915, to state a case for the opinion of the Court of Appeal on behalf of the accused, who were convicted and sentenced to two years' imprisonment for wounding one Gee Chong. The charge preferred at the trial of the prisoners was signed "W. M. McKay, Crown counsel." It was submitted by the prisoners' counsel that the Crown counsel is not a "prosecuting officer" and there was no proper "prosecuting officer"

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present at the trial to prefer the charge against the prisoners for which they had been committed for trial as section 827 subsection 3 directs; also that this was an objection that went to the jurisdiction and the judge had no power to try the accused under the speedy trials clauses of the Criminal Code. It was further submitted that the prisoners being out on bail they cannot make an election for speedy trial under section 827 of the Criminal Code. The questions submitted for a stated case to the learned judge below were as follow:

"(1) Did the prosecuting officer prefer the charge against the accused persons in this case as provided in subsection 3 of section 827 of the Criminal Code and was it necessary that such charge should be so preferred to give me jurisdiction to try the accused under the speedy trials clauses of the Code?

"(2) Did William M. McKay, Esq., act within the definition of the prosecuting officer as defined by section 823 of the Criminal Code, subsection (b) in purporting to prefer the charge against the accused as provided by said subsection 3 of section 827 of the Code?

"(3) Were the said accused persons properly convicted by me, in view of the fact that sections 826 and 827 of the Criminal Code were not complied with in the case of the accused persons?

Statement

"(4) Was it necessary that the fact of the statement to the accused that he was charged with the offence described in the charge and that he had the option to be tried forthwith before the judge without the intervention of a jury or to remain in custody or under bail to be tried in the ordinary way by the Court having criminal jurisdiction being made in pursuance of section 827 of the Code should appear upon the records of the Court over which the judge presides and as part of such records?

"(5) Had I the jurisdiction under Part XVIII. of the Criminal Code to put the accused persons to their election to be tried by a judge without the intervention of a jury or to be tried in the ordinary way by the Court having criminal jurisdiction they at the time not being in custody or in the common goal but being on bail?"

The appeal was argued at Vancouver on the 8th of December, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Martin, K.C., for the accused: The County judge refused to state a case. We say first no prosecuting officer was appointed to act as required by section 827, subsection 3 of the Code, and

Argument

secondly the Court has therefore no jurisdiction to try the accused under the Speedy Trials Act. Section 1019 of the Code does not apply. A prosecuting officer is essential to constitute the Court. The charge was preferred by Mr. *McKay*,

who is the permanently appointed Crown counsel, but a prosecuting officer is an absolutely distinct person. Mr. *McKay* is not appointed Crown counsel by order in council, nor is his appointment in any way connected with section 183 of the County Courts Act. This is a matter exclusively for the Dominion Parliament, and once a Dominion jurisdiction is established there cannot be a Provincial one. No objection was taken to Mr. *McKay* to act, but this is a question of jurisdiction and it is not necessary: *Reg.* v. *Paquin* (1898), 2 Can. Cr. Cas. 134. The judge has no jurisdiction until a charge is made by the officer properly constituted according to the statute: see *Rex* v. *McDougall* (1904), 8 Can. Cr. Cas. 234; *Reg.* v. *Gibson* (1896), 3 Can. Cr. Cas. 451; *Rex* v. *Breckenridge* (1903), 7 Can. Cr. Cas. 116; *Reg.* v. *Burke* (1893), 24 Ont. 64.

Charles Macdonald, on the same side: The Court has a statutory jurisdiction only and the statute must be strictly complied with. When out on bail they could not elect, and the Court has no jurisdiction to give speedy trial even by consent to one out on bail: *Rex* v. *Day* (1911), 16 B.C. 323; *Regina* v. *Lawrence* (1896), 5 B.C. 160; *Reg.* v. *Smith* (1898), 31 N.S. 411; *Rex* v. *Komiensky* (*No. 2*) (1903), 7 Can. Cr. Cas. 27 at p. 29; *Rex* v. *Wener* (1903), 6 Can. Cr. Cas. 406 at p. 411. As to the form of the charge see Tremeear's Criminal Code, 2nd Ed., 661-2.

Argument

W. M. McKay, for the Crown: The same point was in *Rex* v. *Bela Singh* [(1915), 22 B.C. 321]. Questions 1 and 2 are hypothetical: see *Reg.* v. *Whitehead* (1866), 10 Cox, C.C. 234 at p. 237; *Rex* v. *Gray* (1903), 68 J.P. 40; *In re Criminal Code* (1910), 43 S.C.R. 434; *Rex* v. *Hogarth* (1911), 18 Can. Cr. Cas. 272; *Rex* v. *Lynn* (1910), 19 Can. Cr. Cas. 129. The second point raises the question of jurisdiction. This charge is analogous to an indictment under section 2 (16) of the Code: see *Rex* v. *Cross* (1909), 14 Can. Cr. Cas. 171. A charge in the Speedy Trials Court is analogous to an indictment. Sections 898 and 1007 of the Code should have been invoked, and it not having been done and the prisoners having been found guilty, any defects are cured under

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section 1010: see *Rex* v. *Battista* (1912), 21 Can. Cr. Cas. 1 and *Rex* v. *Holyoke; Ex parte McIntyre* (1913), *ib.* 422. The words "prosecuting officer" have never been defined. As to Crown counsel acting as such see *Rex* v. *Faulkner* (1911), 16 B.C. 229; 19 Can. Cr. Cas. 47. In any case it does not go to the jurisdiction and no substantial injustice has been done: see *Reg.* v. *Woods* (1897), 2 Can. Cr. Cas. 159; *Rex* v. *Lew* (1912), 17 B.C. 77; 1 D.L.R. 99 at p. 103. The matter of appointing a prosecuting officer is one of fact, and having been appointed prosecuting counsel and acted thereunder as prosecuting officer for six years there is a presumption of law that I have the power to so act: see Best on Evidence, 11th Ed., pp. 356 to 359; Archbold's Criminal Pleading, 24th Ed., 406; *O'Neil* v. *The Attorney-General of Canada* (1896), 26 S.C.R. 122; 1 Can. Cr. Cas. 303 at p. 315; *Ex parte Thomas Curry* (1898), 1 Can. Cr. Cas. 532 at p. 533; *Ex parte Gaynor and Greene* (*No. 4*), (1905), 9 Can. Cr. Cas. 240 at p. 252; *Kokoliades* v. *Kennedy* (1911), 18 Can. Cr. Cas. 495 at p. 502; *Rex* v. *Wilson* (1913), 22 Can. Cr. Cas. 161. As to the question of being out on bail, subsection (4) of section 825 deals with a different class of persons: see *Rex* v. *Daigle* (1914), 23 Can. Cr. Cas. 92; *Rex* v. *County Court*; *Re Walsh, ib.* 7; *Rex* v. *Price and Burnett* (1914), 19 D.L.R. 229.

Argument

Martin, in reply: The Crown counsel is the Crown's advocate, whereas the Crown prosecutor is an administrative officer to do a particular thing: see *Rex* v. *Turner* (1910), 1 K.B. 346.

Cur. adv. vult.

4th January, 1916.

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 argument before us took a very wide range, but the appeal can, I think, be disposed of on two very short grounds.

Mr. *Martin's* contention is that as no person has been appointed to act as "the prosecuting officer" there is a lack of

jurisdiction in the Court to try any person in the County Court Judge's Criminal Court.

Under the terms of the British North America Act there is committed to the Dominion—section 91 (27)—power to legislate in respect of "criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters."

To the Province is entrusted—section 92 (14):

"The administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and of criminal jurisdiction . . . . ."

Bearing the above distribution of legislative powers in mind we see that the prosecuting officer (assuming he is a statutory officer) must be a Provincial officer. His appointment would be part of the organization of the Court. The interpretation clause—823 (b)—amended in 1909 by chapter 9, does not help Mr. *Martin's* argument. It merely states what officials are included within the words "prosecuting officer." It does not limit but rather extends the words "prosecuting officer" so as to include under that designation persons who otherwise would not be regarded as coming within the term "prosecuting officer." The extension no doubt was advisable in view of the introduction of the power committed to the prosecuting officer to take (in the absence of the judge) the prisoner's election. This power of the prosecuting officer to take the prisoner's election and advise him of the day for his trial is very like the power conferred on a mayor in England who, in the absence of the recorder, must open the Court and adjourn the holding thereof.

IRVING, J.A.

This power does not authorize the mayor to sit as a judge of the Court, for the trial of offenders, or to do any other act in the character of a judge of the Court: Stephen's Digest of Criminal Procedure, p. 28. I think that the due appointment of a person as prosecuting officer is not a question of jurisdiction, using that word in its proper sense, namely, the authority which a Court has to decide matters that are litigated before it, or to take cognizance of matters presented, in a formal way, for its decision. You look to the Act of Parliament for the limitations of the jurisdiction of the Court; whether or not a matter is presented in a formal way by a person who professes

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to act as "Crown counsel" is not a question of jurisdiction. The words "Crown counsel" may if necessary be rejected as surplusage. They are only an abbreviated way of stating what is found in all old records that so and so "who prosecuted for our Lord the King in this behalf." In practice officers are usually appointed by the Province to take charge of all cases proper to be brought up under the Act, but it is not uncommon that an appointment should be made *ad hoc,* and in those cases barristers are frequently instructed by telegram or by telephone to conduct the prosecution, and that in my opinion is sufficient authority for counsel to state to the judge that he appeared for the Crown and for the judge to recognize his appointment as prosecuting officer, and to act upon the charge preferred by him, if it is within the depositions.

The doctrine *omnia præsumuntur* would apply. To give examples of the application of that doctrine may seem superfluous, but it is presumed that all who act as justices of the peace or constables have been duly appointed: *Berryman* v. *Wise* (1791), 4 Term Rep. 366. Proof that a man has acted as constable is sufficient evidence that he was a constable even on a trial for his murder when the offence would have been only manslaughter if he had not been a constable: *The Gordons' Case* (1789), 1 Leach, C.C. 515. On an indictment for perjury before a surrogate of an Ecclesiastical Court, proof

IRVING, J.A.

that the person who administered the oath had acted as surrogate was held *prima facie* evidence that he has been duly appointed and had authority to administer the oath: *Rex* v. *Verelst* (1813), 3 Camp. 432. In *Reg.* v. *Roberts* (1878), 14 Cox, C.C. 101, the doctrine was held applicable to the proof of perjury where it was objected that the appointment of the deputy judge before whom the perjury was committed, had not been established.

The facts regarding the point discussed by Mr. *Macdonald* are not quite accurately stated in the question submitted to the learned judge. The prisoners were committed for trial by the magistrate who refused bail, on the 2nd of November. Later, they were admitted to bail on the order of a County Court judge on the condition that they were to appear within two

weeks or whenever called upon to make their election under the Speedy Trials Act.

On the 9th of November they attended before McInnes, Co. J. and elected for a speedy trial. On the 18th of November, 1915, the trial came on to be heard. It is not stated that the prisoners when they appeared before the Court were placed under arrest, nor is it stated that they were at liberty between the 9th and the 18th. In my opinion it makes no difference that they were not placed under arrest, and that they walked out of Court after they had made their election without even saying "by your leave." When they appeared in Court they were in law in custody. Had the sheriff been present in Court on that occasion (I understand he was not) they would not have been more in custody than they were. It would not have been necessary for him to seize or otherwise exercise control over them in any way. Section 825 dealing with the "jurisdiction" of the Court, says:

"Every person committed to gaol for trial [on a certain class of cases] may, with his own consent, be tried."

It is the fact of being committed to gaol, on one of the charges within those cases that confers on the prisoner the right to be tried speedily, and gives the judge jurisdiction.

IRVING, J.A.

It is true that in the sections under the *fasciculus* "procedure" provision is made (a) for those confined to gaol, including as well those who though not originally committed by the magistrate have been surrendered, as those who have been actually committed; and (b) for those who have been bound over under section 696 and are therefore at large.

In this case we have men who were committed to gaol but released on bail, surrendering voluntarily in a sense, but really in obedience to their obligation in their recognizances, and making their election and subsequently taking their trial.

In my opinion there is nothing in either point, and the appeal should be dismissed.

MARTIN, J.A.: In my opinion this motion should be refused.

MARTIN, J.A.

It is submitted that the conviction of the appellants in the "County Court Judge's Criminal Court of the County of Van-

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couver" (Criminal Code, Sec. 824, and *cf.* Subsecs. (a) and 2) should be set aside because in fact, it is alleged, there was no proper "prosecuting officer" present at the trial "to prefer the charge against him for which he has been committed for trial" as section 827, subsection 3 directs. It is further submitted that this is an objection to the jurisdiction to the same extent as though the prisoner has been tried by a judge who had no jurisdiction (as in *Reg.* v. *Paquin* (1898), 2 Can. Cr. Cas. 134) in that "county or union of counties or judicial district," as the case may be, under section 824, and therefore that section 1019 cannot be invoked to support the conviction, as the whole proceedings at the trial were absolutely void and of none effect owing to the failure of the nominated officer to prefer the charge.

It will be seen at once that, quite apart from other things, this contention that the presence of a proper "prosecuting officer" is essential to jurisdiction raises a question of fact (as well as a question of law as to what is meant by that term), *viz.*: whether or no a "prosecuting officer," within the meaning of the Act, was in fact present at the trial. It is conceded that as there was no evidence given on the point before the learned trial judge, owing to the objection not having been taken before him, we are restricted, in the determination of the legal question of jurisdiction (assuming for the present that it is one and can be so raised) to such facts as appear on the face of the record because there is no appeal to us on questions of fact (save under sections 1012 and 1021) and so we cannot properly receive or allow to be given, orally or otherwise, any further evidence to supplement the record: *Rex* v. *Carlin* (1903), 6 Can. Cr. Cas. 507; *Rex* v. *Spintlum* (1913), 18 B.C. 606; and *Rex* v. *Mulvihill* (1914), 19 B.C. 197; 49 S.C.R. 587. It was also conceded (apart from the alleged omission in the statute hereinafter noticed), as it must have been, that the clerk of the peace for the county would be a proper "prosecuting officer" even though that expression is not defined in section 823 (b) as regards this Province. It appears, indeed, from the time that these Speedy Trial Courts were first established (originally for Ontario and Quebec only)

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by the Act of 1869, Cap. 35 of 32 & 33 Vict., that clerks of the peace and county attorneys were by name recognized as proper prosecuting officers: see section 4; and *cf.* Cap. 175, R.S.C. 1886, Sec. 7; and section 767, subsection 2 of the Criminal Code of 1892 which refers to "the county solicitor (*sic*) clerk of the peace or other prosecuting officer," and *cf.* sections 772-3. In anticipation of the extension of these tribunals to this Province, there was passed on the 28th of April, 1888, "An Act to constitute County Court Judge's Criminal Courts," section 3 of which provides for the appointment by the Lieutenant-Governor in Council of clerks of the peace for every County Court district, and part of their duties is to "issue all process, arraign prisoners, record verdicts," etc. I only note that though this power of appointment was in fact conferred by statute, the office was a very ancient one existing at common law and was introduced here with other judicial machinery in early colonial days (see *Sheppard* v. *Sheppard* (1908), 13 B.C. 486; approved in *Watts and Attorney-General for British Columbia* v. *Watts* (1908), A.C. 573 at p. 579) and therefore appointments could have been made to it by the Crown without any statute, as was anciently done by the *custos rotulorum* as recited so long ago as 1545 in the preamble to Cap. 1, 37 Hen. VIII., being "A Bill for *custos rotulorum* and the Clerkship of the Peace," which, with later Acts, is learnedly considered in *Harcourt* v. *Fox* (1693), 1 Shower 506.

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Turning then to the record before us, kept and filed pursuant to section 824, subsection 3, we find that the clerk of the peace for the county duly certified on the 18th of November last to the conviction on that day of the appellant Wong Sing, and next day likewise certified to the conviction at the same time of the other appellant Goon. I note, in passing, that the form of record of conviction to be signed by the judge, as required by section 833, Form 61, is not before us, as it should be. From these certificates, and even in their absence, we must assume that the clerk of the peace was present in Court, and discharged his duty in all respects and that the trial proceeded according to law and practice and that nothing contrary to the ordinary course of procedure occurred, otherwise the

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presiding judge would have taken appropriate action to insure the attendance of necessary officials or otherwise. In the course of his duty, the clerk of the peace would in this Province (I speak from former long experience as a judge in these Speedy Trial Courts in many and widespread parts of this Province while on circuit, exercising the special jurisdiction conferred upon judges of the Supreme Court by the Code of 1892, Sec. 763 (*a*) (v.) and preserved to this day) at the opening of the trial of the accused "prefer the charge against him for which he has been committed for trial," which is done by reading it to him, as it appears from the information and complaint laid against him upon which he was committed for trial (as well as such additional charges as may by leave of the judge be preferred by the prosecuting officer under section 834) and when that is done the preferring of the charge is complete and constitutes the first part of the arraignment, the second and completing part of which consists in asking the accused if he is guilty or not guilty: Roscoe's Criminal Evidence, 13th Ed., 166. These things seem so elementary to one accustomed to criminal procedure that one feels almost apologetic in stating them, but the matter became so confused in the argument that it is desirable to restate them so that the exact situation may be understood for future guidance.

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There is no essential difference in this "preferring" the charge against the accused at the trial and "the stating" of it to him by the judge (or prosecuting officer) when the accused is first brought before him for his election under the first part of the same section 827 (a).

What then is it that is relied upon to establish the contention that the clerk of the peace did not in fact do his duty? Nothing, except that at the foot of the charge appear the words "W. M. McKay, Crown counsel." This charge contains one count for inflicting grievous bodily harm in addition to the sole original one, wounding with intent, upon which the accused were committed, and it may be that accounts for the fact of counsel being called in to settle the altered form of the charge, but ordinarily there is no occasion to do so because, as already noted, it usually remains the same as that upon "which he has

been committed for trial," and so there is no necessity for any alteration, and ordinary cases at least come within the scope of the duty of the clerk of the peace, as may conveniently be found set out in Archbold's Criminal Pleading, 24th Ed., 23:

"Drawing the indictment.]—In ordinary cases, upon furnishing the clerk of assize, clerk of arraigns, or clerk of the indictments at the assizes, or the clerk of the peace at sessions, with the particulars of the offence, he will draw the indictment; but in cases where more than ordinary care may be requisite in framing the indictment, it is better to get it drawn by counsel, and then let it be engrossed on plain parchment, without stamp."

And it was said by Holt, C.J. in *Harcourt* v. *Fox, supra,* at p. 530, that

"As my brother Gregory observed, the clerk of the peace does act for the King as his attorney, and at the sessions does join issue for the King. The *custos* names him for this reason, because the rolls and records of the sessions being by the commission put into the custody of the *custos rotulorum,* the clerk being the person that must be trusted with the rolls to make entries upon, to draw judgments, to record pleas, to join issues, and enter judgments; then of common right, by the common law of the land, it belongs to him that hath the keeping of the records, to nominate this clerk, and not to any one else."

To my mind the only legal deduction that should be drawn from counsel's signature at the foot of the charge is that the clerk of the peace requested him to draw it up, and after having done so he signed it, quite improperly and superfluously, and contrary to all correct precedent in such cases in this Province, but possibly out of some fancied analogy to the civil practice in England which by rule 200 requires that if pleadings are settled by counsel they should be signed by him, differing in this respect from our Supreme Court Rule 200, *cf. Page* v. *Page* (1915), 22 B.C. 185 at p. 196; 25 D.L.R. 99 at p. 102. I speak positively on this point in view of my long and wide experience above noted. There is not, and never was any more propriety or necessity either by statute or practice for counsel to sign the charge under section 827 than to sign a bill of indictment to be preferred before the grand jury, or the indictment itself after it has been preferred by the grand jury against the accused. I am not referring to the written consent of the judge or the Attorney-General indorsed upon the bill under section 873 or any other indorsements under the recent change in the practice: *Rex* v. *Montminy* (1912), 20 Can. Cr. Cas. 63; *Rex*

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v. *Faulkner* (1911), 16 B.C. 229, wherein it was held that when the Crown counsel prefers a bill under section 872 there need be nothing in writing to shew that he does so. If I had been presiding at the trial and my attention had been drawn to the fact that the charge bore the signature of counsel I should have ordered it to be expunged as an unwarrantable innovation—an excresence—upon the record which amounted to nothing and should be entirely ignored. It cannot, I think, fairly be contended that merely because the signature of counsel was added to the charge at some time (whether a week, a day, or a minute before the trial, we know not) therefore it must be presumed that the clerk of the peace failed to discharge his duty in preferring the charge in the proper manner (hereinbefore mentioned) pursuant to subsection 3. On the contrary the presumption is that the proper officer properly discharged his duty in the presence of the presiding judge—*omnia præsumuntur,* etc. No authority need be cited in support of a maxim so well known, but a recent apt illustration of it is to be found in *Rex* v. *Wilson* (1913), 6 Sask. L.R. 348; 22 Can. Cr. Cas. 161 at p. 165; and see also *Rex* v. *Spintlum, supra.* I have not overlooked the fact, assuming this is to be viewed as a question of jurisdiction, that in the case of a Court of limited jurisdiction either in point of place or subject-matter, "its judgment must set forth such facts as shew that it has jurisdiction and must shew also in what respect it has jurisdiction." "But," as Lord Brougham goes on to remark, in *Taylor* v. *Clemson* (1844), 11 Cl. & F. 610 at p. 640, "it is another thing to contend that it must set forth all the facts or all the particulars out of which its jurisdiction arises." And he further lays it down that an appellate Court can decide these facts in its own way, thus (p. 641):

MARTIN, J.A.

> "It is necessary that the jurisdiction should appear, but there is no particular form in which it must be made to appear. The Court above, which has to examine, and may control the inferior Court, must be enabled somehow or other to see that there is jurisdiction, such jurisdiction as will support the proceeding; but in what way it shall so see is not material, provided it does so see."

I experience no difficulty in "seeing" the facts here from which the necessary inference may be drawn to support the legality of what was done.

In making the foregoing observations upon the impropriety of the charge being signed by the Crown counsel I have not overlooked the case that was cited to us on that point—*Rex* v. *Wilson, supra,* a decision of the Supreme Court of Saskatchewan, *in banc,* wherein it appears that at the opening of the trial a count was permitted to be added to the original charge but instead of said charge being redrafted so as to contain both counts, as is usually and properly done, the new count was written on a separate sheet of paper, signed by the "counsel and agent of the Attorney-General for the Province of Saskatchewan," and pinned to the original charge. It was held that this was sufficient to incorporate the new charge with the old; nothing turned upon the question of signature, and the point that neither by statute nor practice is it necessary that the charge should be signed was not brought to the attention of the Court. In truth the voluntary and unwarranted addition of unnecessary signatures to complete public documents amounts to nothing and has no effect upon them and only constitutes an improper defacement thereof, like a blot of ink. If a Court record is complete without being signed, the gratuitous, and therefore impertinent, addition thereto, at any time, of the signature of say, the Lieutenant-Governor, or Crown counsel, or chief janitor, or head charwoman or anyone else who might, *e.g.,* happen to see the charge lying upon the table of the clerk of the peace, any number of days before the trial, and form the opinion that it would be embellished by the addition of his or her signature, is of equal and none effect, other than the physical disfigurement thereof, in a legal sense. Therefore this charge must be regarded as though no such fanciful addition had been made to it, or that if made it had been expunged, and in such case the objection based thereon falls to the ground because there is nothing from which the inference can be drawn that the clerk of the peace or prosecuting officer did not discharge his duty and prefer the charge according to the statute.

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It was also submitted that the term "prosecuting officer" does not mean an advocate but a ministerial officer of the Court only, and therefore the Crown counsel could not, in any event,

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act in that capacity. In the view I have taken it is not necessary to pursue this subject far, but it is clear from a careful perusal of the statute that the submission is not correct, and that the term is a very loose one, and is used in various senses. For example, under section 826, subsection 2 and the first part of sections 827-8, the duty now discharged by the prosecuting officer in taking the election and re-election is one which was formerly discharged by the judge alone, and is of a judicial nature; then under subsections 3 and 4 of sections 827 and 833 the duties are primarily those of a ministerial officer of the Court; then under section 828 in the granting or withholding the consent for re-election after indictment, required by the proviso, there is the discharge of a duty quite distinct from either of the foregoing and pertaining more to the powers of the Attorney-General as representing the Crown; and finally, there is this curious and anomalous situation that under the provision in the interpretation section 823 (b) that in Ontario "prosecuting officer" includes the County Crown attorney, in that Province the prosecuting officer combines both the antagonistic duties of advocate and ministerial officer because by The Crown Attorney's Act, Cap. 91, R.S.O. 1914, the County Crown attorney is directed, *inter alia,* to conduct prosecutions at the County or District Court Judge's Criminal Court, Sec. 8 (*b*) (as to which *vide Rex* v. *Martin* (1905), 9 O.L.R. 218 at p. 231), and by The General Sessions Act, Cap. 60, R.S.O. 1914, Sec. 11 (2), "except in the County of York, every clerk of the peace shall be *ex officio* Crown attorney for the county or district of which he is clerk of the peace." In the County of York these offices "may be held by different persons." And further, the same subsection (*b*) declares that in Manitoba also "any Crown attorney" is included in the expression "prosecuting officer." This strange and unprecedented combination of antagonistic functions is, of course, the consequence of imposing new duties upon ancient as well as modern officers and it is difficult if not impossible to draw the line accurately between such protean capacities. The only thing certain is that no analogy can safely be drawn between such proceedings of new and special Courts and those of

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ancient ones. In making these observations I am not reflecting in the slightest upon the Courts in question; on the contrary, I have in my experience found that the machinery worked well and was easily adapted to the varying conditions of a vast country, and it is only when highly technical objections, based upon an incomplete study of the subject, are advanced that any imaginary difficulty is encountered, of which the present case is an instructive example.

It is further submitted that the statute, section 827, subsection 3 nominated and authorized only those persons to "prefer the charge" who are specified and defined as "prosecuting officers" in subsection (b) of the interpretation section 823, and that as there are none such specified for this Province, therefore no one can discharge that duty because of this omission in the statute. As to that there are several observations to be made, *viz.*:

(1) The said section is excepted from operation where "the context otherwise requires," as I think it does here, from the history of the legislation as hereinafter considered.

(2) It only says "prosecuting officer includes," etc., which primarily, and as here used, is not a term of restriction of meaning, but of extension as shewing that in addition to something already existing there is a further inclusion; and the difference is well brought out and marked by the prior definition of "judge" which "means and includes," etc., etc., and which therefore is primarily restricted to the "meaning" as defined: *The Queen* v. *Kershaw* (1856), 6 El. & Bl. 999 at p. 1007; *Reg.* v. *Hermann* (1879), 4 Q.B.D. 284 at p. 288, wherein Coleridge, L.C.J. at p. 288, said:

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"The words 'shall include' are not identical with, or put for 'shall mean.' The definition does not purport to be complete or exhaustive. By no means does it exclude any interpretation which the sections of the Act would otherwise have, it merely provides that certain specified cases shall be included."

And see Lord Watson in *Dilworth* v. *New Zealand Commissioner of Stamps* (1898), 68 L.J., P.C. 1 at p. 4.

(3) No attempt is made to define the term not only for this Province, but also for Quebec (the largest in Canada) and it is almost incredible that the requirements of two such immense

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portions of Canada should have been overlooked and unprovided for by Parliament; it would require very clear language indeed to justify any Court in reaching such a conclusion the result of which would affect innumerable convictions for many years.

From 1868 down to 1892 the words "prosecuting officer" do not appear in the statute, being first introduced by section 767 of the Criminal Code for 1892, *viz.*: "the county solicitor, (*sic*) clerk of the peace or other prosecuting officer shall prefer the charge," thus naming the two officers mentioned as being "prosecuting officers," as well as others undefined, and that expression is not defined by section 763 (b), which simply retains the former definition of "Crown attorney" and "clerk of the peace" to be found in 52 Vict., Cap. 47, Sec. 2 (1889), which definition is continued, in an expanded form, to include Ontario, in 1900, 63 & 64 Vict., Cap. 46, and through Cap. 146, Sec. 823 (b), R.S.C. 1906; with extension to Saskatchewan and Alberta by Cap. 45, Sec. 6, of 6 & 7 Edw. VII., in 1907, down to 1909, wherein by Cap. 9, Sec. 2 (Sch.), 8 & 9 Edw. VII., "prosecuting officer" is at last defined displacing in section 823 (b) as amended, the former expression "county attorney or clerk of the peace."

The strange thing to be noted is that though in 1900, by Cap. 46, of 63 & 64 Vict., Sec. 3 (Sch.) the expression "the

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prosecuting officer shall prefer the charge" first appears with the omission of the preceding words "in said original section 767 of the Code, 'county solicitor, clerk of the peace, or other,'" etc., yet no definition of the new expression is given till nine years later.

It must, first, be quite apparent I think from the history of this legislation that apart from any existing definition clerks of the peace and county attorneys are and always have been by it regarded as proper prosecuting officers, whatever may be said about others. The propriety of a clerk of the peace so acting has recently been recognized by this Court in *Rex* v. *Day* (1911), 16 B.C. 323, wherein it was decided that he properly adjourned the application to fix the trial and made the statutory entry of the prisoner's consent to be tried. And, second,

it is equally apparent that the definition is not intended to be a hard and fast one or the nomination by the Federal Parliament of particular officers to the exclusive exercise of the present prescribed duties. In other words, the term is not nominative of individuals but descriptive of various officers who may be appointed by the Provincial Government for the purposes of the statute, and the Federal Parliament adopts them as the machinery to carry out its legislation, while indicating, but not exhaustively, who may in certain Provinces be qualified to act in that capacity. Exactly what officers the expression includes I do not now attempt to say because that is a question of fact to be determined in each case wherein the right of an officer is challenged; it is sufficient for the purpose of this action to say that it still continues to include clerks of the peace in this Province. It is to be noted that in the Provinces of Saskatchewan and Alberta the definition already is so wide as to include "any person conducting under proper authority the Crown business of the Court."

There remains the point that accused persons who are out on bail cannot make an election. I am unable to find anything in the statute or in any of the cases cited, when properly understood, that really supports this contention. Once it appears that the "prisoner" has been "committed to gaol for trial" then section 826 is satisfied and the sheriff's duty to bring about an election of such "prisoner" under 827 begins. The fact that bail has been granted after the committal has been ordered does not alter the situation as regards the procedure to obtain the election. In the case proposed to be stated it is set out that the accused were "not in custody or in the common gaol but being on bail" (*sic*). This is a misconception of the words "in custody," and a failure to realize the distinction between custody and close or strict custody—*arcta custodia*. It was rightly observed by Wurtele, J. in *Reg.* v. *Cameron* (1897), 1 Can. Cr. Cas. 169, that "bail is custody and he is constructively in gaol," which explains the reference of the same learned judge in *Rex* v. *Komiensky* (*No. 2*) (1903), 7 Can. Cr. Cas. 27 at p. 29, that "the accused must be in custody awaiting trial." The reference of the same judge in *Rex* v. *Brecken-*

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ridge (1903), 7 Can. Cr. Cas. 116 at p. 120, that the accused person must "have been committed or bailed for trial," seems to be inconsistent with the following words, "that he be in actual custody awaiting trial," and not in harmony with his opinion as to the effect of bail above cited. But in my view there is now no doubt about the matter for it is said in Hawkins's Pleas of the Crown, 8th Ed., 138-9, Bk. 2, Ch. 15, Sec. 3, that

> "A man's bail are looked upon as his gaolers of his own choosing, and that the person bailed is in the eye of the law, for many purposes, esteemed to be as much in the prison of the Court by which he is bailed, as if he were in the actual custody of the proper gaoler. But I do not find this point clearly settled in relation to any other Court besides the King's Bench . . . . . ."

The principle is well shewn in *Foxall* v. *Barnett* (1853), 2 El. & Bl. 926 (citing Hawkins, *supra*) in a case where the plaintiff had been committed to gaol for trial on a charge of manslaughter found by a coroner's inquisition against him, but was afterwards bailed by a judge, and the inquisition quashed by *certiorari*. Lord Chief Justice Campbell said, Coleridge, J. agreeing (p. 932):

> "The plaintiff, by being bailed, was released only from imprisonment within four walls: he still had to restore himself to a state of freedom; which he did not do until he had the inquisition set aside: till then the imprisonment was not done away with."

This view is supported in principle in this Province by the decision of MCCOLL, C.J. in *Regina* v. *Lawrence* (1896), 5 B.C. 160 at p. 164, applying *Reg.* v. *Burke* (1893), 24 Ont. 64, affirming the right to election "although the accused has never been received into custody at all except in the way of surrender merely for the purpose of appearing before the judge for election." If close custody can be dispensed with so as to obviate the necessity of going to gaol at all and thereby being actually "imprisoned within four walls" why cannot such dispensation be extended to the case of those who have actually been in gaol but have been later given a certain form of restricted freedom by being bailed? It is not, in my opinion, necessary that the "prisoners" when brought before the judge for election should be surrendered by their bail: so long as they are before the judge and still under bail that is sufficient

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to satisfy the statute and their election in such case is a valid one for they are both "prisoners" and "otherwise in custody" at that time within the true intent and meaning of sections 825 (4) and 827. The point, indeed, has already been decided by this Court, as I have indicated, in the case of *Rex* v. *Day, supra,* where the accused having been bailed after committal came voluntarily before the judge (not being brought up by the sheriff) and elected, but the Court unanimously rejected as "altogether too technical" the submission that the election was thereby invalidated.

It follows that leave to appeal (section 1016) from the refusal of the learned judge below to state a case should not be granted.

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

GALLIHER, J.A.

MCPHILLIPS, J.A.

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

Appeal dismissed.

MURPHY, J.

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MARITIME TRUST CO. v. ALCOCK

MARITIME TRUST COMPANY v. ALCOCK.

Company law—Winding-up—Order to pay a call—Action to recover judgment for amount of call—Costs—Disposition of owing to more expensive mode of procedure—Winding-up Act, R.S.C. 1906, Cap. 144—Winding-up Rule No. 34.

Upon a company in liquidation obtaining an order under the Winding-up Act for the payment of a call of a certain sum of money by the defendant, the company may sue for judgment on the call if a final order for judgment has not been obtained under the Act, but where a more expensive mode of procedure is adopted in obtaining judgment the Court will order the party taking such course to pay the difference in cost as compared with the less expensive and equally effective method.

Statement

ACTION by plaintiff Company (in liquidation) to recover judgment for a call of $950, ordered to be paid by the defendant in liquidation proceedings, tried by MURPHY, J. at Van-

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couver on the 22nd of December, 1915. The facts are that by an order of the 23rd of October, 1914, the liquidator was given power to bring any actions he saw fit. By an order of the 4th of May, 1915, made in the liquidation the defendant was ordered to pay a call of $950 on or before the 20th of June, 1915. By an order of the 30th of June, 1915, liberty to serve notice of call by registered mail was given. Defendant duly received such notice. On the 22nd of September, 1915, a writ was issued in the Supreme Court in this action to recover judgment for this call of $950. The action came on for trial when all other defences were abandoned other than the following: (1) That there had been a merger of the claim in a judgment by operation of the Dominion Winding-up Act which makes any order for payment of money by a judge under the Winding-up Act a judgment. (2) There had been an election to proceed under the Winding-up Act and in consequence recourse to a Supreme Court suit could not be had. (3) In any event a more costly method of proceeding had been adopted and the Court should apportion the costs.

Statement

W. C. Brown, for plaintiff.
Dickie, for defendant.

9th February, 1916.

MURPHY, J. (after stating the facts): Under the Winding-up Rule, No. 34, it is directed that at the time of the making of an order for call further proceedings relating thereto shall be adjourned as therein directed. This rule further provides that on such adjourned date an adjudication shall be made. Whilst the Act therefore apparently makes an order for payment of money a judgment the rules provide two steps before a final order can be obtained. For this reason I hold on the facts there was no merger. I further hold that it was open to the Company to sue on the call perfected as it was. The steps taken were necessary to make the call legal. But under the Winding-up Act a single further application would serve to dispose of the liability of all contributories on whom the call had been made. If the method here adopted of suit can be pursued and costs claimed as of right costs in liquidations will

Judgment

be enormously and fruitlessly incurred. Considering the volume of liquidation proceedings now going on in our Courts the question is of great importance. The authorities are clear that where a more expensive mode of determination is adopted the Court has jurisdiction to order the party taking such course to pay the difference in cost as compared with the less expensive and equally effective method. It was admitted in argument that the proceedings under the Winding-up rules, if pushed to a conclusion, would give all the remedies obtainable under a Supreme Court judgment. No bad faith is to be imputed to plaintiff's solicitors. Admittedly they were under a misconception of the law because of differences between the Canadian and English Winding-up Acts. I think then I must deal with the matter as follows: There will be judgment for plaintiff for amount claimed with such costs only as would be recoverable on an application under the Winding-up Act for the final order for payment plus the costs of the issue raised by defendant and abandoned at the trial. The defendant is to have the excess costs caused to him by bringing a Supreme Court action as compared with completing the matter against him under the Winding-up Act, a set-off to be made. Copy of this judgment to be filed in the winding-up proceedings for the information of the winding-up judge when passing the liquidator's accounts.

Judgment

Judgment accordingly.

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AMYOT v. QUINBY

AMYOT v. QUINBY AND WATT.

Promissory note—Agreement to renew at maturity—Condition precedent—Must be strictly performed—Admissibility of evidence.

A promissory note for $150 made by a debtor and indorsed by a third party was given upon an undertaking in writing by the creditor, that if $60 and interest be paid on the note when it became due he would agree to its renewal for the balance due for a term of three months. The note was protested at maturity and on the following day the debtor tendered $60 with interest and a renewal note for the balance which the creditor then refused to accept. An action to enforce payment of the note was dismissed.

Held, on appeal (reversing the decision of SCHULTZ, Co. J.), that where there is a condition precedent such as in this case it must be strictly performed. The agreement to extend the time never came into operation because the condition upon which the right to an extension was based had not been complied with.

Statement

APPEAL from the decision of SCHULTZ, Co. J. of the 16th of December, 1915. The action was against the defendant Quinby as maker and the defendant Watt as indorser of a promissory note for $150 with interest. The circumstances under which the note was given were as follows: The defendant Quinby was indebted to the plaintiff for rent for rooms he occupied in the Capitola Apartments in Vancouver. Messrs. Roberts, Maltby & Co., who were the plaintiff's agents, told Quinby that they would accept his note for $150 payable in three months if he obtained the indorsement of the defendant Watt (by whom Quinby was employed). An interview followed with Watt, and Roberts, Maltby & Co., on behalf of Amyot, agreed in writing that if Watt indorsed the note and at least $60 and interest were paid upon it when it became due, they would renew it for three months. The note was then made by Quinby in favour of Amyot indorsed by Watt and given to Roberts, Maltby & Co. When the note became due it was presented and protested for non-payment. On the following day Quinby offered the $60 and interest and asked that a renewal of the note be accepted for the balance,

but Roberts, Maltby & Co. refused to accept the money or renewal note. The plaintiff then brought action for enforcement of payment of the note and the trial judge dismissed the action. Plaintiff appealed.

The appeal was argued at Victoria, on the 5th of January, 1916, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Wilson, K.C., for appellant: The note in question was made by Quinby and indorsed by Watt and Roberts, Maltby & Co. for Amyot on the 15th of May payable in three months. On the 11th of May a letter was written by Roberts, Maltby & Co., Amyot's agents, to Watt agreeing to renew the note if $60 was paid on account when it became due. This document was made by parties extraneous to the note and should not be accepted in evidence as Roberts, Maltby & Co. were merely agents to collect rents: see *Heilbut, Symons & Co.* v. *Buckleton* (1913), A.C. 30 at p. 47; *Salmon* v. *Webb and Franklin* (1852), 3 H.L. Cas. 510; *Besant* v. *Cross* (1851), 20 L.J., C.P. 173; *New London Credit Syndicate* v. *Neale* (1898), 2 Q.B. 487; Best on Evidence, 11th Ed., 216, Sec. 223; *Smith* v. *Squires* (1901), 13 Man. L.R. 360; *Emerson* v. *Erwin* (1903), 10 B.C. 101. But even assuming the document should be allowed in evidence, the defendant should have protected the note but he did not do so; it went to protest and was dishonoured. There was no attempt to perform the condition within the time specified, namely, to pay the $60 and renew the note, but the day after the note was protested the defendant offered the $60 which was then refused. He must perform the condition within the time specified or we are entitled to sue on the note. Argument

O'Brian, for respondents: The note was not complete as the plaintiff never agreed to it or accepted it and there is no evidence to shew that the person to whom the note was made payable was the plaintiff. In any event the $60 and a renewal note for the balance should have been accepted, as it was a substantial compliance with the agreement: see *Souther et al.* v. *Wallace et al.* (1888), 20 N.S. 509; (1889), 16 S.C.R. 717.

MACDONALD, C.J.A.: I think the appeal should be allowed. It is quite clear to my mind that the agreement in question MACDONALD, C.J.A.

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could only be relied upon as a defence to an action of this kind had the condition precedent mentioned in the agreement itself been performed within the time specified. The condition in the agreement was that if $60 and certain interest were paid upon the note before maturity, the time for payment of the balance would be extended for a period of three months. Now it is conceded that the $60 and interest were not tendered until after maturity, until after protest of the note. Where there is a condition precedent such as in this case, it must be strictly performed. This agreement to extend the time never came into operation at all because the condition upon which the right to an extension depended was not complied with. Therefore I think the learned judge was in error in admitting the agreement in evidence.

MACDONALD, C.J.A.

IRVING, J.A.

IRVING, J.A.: I agree.

MARTIN, J.A.

MARTIN, J.A.: I agree. This case turns on a very simple question of fact. The condition upon which the note was to be renewed never was performed.

GALLIHER, J.A.

GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the same view. I wish merely to add that I do not think it necessary really to determine as to whether or not compliance with this agreement should have been proved, because, in my opinion, it is nothing but a collateral agreement in any event and one that could not be set up in this action. It is only available to Mr. Watt, one of these defendants, and if he still considers he has been wronged in this matter, he has a right of action against Roberts, Maltby & Co., but it does not amount to a defence in this action on the note. However, I do not wish to indicate as to whether or not, if the agreement had been complied with, whether we should consider whether it was absolutely incumbent upon the parties to pay the $60 and interest at the exact moment of the maturity of the note. Possibly equitable principles might have been invoked. It is true common law principles have in the main been considered in dealing with nego-

tiable securities and commercial loans, yet there are instances where equitable principles have been invoked and given effect to.

Appeal allowed.

Solicitors for appellant: *Wilson & Whealler.*
Solicitors for respondents: *McKay & O'Brian.*

BRANDEIS v. WELDON

Negligence—Attendance on patient in hospital—Escape of patient—Death by drowning—Relatives not advised of escape—Burden of proof.

Where a patient escapes from a hospital resulting in death by drowning and the attendants neglect to immediately notify the patient's husband upon learning of her disappearance, in an action for damages for negligence the burden is on the plaintiff to shew that the patient was not already deceased when her absence was discovered and that notification might have saved her.

APPEAL from the decision of HUNTER, C.J.B.C. of the 15th of October, 1915, and the verdict of a jury in an action tried at Cranbrook on the 14th of October, 1915, for damages caused by the negligence of the defendant in allowing the escape and consequent drowning of Mrs. Vencel Brandeis, the plaintiff's wife, from his hospital at Natal, British Columbia. On the 22nd of May, 1915, Mrs. Brandeis (who was a Bohemian and could not speak English) being ill with pelvic inflammation, the defendant who was the physician in attendance advised the husband to have her removed to his hospital where she would receive better treatment. She was removed to the hospital at once, her temperature that day being 101 1-5. On the following evening her temperature was 100 4-5, and to all appearances she was improving. A nurse attended her at about 10 o'clock in the evening when she appeared to be in a normal condition. At 11 o'clock the nurse again went to the room and found the patient had disappeared. She immediately

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told the matron who by telephone advised the doctor (defendant) of the patient's disappearance. The plaintiff lived about one mile from the hospital and, assuming the patient had gone home nothing further was done that night in the way of informing the patient's relatives of her disappearance. On the following morning (the 24th) the patient's clothes were found on the bank of the river about 200 feet from the hospital and her naked body was later found about a mile down the river. The jury brought in a verdict for $1,000 for which judgment was entered. The defendant appealed on the ground that there was no evidence upon which the jury could find negligence on the part of the defendant.

Statement

The appeal was argued at Victoria on the 6th of January, 1916, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Maclean, K.C., for appellant: The plaintiff must trace the damage to the cause he alleges as negligent. The question of not giving notice to the husband when they knew she had left the hospital is not material as there is no evidence as to whether the drowning took place before or after they discovered that she had left the hospital.

Argument

A. B. Macdonald, for respondent: This woman was a Bohemian. It is a rule that a foreign patient must be carefully watched. The doctor admits she should have been attended at least once an hour, and her clothes should not have been left in the room. This alone is sufficient evidence for a jury to pass upon the question of negligence.

MACDONALD, C.J.A.: I think the appeal must be allowed. There are only two items of negligence charged against the defendant in this case and one is that there was negligence on the part of his servants or nurses in not preventing this unfortunate plaintiff's wife leaving the hospital some time between 10 and 11 o'clock on the night in question.

MACDONALD, C.J.A.

The only thing that could be discovered in the nature of evidence on that point is that the nurse had seen her at 10:15; she was then in a normal condition, she was improving, her temperature had been improving, she was cheerful, there were no indications of irresponsibility or that she needed special

looking after or watching. The nurse came back approximately an hour afterwards and found her gone. She had got up and taken her clothes, with the exception of two small articles. The nurse assumed that she had gone home. The doctor was away and nothing was done until the next morning, when the husband came to inquire for his wife and was told she had gone home, and then the police were communicated with, a search was made for her, and her body was found in the creek.

On the evidence it seems to me that reasonable men could not find that the defendant or his servants were guilty of want of reasonable care in the discharge of their obligations towards her.

The other branch of the case turns on the fact that the plaintiff was not notified of the disappearance of his wife until next morning. It is evident if there was any want of reasonable care in visiting her after 11 o'clock that the earliest time for notifying the plaintiff should be fixed only at a time shortly after 11 o'clock when the nurse went to her room, and found that she had gone away. Assuming that there was an obligation to notify in the case of an apparently sane person leaving the hospital of her own accord, there was no evidence to shew that failure to notify was the cause of death, in other words that she was not already dead, when the nurse discovered her absence.

MACDONALD, C.J.A.

The onus was on the plaintiff to shew that death was caused by the failure of the defendant to notify, and there is not a tittle of evidence on this point.

IRVING, J.A.: I think the judge should have withdrawn the case from the jury on the ground that there was no evidence of want of care on the part of the hospital staff. There was nothing in the history of the case to shew that it required watching. There was no reason to anticipate that the woman would leave the hospital, and no reason to suppose if she had left, that she would do anything else than return to her own people.

IRVING, J.A.

It is for the judge to determine whether there is any case to go to the jury before he allows the jury to deal with it at all. I think he should have taken it away on the above grounds.

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There is a report of a case in England (*Hickmore* v. *St. George-in-the-East*) not unlike this. There the plaintiff's husband some months previously to the accident out of which the action arose, had suffered from delirium tremens and had been received into the infirmary of St. George-in-the-East. The patient was shortly afterwards discharged as cured and some months later was brought in again with a certificate from the parish doctor that he was suffering from fits, and was put into the fits ward, a reference being made at the time to his previous admission three months earlier. He shewed no symptoms of violence; but after a few days, when the nurse who was in charge was away, he broke the window, squeezed through the bars, and threw himself into a yard below and was killed. The widow brought her action on the ground that more vigilance should have been exercised. That is the point in this action.

IRVING, J.A.

The case was tried before Baron Huddlestone, who gave judgment in her favour. This was afterwards reversed in the Court of Appeal, which held that no evidence of negligence was disclosed. The case has never been fully reported, but it is mentioned in Beven on Negligence, 3rd Ed., Vol. 1, p. 245.

In the case before us there was no evidence to cause anyone to anticipate that the woman would behave as she did behave, and therefore there was no case to go to the jury.

MARTIN, J.A.: I agree. Even assuming that the husband should have been notified when the patient's absence was discovered, the only possible inference to be drawn from the evidence was that she was already dead when her absence was discovered, and therefore the notification would have been futile.

MARTIN, J.A.

GALLIHER, J.A.

GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am in agreement with my learned brothers, but I wish to add that it is a matter of regret that the verdict of the jury has to be overborne.

The hospital authorities in this case did all that the law requires, which was the best care that physicians and nurses could give in the circumstances. There is no evidence that the physicians and nurses were not competent and that

reasonable care was not exercised. That being so, the decision in *Hillyer* v. *St. Bartholomew's Hospital (Governors)* (1909), 78 L.J., K.B. 958, is really the governing decision, supplemented also by *Foote* v. *Directors of Greenock Hospital* (1912), S.C. 69. Apart from a special contract, the managers of a public hospital are not responsible for the patients they receive, provided they exercise due care in selecting a competent staff. I consider that in this particular case the attendance upon this patient was in its nature professional attendance and the professional attendants would be called upon to do all that was reasonable and proper consistent with their professional knowledge, and I cannot see there was any absence of that.

I feel very much impressed by the language of Lord Loreburn in *Kleinwort, Sons and Co.* v. *Dunlop Rubber Company* (1907), 23 T.L.R. 696 at p. 697, dealing with the verdict of a jury, "To my mind nothing could be more disastrous to the course of justice than a practice of lightly overthrowing the finding of a jury on a question of fact. There must be some plain error of law which the Court believes has affected the verdict or some plain miscarriage before it can be disturbed."

MCPHILLIPS, J.A.

In the present case, in my opinion, there was error of law as there was no sufficient evidence to be submitted to the jury in the establishment of negligence, and it is plain that there was no sufficient evidence to support the finding of the jury.

I would refer to the case of *Cooke* v. *T. Wilson and Sons* (1915), 32 T.L.R. 160, Phillimore, L.J. at p. 161.

In my opinion, the jury could only come to one conclusion in this case, and that conclusion should have been that there was an absence of negligence and being of that opinion, I consider that it is a proper case for the Court of Appeal to overthrow the verdict of the jury.

Appeal allowed.

Solicitor for appellant: *H. S. Banwell.*

Solicitors for respondent: *Harvey, McCarter, Macdonald & Nisbet.*

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Jan. 7.

SHIPWAY v. LOGAN.

SHIPWAY v. LOGAN

Practice—Costs of appeal—Security for—Proceedings to enforce.

Appeal—Notice of—Application to extend time for—County Court—Jurisdiction—Marginal rule 967—Dual jurisdiction—Effect of—County Courts Act, R.S.B.C. 1911, Cap. 53, Sec. 121.

The hearing of an appeal will not be refused on the ground that security for costs has not been given. It is the duty of the party entitled to take proceedings to enforce it.

A County Court judge has no power to extend the time for hearing an appeal under marginal rule 967 of the Supreme Court Rules. The exercise by a judge of his jurisdiction under said rule is a judicial act and not a question of practice and procedure as contemplated by section 121 of the County Courts Act.

Where a dual jurisdiction is conferred on two separate tribunals to do a particular act, to either of which a litigant may resort, upon his selecting one of them the other is excluded and the matter must be solely adjudicated upon by the forum to which he has decided to resort.

APPEAL by plaintiff from an order of LAMPMAN, Co. J. of the 3rd of December, 1915, granting the defendant's application for leave to appeal from the judgment in the action notwithstanding the expiration of the time allowed for giving notice of appeal. Judgment was delivered in the action on the 16th of December, 1914, but the formal judgment was not finally settled until the 23rd of February, 1915. Notice of appeal was served on the 27th of March following. On the hearing of the appeal on the 29th of June, 1915, the preliminary objection of the plaintiff that the appeal was out of time was allowed on the ground that the time for bringing the appeal ran from the 16th of December, 1914. The defendant then applied to said Court to extend the time for bringing on the appeal but the application was refused. On this appeal the preliminary objection was raised by the respondent that security had not been given by the appellant.

Statement

The appeal was argued at Victoria on the 7th of January, 1916, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

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Jan. 7.

SHIPWAY v. LOGAN

Harold B. Robertson, for appellant.

W. J. Taylor, K.C., for respondent, moved to strike out the appeal on the ground that no security for costs had been put up by the appellant. Section 29 of the Court of Appeal Act was re-enacted by section 6, B.C. Stats. 1913, Cap. 13. Under this section the words are that "the appellant shall deposit." He not having done so his appeal should be struck out: see *In re Florida Mining Co.* (1901), 8 B.C. 388.

Argument

Robertson, contra, not called on.

MACDONALD, C.J.A.: We do not desire to hear Mr. *Robertson* on this point. I think the practice is very well settled. In my opinion the section of the statute is directory just as the old one was. I may say I think the first time I ever sat in this Court room I heard the very question discussed before the Full Court, and the same objection was taken that Mr. *Taylor* took today. The Full Court said, "No, if security were not given, the business of the party entitled to it was to move and get an order and take the proper proceedings to enforce it."

MACDONALD, C.J.A.

There is no more reason why we should refuse to hear this appeal because security has not been given, than that a judge should decline to proceed with a trial because the plaintiff had refused to answer a question on discovery.

I think we cannot refuse to hear the appeal on the merits.

IRVING and MARTIN, JJ.A. agreed.

IRVING, J.A.
MARTIN, J.A.

GALLIHER, J.A.: My learned brothers all seem satisfied as to the established practice, and being all of that view, it seems to me (although I might desire some time to consider the argument Mr. *Taylor* has put up) that the practice of the Court should be maintained.

GALLIHER, J.A.

Motion dismissed.

Robertson, on the merits: At the hearing of the defendant's appeal last July he had two remedies open to him: (1) to apply to the Court of Appeal for extension; (2) to apply to the County Court judge. He took his election and applied to the Court of Appeal when his application was refused. He

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then had no right to go to the County Court. As to extension of time see B.C. Stats. 1913, Cap. 13, Sec. 4; also section 121 of the County Courts Act, and Supreme Court Rule 967. The right to extend the time of an appeal is not a question of "practice and procedure"; the contention is it goes to the "jurisdiction": see *Williams* v. *Faulkner* (1901), 8 B.C. 197; *The Attorney-General* v. *Sillem* (1864), 10 H.L. Cas. 704.

Argument

Taylor: On the first application there was no material before the Court. The election by a party cannot deprive the County Court of its jurisdiction: see *Laursen* v. *McKinnon* (1913), 18 B.C. 677; *Frere* v. *North Shore Mill Co.* (1905), 49 Sol. Jo. 315. We rely on the point that we had fresh material for the application to the County Court judge.

MACDONALD, C.J.A.: Mr. *Robertson's* two points in this appeal are these: First, that the County Court judge had no jurisdiction at all to hear the application, and secondly, if he had such jurisdiction, he could not properly or legally exercise it because this Court had decided the matter already.

I do not think the Supreme Court Rule 967 applicable in the County Court. That rule provides that a judge of the Supreme Court may grant an extension of time. That is a judicial act of the judge who is nominated for the purpose of doing that particular act. It is not a question of practice and procedure; the matter of bringing it before the judge is that, but the act to be performed is a judicial act.

MACDONALD, C.J.A.

Section 121 of the County Courts Act makes the Supreme Court Rules applicable to the practice and procedure only in the County Court where the County Court Rules are deficient.

On the other point, all I wish to say is that I think it has been recognized almost from time immemorial, except in the case of *habeas corpus,* that Courts should not be canvassed. The applicant is not to go to another Court of concurrent jurisdiction and renew the application. The scandal which that would bring about has already been adverted to.

While I do not wish to express any settled opinion whether or not, assuming that the County Court judge had jurisdiction under the Supreme Court rule mentioned, he could legally

make the order notwithstanding the impropriety of canvassing two jurisdictions, yet I do wish to express my own feeling that such a thing should not be followed. The appeal should be allowed.

IRVING, J.A.: In my opinion the learned County Court judge had no jurisdiction under rule 567. Section 121 does not import the power into the County Courts Act. The policy of the law is that a judgment when it is given should be final. When the time allowed for appeal is at an end the successful person acquires vested right in his judgment. Parliament has seen fit to provide for granting an extension under certain circumstances. This has sometimes been called an equity, it is not really an equity but an indulgence, but this indulgence only can be granted by the persons who are nominated for the particular purpose of granting it. It is like the right of appeal, it is not practice and procedure, the right of an appeal is not procedure, the means by which it is to be enforced are procedure. I do not think that the power conferred on the Supreme Court judge can be imported into the County Court jurisdiction by using the words "practice and procedure." On the other point I do not wish to express any opinion.

IRVING, J.A.

MARTIN, J.A.: I am basing my judgment upon the second point, and I do not wish to lay so much stress upon the other, although I must say it seems to me what my learned brothers have said, with regard to the first point, the nomination of a judge of the Supreme Court under rule 976, not being imported into the County Courts Act by section 121 is strong; I would not dissent from it.

Primarily, on the second ground, that the learned County Court judge had no jurisdiction to make this order, a dual jurisdiction is conferred upon two separate tribunals to do a particular act, that one particular act is the extension of time. To either of these tribunals a litigant may resort. The moment he selects either one of these concurrent tribunals, then the other tribunal is excluded and the matter can solely be adjudicated upon by the forum to which he has decided to resort; that forum alone can adjudicate upon it and it is *res judicata* to apply to

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the other tribunal because the forum chosen is the only forum that can be moved by reason of that selection.

To say two different tribunals can be resorted to at the same time, which in the same building and at the same hour can give an order, one refusing and another granting the same application is so farcical as to be beneath consideration; and the only way to get away from that is to say that it is impossible because the forum which might be resorted to may under certain circumstances change its judgment, that does not alter the fact that there is only one tribunal that can deal with the matter.

MARTIN, J.A.

GALLIHER, J.A.

GALLIHER, J.A.: I agree in the result without expressing any opinion as to whether the County Court judge is entitled to make the order.

Appeal allowed.

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

Solicitors for respondent: *Eberts & Taylor.*

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MCLENNAN v. KINMAN.

KINMAN v. BANK OF VANCOUVER *ET AL.*

Banks and banking—Subscribers for stock—Stock paid for by notes—Notes sold by provisional directors to obtain funds—Funds required for deposit with finance minister to obtain certificate of treasury board—Bank Act, R.S.C. 1906, Cap. 29.

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An out-and-out sale of securities held by the provisional directors of a bank about to be established for stock subscriptions, in order to put itself in funds to make the deposit with the minister of finance necessary to obtain the certificate from the treasury board authorizing the bank to commence business, was not an illegal proceeding prior to the 1913 amendment to the Bank Act.

Statement

CONSOLIDATED actions tried by CLEMENT, J. at Vancouver on the 13th of December, 1915. The facts are set out in the reasons for judgment.

Lennie, for plaintiff Kinman.
C. W. Craig, for defendant Dewar.
Martin, K.C., for defendant Bank.
E. B. Ross, for defendant McLennan.

12th January, 1916.

CLEMENT, J.: In these two cases which were tried together before me, I expressed the view at the close of the trial that the plaintiff in the first action was entitled to recover upon the note sued on unless the alleged illegality in the method adopted by the provisional directors of the Bank of Vancouver to procure the sum ($250,000) which it was necessary under the Bank Act to deposit with the minister of finance in order to obtain the certificate from the treasury board which would permit the Bank to commence business, was made out. I must find on the evidence adduced that Kinman's subscription to the capital stock of the Bank was a real subscription which he was and is legally liable to make good. At the most I would say that the optimistic gentlemen, including Kinman, who were trying to get a local bank established, were of opinion that subscribers would have little or no difficulty later on in disposing of their shares in such fashion as would relieve them from liability if they so desired. But that there was any fraud or deceit practised upon Kinman I do not for a moment believe; and unless therefore there was the illegality I have suggested, the defendant Kinman must meet his obligations.

Judgment

And, after careful consideration, I have come to the conclusion that the method adopted to raise the deposit required by the Bank Act was not illegal. On the evidence before me, I find that what was done was a sale out and out of subscribers' notes to the plaintiff McLennan. One of these was the note sued on. The money paid for it (its face value) became the absolute property of the Bank, with no express or tacit charge upon it in favour of the plaintiff McLennan; and there is no suggestion in the evidence before me that when, upon the issue of the treasury certificate, the deposit was returned to the Bank of Vancouver it was used in any way to relieve the plaintiff McLennan of the liability he was under to the Royal Bank in respect of the loan which that Bank had made to him to enable

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him to buy subscribers' notes from the Bank of Vancouver. It seems to me that what the Bank Act as it stood until 1913 indicated as the *desideratum* was that the Bank should have on hand $250,000 of its own with which to commence business; and that was, so far as I can see through the evidence, the position of the Bank of Vancouver. I cannot find in the Act anything to indicate that Parliament was concerned as to the financial standing of the subscribers apart from this that out of their subscriptions or upon their subscriptions to the extent of $500,000 the Bank should have been able to raise in cash $250,000. Whether this could legally be done by discounting the subscribers' paper with some other bank, the bank borrowing the money remaining liable as indorser, I am not concerned to inquire. But I am of opinion that an out-and-out sale of the securities held by the Bank for subscriptions in order to put itself in funds to make the deposit referred to was not an illegal proceeding.

Judgment

In the first action, therefore, there will be judgment for the plaintiff for the amount of the note sued on with interest from its due date at 5 per cent.; and in the second action there will be judgment dismissing the action and in favour of the Bank of Vancouver upon its counterclaim for the balance due upon the subscription; all with costs against Kinman.

Judgment accordingly.

BRITISH COLUMBIA TRUST CORPORATION v. AICKIN *ET AL.*

MURPHY, J.

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B.C. TRUST CORPORATION *v.* AICKIN

Evidence—Legal mortgagee—Parol evidence as to additional equitable mortgage—Admissibility.

A legal mortgagee cannot prove by parol evidence that he is entitled to an additional equitable mortgage on the same property.
Ex parte Hooper (1815), 19 Ves. 477 followed.

ACTION tried by MURPHY, J. at Vancouver on the 8th of December, 1915. Statement

A. D. Taylor, K.C. (*H. Campbell,* with him), for plaintiff.
H. S. Wood, for defendant Amano.
J. A. MacInnes, for defendant Aickin.

7th February, 1916.

MURPHY, J.: In my opinion Mr. *MacInnes's* point that plaintiff has no mortgage is well taken. *Ex parte Hooper* (1815), 19 Ves. 477 decides that a legal mortgagee cannot prove by parol evidence that he is entitled to an additional equitable mortgage on the property on which he holds a legal mortgage. Admittedly the legal mortgage here has been satisfied. I can find nothing in the Land Registry Act doing away with the decision in *Ex parte Hooper.* The case is therefore dismissed. Judgment

Action dismissed.

HUNTER, C.J.B.C.

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Feb. 17.

DOIG v. PORT EDWARD TOWNSITE COMPANY, LIMITED.

Company law—Quorum at general meeting—Members not entitled to vote—Not counted to transact voting business—Companies Act, R.S.B.C. 1911, Cap. 39, Table A, Arts. 51, 63, 65.

DOIG v. PORT EDWARD TOWNSITE CO.

At a general meeting of the defendant Company held on the 15th of September, 1915, and at an extraordinary general meeting held later, there were present on each occasion seven members, only two of whom were qualified to vote. Under article 51 of Table A of the Companies Act, three members personally present shall form a quorum. In an action by the plaintiff on behalf of himself and the other shareholders for a declaration that the proceedings were irregular for want of a quorum and for an injunction:—

Held, that articles 51 and 63 of Table A of the Companies Act must be read together and there must be three members qualified to vote to form a quorum competent to transact voting business, although three not qualified to vote may form a valid quorum to transact non-voting business.

ACTION tried by HUNTER, C.J.B.C. at Vancouver on the 17th of February, 1916. The annual general meeting of the defendant Company was held at Prince Rupert on the 15th of September, 1915. Seven shareholders were present of whom five were disqualified for voting, being in arrear for calls. A board of directors was nominated for the ensuing year and the plaintiff, who was present, nominated another board. A poll was demanded and the plaintiff took objection to a number of the votes cast but he was overruled by the chair, and the board first nominated was declared elected. The plaintiff then brought this action claiming the election was invalid and praying for an injunction. There were two adjournments of the motion for an *interim* injunction, the second being made on the ground that two shareholders had sent in a requisition for an extraordinary general meeting on the 29th of October. This meeting was held and seven members were present, only two of whom were qualified to vote, the chairman being one of those not qualified. The chairman declared there was a quorum

Statement

present and the meeting proceeded to annul the proceedings of the previous meeting and elected the defendants as directors for the ensuing year. The application for an injunction was then brought on for hearing before MACDONALD, J., who refused to grant an injunction, but allowed the plaintiff to proceed to trial reserving the question of costs (see 22 B.C. 352). The trial was then brought on before the learned Chief Justice.

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J. H. Lawson, for defendant: The point has never been directly decided but in the Act there is a distinction between "members" and "members entitled to vote." There is a *dictum* by Kekewich, J. in *Young* v. *South African and Australian Exploration and Development Syndicate* (1896), 2 Ch. 268 on the point: see also Palmer's Company Precedents, 10th Ed., Part I., p. 642.

A. D. Taylor, K.C., for plaintiff: In the case cited the *dictum* of Kekewich, J. was to the effect that for a member who is not entitled to vote to be counted to form a quorum seems to be a practical absurdity. In *In re Greymouth Port Elizabeth Railway and Coal Company, Limited* (1904), 1 Ch. 32, it was held that a director is not entitled to join in forming a quorum for the consideration of matters with regard to which he is not entitled to vote. The chairman was disqualified and he might be called on for a casting vote.

Argument

HUNTER, C.J.B.C.: It is strange that there appears to be no decision on the point. I think that articles 51 and 63 must be read together with the net result that there must be three members qualified to vote to form a quorum competent to transact voting business although three not qualified to vote may form a valid quorum to transact non-voting business. The resolutions are therefore invalid.

Judgment

Judgment accordingly.

CLEMENT, J. (At Chambers)

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NEWMAN v. BRADSHAW

NEWMAN v. BRADSHAW.

International law—"Alien enemy"—Resident in neutral country—Right to sue.

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The only exception to the rule that an alien enemy by birth can have no standing in a British Court is the case of an alien residing upon British soil under the King's peace (*i.e.*, his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hac vice.*)

A German subject resident in the United States cannot sue in a Canadian Court, but the proper procedure is to enlarge a motion to set aside a writ on such grounds to the trial, to which the plaintiffs may proceed at their own risk.

In re Mary Duchess of Sutherland (1915), 31 T.L.R. 394 followed.

Semble, residence in a neutral country by a natural-born German does not take him out of the category of "alien enemy" of the King of England.

MOTION by defendant to set aside the writ of summons in the action on the ground that the plaintiffs are alien enemies. Heard by CLEMENT, J. at Chambers in Vancouver on the 19th of February, 1916. The facts are set out in the reasons for judgment.

Statement

G. E. Martin, for plaintiffs.
Donald Smith, for defendant.

19th February, 1916.

CLEMENT, J.: The plaintiffs are two brothers who for many years owned and worked a ranch in the Fraser Valley. In 1913, more than a year before the outbreak of the present war, they sold the ranch to the defendant and then moved to the State of Washington where they now reside. Both are of German birth. One of the brothers, Gustaf Newman (or Neuman) emigrated from Germany in 1872 to the United States. In 1876 he received a certificate of naturalization in the State of Pennsylvania. The other brother, Carl, left Germany in 1881 for the United States but never became naturalized there. Lately however he has taken the first step to that end by sign-

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ing a declaration on oath of his intention to renounce allegiance to any foreign prince "and particularly to George V., King of Great Britain and Ireland of whom I am now a naturalized subject." In explanation of this last statement, it should be mentioned that both brothers were on the municipal voters' list in this Province and were, they say, in possession of some papers given them by a Canadian Customs officer, which they thought were naturalization papers. These cannot be found, and it is not now contended that these plaintiffs are British subjects by naturalization. One of them, Carl, is clearly a subject still of the German Emperor. In this situation I have not to consider the position of a natural-born German who has become a subject or citizen—as distinguished from a mere inhabitant —of the United States. Whether or not he is still, as to all other countries than the United States, a subject of the German Emperor is a debatable question upon which it is not necessary to express any opinion. His co-plaintiff is a German subject and the broad question I have to consider is whether a German subject resident in the United States can sue in a Canadian Court.

Were it not for what was said by the Lord Chief Justice of England (Lord Reading) in delivering the judgment of the full Court of Appeal in England in *Porter* v. *Freudenberg* (1915), 84 L.J., K.B. 1001, as to the scope of the phrase "alien enemy" as used in the proposition that an alien enemy cannot sue in a British Court, I should have no hesitation in saying that a German subject by birth living in the United States and not naturalized there, is debarred while the war lasts from seeking redress in a Canadian Court by a rule of law of long standing and undoubted authority. Much of what was said in *Porter* v. *Freudenberg* was *obiter* but it was a deliberate examination of and pronouncement upon the general principles which govern in cases where alien enemies are parties, plaintiffs or defendants, to litigation in British Courts. So that if there were a pronouncement upon the very point now before me I should think it my duty to bow to the view expressed by such an august tribunal. But on a careful study of the judgment I am convinced that it does not lay down any

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such proposition as that residence in a neutral country by a natural-born German takes him out of the category of alien enemy to the King of England. The judgment deals with the enlargement of the ambit of the term "alien enemy" so as to include those, even British subjects, who choose to signify their identification with the German cause by taking up or continuing their residence in Germany. But as I read the judgment the other side of the question is not touched. I think therefore I am free to follow what I have termed a long line of clear authority that the only exception to the rule that an alien enemy by birth can have no standing in a British Court is the case of an alien residing upon British soil under the King's peace. I have found nothing in decided cases—and I have searched rather carefully—to weaken what was laid down by Sir Wm. Scott (afterwards Lord Stowell) in the oft-cited case of *The Hoop* (1799), 1 C. Rob. 196 at pp. 200-1:

"Another principle of law . . . . forbids this sort of communication as fundamentally inconsistent with the relation at the time existing between the two countries; and that is, the total inability to sustain any contract by an appeal to the tribunals of the one country, on the part of the subjects of the other. . . . . The peculiar law of our own country applies this principle with great rigour."

Speaking of the High Court of Admiralty, he adds:

"No man can sue therein who is a subject of the enemy, unless under peculiar circumstances that *pro hac vice* discharge him from the character of an enemy; such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hac vice*. But otherwise he is totally *exlex*."

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How completely war cuts off all intercourse, commercial or otherwise, between the subjects, respectively, of the States at war is emphasized in the recent judgment of the President of the Admiralty Division (Sir Samuel Evans) in *The Panariellos* (1915), 84 L.J., P. 140; and this judgment was adopted by the Court of Appeal in *Robson* v. *Premier Oil and Pipe Line Co.* (1915), 84 L.J., Ch. 629 in which it was held that an alien enemy can not validly give a proxy to a resident of England to vote his shares in an English company.

It is not necessary to discuss the earlier cases but I would point out that in several passages the effect of residence in the enemy's state is said to be that such a resident is to be treated as an alien enemy by birth, thus treating this latter as the case

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par excellence of exclusion. Nationality therefore is *prima facie* one test but not the only test of the alien enemy.

In the case of an alien, resident here, subject by birth of the enemy State, *prima facie* he cannot sue. The only reason must be that the tie of allegiance to the land of his birth is considered as a tie of such strength as to warrant the belief that it would lead the alien resident here to do what he could for his home land in the war. If in such case, where this country has control of the person of the would-be plaintiff a special licence is necessary, *a fortiori* in a case such as this the presumption of desire to act upon his allegiance on the part of the alien enemy resident in a neutral country where this country has absolutely no control over his actions should preclude the King's Court from affording such an alien any assistance *flagrante bello*. To hold otherwise is to say that the tie of allegiance when the subject is abroad is an idle fiction.

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But in view of the course taken in the recent case *In re Mary Duchess of Sutherland* (1915), 31 T.L.R. 394, I enlarge this motion to the trial, to which the plaintiffs may proceed at their own risk.

Motion enlarged to trial.

MARTIN, LO. J.A.

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Feb. 25.

MORRISSETTE v. THE "MAGGIE" *ET AL.*

Admiralty law—"Seamen"—Scope of term—Fishermen—Sleeping quarters —Lien for "lay"—Wages.

MORRISSETTE v. THE "MAGGIE"

Persons employed on a salmon fishing "lay" performing work on a fishing launch in the double capacity of sailors and fishermen though most of their time is occupied in fishing (they not having any sleeping quarters on board the vessel) are nevertheless "seamen" and are entitled to their maritime lein for seamen's wages; but the lien will not attach if the use of the vessel is no part of the agreement on which the lay is based, it having been merely loaned by the owner as a matter of convenience.

CONSOLIDATED ACTIONS by Chief Julius, an Indian, of Sechelt, and his two sons, for $726.50 for seamen and fishermen's wages, to answer which the gasoline fishing-boat "Maggie" has been arrested. The wages are claimed on a salmon-fishing lay of the three Indians and one H. J. Cook whereby it is alleged that the four men were to work on a lay with George Bampton who was to furnish the said launch and fishing-gear and skiff and after deducting the expenses of provisioning and running the boat the proceeds were to be divided between all parties as follows: two shares to Bampton and one share to each of the other four, based upon the following prices for various kinds of salmon, *viz.*: 25 cents for cohoes, 5 cents for dogs, 3 cents for hump-backs and 40 cents for sockeyes, which fish were to be sold to Sherman's cannery by George Bampton and a settlement made at the end of the fishing season, which ended with the closing of the cannery on the 16th of September. Cook also joined in the action but at the trial it was announced that he had withdrawn his claim. Tried by MARTIN, Lo. J.A. at Vancouver on the 23rd of February, 1916.

Statement

Wintemute, for plaintiffs.

Brydone-Jack, for owners of the "Maggie."

25th February, 1916.

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MARTIN, Lo. J.A. (after stating the facts as set out in statement): This subject of seaman's wages in the form of a lay has recently been considered by this Court in *Farrell* v. *The "White"* (1914), 20 B.C. 576; 7 W.W.R. 389, a whale fishing case, and I have nothing to add to that decision except to say that it is in general accordance with the decision of the Supreme Court of Nova Scotia *in banc* in *Swinehammer* v. *Sawler et al.* (1895), 27 N.S. 448. That case was cited in answer to the contention on behalf of the owner of the "Maggie" that on the facts here the three Indians were fishermen only and therefore could not have a seaman's lien. But I am of the opinion that upon the evidence before me it must be held that each of the four laymen not only fished but took part in the working of the boat as a seaman, *e.g.*, in steering, or tending her while fishing, or taking on or discharging her cargo of fish, or cleaning her as occasion arose, or as was otherwise necessary, though most of their time was occupied in fishing, and they did not sleep on board of her but on the shore or in the Indians' rancherie near by. Much stress was laid by the defendant upon this fact of not sleeping on the vessel, but that, while important, is not the sole or true test of the capacity in which men are acting on or about a vessel either temporarily, as *e.g.*, in the case of seamen camped for weeks on an island trying to salve their stranded ship from an adjacent reef, or permanently as *e.g.*, in the case of a crew of a river boat or ferry which ran only in the day time and had insufficient sleeping accommodation for all her crew. It is only a question of degree, the principle is the same in the case of mariners on a big ship on a long whaling lay or on a small launch on a short salmon lay. Such being the facts, the *Swinehammer* case above cited decides that where one is "employed in the double capacity of sailor and fisherman [he is] therefore clearly a seaman under the definition given in the subsection," now subsection (*d*) of section 126 of the Canada Shipping Act, R.S.C. 1906, Cap. 113, and *cf.* the definition of "ship" in section 2 (*d*), and also section 295 recognizing "contracts for wages by the voyage or by the run or by the share." It would follow therefore in the absence

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of other objection that these Indian seamen would be entitled to their maritime lien.

But two further objections are raised to their right to recover; first, that under this lay there was to be no payment till after the proceeds had been received by George Bampton from the cannery; and second, that William Bampton, brother of George, was the owner of the "Maggie," on board of which he lived, and was also one of the laymen and as such allowed it to be used as a matter of personal convenience to himself and mere favour and friendly assistance to the others as his mates and fellow lay men, and therefore there could be no lien upon it as the use of it was *de hors* the contract with George Bampton who it was alleged, did not agree to furnish the launch but merely the gear, skiffs, etc.

With respect to the first, it is to be noted that, as alleged, this is a different lay, in this particular, from that in *Farrell* v. *The "White," supra,* wherein the wages were to be paid monthly, and according to the plaintiff's contention it is like that in *Swinehammer's* case, wherein they were to be paid on delivery to the market. But I must say I have much doubt on the point as to exactly what the lay was, the evidence being far from clear in several respects (particularly the price that was to be obtained from the cannery) and I think it better not to go into it fully now because there are other similar claims to be tried in regard to two other fishing launches arrested in this action, the Eva and the Echo. There is, however, something appreciable at least to support the defendant's contention that George Bampton was not to pay the claimants till he had been paid by the cannery of which essential condition precedent no satisfactory evidence has been given, but as I have come to a clear decision on the second objection I do not, for the reasons above indicated, decide this point, as it is unnecessary. Then as to the second objection, I find, as a fact, to put it briefly, after a careful consideration of the conflicting and unsatisfactory evidence, on both sides, that the plaintiffs have not discharged the onus cast upon them to prove that the use of the "Maggie" was part of the agreement on which the lay is based, and I am forced to the conclusion that, on the evidence,

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she must be held to be the property of William Bampton and to have been used by him personally, apart from the lay agreement, in the manner contended for, and therefore she is not subject to the lien from which she is hereby discharged, and also released from arrest, and the action as regards the claim of the three Indians and Cook is dismissed with costs.

Action dismissed.

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FRUMENTO v. SHORTT, HILL & DUNCAN, LIMITED.

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Jan. 10, 11.

FRUMENTO v. SHORTT, HILL & DUNCAN, LTD.

Practice—Interlocutory judgment—Appeal—Notice of appeal out of time—Application to extend time—Grounds for.

The decision of a judge on an interpleader issue is not a final judgment and an appeal must be taken within 15 days.

Upon an application to extend the time for appealing from a judgment on the grounds that the solicitor's agent was lax in giving information as to the entry of judgment and that judgment had not been given on a supplementary application by the respondent to include in the judgment a special clause as to costs:—

Held (MACDONALD, C.J.A. and GALLIHER, J.A. dissenting), that no distinction can be drawn between the laxity of an agent and that of the solicitor and as the supplementary motion could be disposed of by a separate order and did not in any way affect the completeness of the judgment appealed from, the extension should not be granted.

APPEAL by plaintiff from the decision of BARKER, Co. J., delivered at Nanaimo on the 29th of September, 1915, on an interpleader issue as to the ownership of a motor-car seized by the sheriff at Nanaimo under a warrant of execution issued at the instance of the defendants in an action by them against Mrs. Antionette Frumento, the plaintiff claiming that at the time of the seizure the motor-car belonged to her. On the hearing of the appeal the respondent raised the preliminary objection that as the judgment appealed from was interlocutory

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FRUMENTO v. SHORTT, HILL & DUNCAN, LTD.

Statement

the notice of appeal was out of time, it having been served on the 2nd of December, 1915. The objection was sustained. The appellant then applied for an extension of time, claiming the indulgence of the Court in this respect under the following circumstances. The judgment was delivered on the 29th of September, 1915, and the plaintiff then instructed her solicitor to appeal. The formal order was submitted for approval to the plaintiff's solicitor on the 4th of October. It was approved by him after he had first struck out a clause that in the event of the plaintiff not paying the costs forthwith they should be payable out of the proceeds of the sale of the car in priority to the claim of execution creditors. The defendants served notice of motion on the 8th of October to include said clause in the judgment which was heard on the 15th of October, and judgment was reserved. Judgment not being delivered on the supplementary motion the defendants entered the judgment on the interpleader issue as approved by the plaintiff's solicitor on the 30th of October and the car was sold on the 6th of November. On the 15th of October the plaintiff's solicitor ordered and obtained a copy of the judge's notes of evidence. On the 10th of November he wrote his agents inquiring as to judgment being entered and on the 15th received a letter in reply referring to other matters but giving no information as to the judgment. On the 25th of November he again wrote his agents, and the registrar of the Court as to the judgment and on the 29th received a reply from the registrar that judgment had been entered. On the 2nd of December following, he served notice of appeal.

The appeal was argued at Victoria on the 10th and 11th of January, 1916, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

F. C. Elliott, for appellant.

A. D. Macfarlane, for respondents, raised the preliminary objection that appeal was out of time. This is an interpleader issue and the judgment is therefore interlocutory. The notice of appeal is out of time as it was not given within 15 days of the date of the judgment appealed from.

Argument

Elliott, contra: This is a final order under the decision in

Bozson v. *Altrincham Urban Council* (1903), 1 K.B. 547, which overrules *Salaman* v. *Warner* (1891), 1 Q.B. 734. If the judgment delivered finally disposes of the rights of the parties it is a final judgment. [He referred to *McNair & Co.* v. *Audenshaw Paint and Colour Co.* (1891), 2 Q.B. 502; *Hovey* v. *Whiting* (1887), 14 S.C.R. 515.]

MACDONALD, C.J.A.: I am of opinion that the judgment is interlocutory and that leave is required, so that on the question as to whether it is interlocutory or final I am giving my judgment now. The respondents are entitled to the costs of this motion.

MACDONALD, C.J.A.

IRVING, J.A.: I think all these applications for extension of time ought to be based on affidavit. I cannot imagine anything more conducive to slack practice than to have these applications such as are being made in this way. If the application comes up again I shall refuse it on the ground of want of evidence.

IRVING, J.A.

MARTIN, J.A.: I am entirely in accord with that.

MARTIN, J.A.

GALLIHER, J.A.: I agree.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I agree in the disposition made of this, but I would reserve the right to consider the point if it is ever raised again.

MCPHILLIPS, J.A.

[The preliminary objection being sustained the appellant moved to extend the time for giving notice of appeal. The motion was adjourned and heard on the following day.]

Elliott, on the motion to extend the time: The delay was largely due to the neglect of my agents in not replying to my letters in regard to entry of the judgment and in any case the judgment was entered before any decision was given on the plaintiff's motion to include the clause as to costs in the judgment, and the judgment was not complete until this was decided.

Argument

Macfarlane, contra: The neglect of the plaintiff's agents in Nanaimo as to the entry of the judgment is not material as the

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time runs from the date of delivery on the 29th of September. A separate order can be taken out on the result of the motion as to costs; it has no bearing on the main issue, *i.e.*, the ownership in the car. A successful party is entitled to the protection the law affords as to the time within which an appeal must be brought.

MACDONALD, C.J.A.: This is an application to the indulgence of the Court, based upon circumstances which the appellant's solicitor has placed very fully before us, and which shew that as far as the appellant himself is concerned and his solicitor—I judge his own conduct from that of his solicitor—he was quite desirous and intended to appeal all along and was diligent in the prosecution of the process which would result in the judgment being settled. Now the judgment was delivered on the 29th of September and the formal order was settled on the 4th of October. It contained a clause which the respondents' solicitor is insisting on in this motion, insisting that the judgment covered something more than the appellant's solicitor thought it covered; at all events it gave rise to a dispute. The solicitor for the defendant carried that dispute to the county judge by motion to vary the judgment by inserting a provision as to costs which the appellant's solicitor thought ought not to be in the judgment.

MACDONALD, C.J.A.

Looking at the circumstances of the case, it seems to me that it is a proper case for exercising the discretion which we have of permitting the appellant further time to bring his appeal. It is purely a question of the point of view that one takes of circumstances of this kind, and when I am convinced that the litigant and his solicitor were really desirous of appealing and intended to appeal, I am not disposed to prevent them if there is some fairly reasonable explanation for the failure to serve the notice in time. It is where one suspects that there was originally no intention to appeal at all and that at a later date that intention is conceived and then some excuse is trumped up to induce this Court to extend the time, that one should jealously watch to see that the Court is not imposed upon in that way. I am convinced in this case that indulgence ought to be granted.

IRVING, J.A.: I take a different view. The appellant was in no way misled by anything that was found in the judgment. The appellant owes his unfortunate position today to the indifference apparently of his solicitor's agent at Nanaimo. I do not know how we are going to distinguish between the slackness of the agent and the laxity of the solicitor. The fault is with his legal advisors and the respondents have been in no way to blame. The order was pronounced on the 29th of September, the appellant's solicitor then should have known that it was an interlocutory judgment and should have been prepared to give his notice of appeal within the time limited for that purpose. Really in truth, although it has not been up before us, he came to the conclusion that he had to appeal from a final judgment. The fact that a supplementary motion was made to do something to the judgment, did not interfere in any way with the completeness of the judgment as delivered on the 29th of September. That order if granted might very well have been granted by an entirely separate order; it was something wholly outside the matter that was dealt with at the trial. And its inclusion or non-inclusion in the judgment to be appealed from is merely drawing a herring across the trail.

IRVING, J.A.

The cases on this question of extending time are very fully set out in the case of *Koksilah* v. *The Queen* (1897), 5 B.C. 600.

I would refuse the application.

MARTIN, J.A.: I also take the view that the application must be refused. I agree that we cannot distinguish between the laxity of the agent and the laxity of the solicitor. That would be establishing too dangerous a precedent, and leaving the vested interest which the party who recovers judgment has in a very perilous state.

I have had no explanation at all of the delay that occurred. It is clear that the final judgment was submitted to the counsel on the other side on the 4th and 9th, I think, and nothing was done for over a month. That disposes of the whole matter, in view of the fact that it is impossible to support the contention that the implementing order regarding costs had any effect on the finality of the judgment; it was something that had really no bearing on that aspect of the case.

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The position is really, to my mind, that an error was made in regarding this order as final instead of interlocutory. *Oxley* v. *Link* (1914), 2 K.B. 734 is a case in regard to slips of counsel being considered as an appropriate ground for relief; and see *McEwan* v. *Hesson* (1914), 20 B.C. 94.

GALLIHER, J.A.: This is an application to the Court for indulgence. Any error that may have been made as to whether the judgment was final or interlocutory is not being considered at all on this present application this morning.

GALLIHER, J.A.

I think myself that the circumstances detailed in this case are so peculiar that it is not at all likely that we will have a similar set of circumstances before us in any other case. This is one that I feel we would not be faced with at any time as laying down a line or establishing any precedent. I think the circumstances here, taking them all together, are so peculiar that I may say shortly they have influenced me to the extent that I think the indulgence should be granted.

MCPHILLIPS, J.A.: I take the view that this is not a proper case to extend any indulgence, loath as I am to have to arrive at any such conclusion. Yet there must be some certainty, and I know of no rule of practice which will admit of the principal saying that it was the fault of his agent that he was placed in the position that he could not do what he should have done; he must be fixed with the conduct of the agent.

MCPHILLIPS, J.A.

Further, the surrounding facts and circumstances would all seem to preclude extending any indulgence in this case.

If it was an error in the proper appreciation of the legal position, that is not a matter that will be relieved against, but if it should happen that a solicitor by mistake in the computation of time or by holidays intervening, or any of those accidents, that we find in practice cases, where through some slip something has not been done, the Court will relieve against it, but not one of this character.

Motion dismissed,
Macdonald, C.J.A. and Galliher, J.A. dissenting.

Solicitors for appellant: *Courtney & Elliott.*
Solicitors for respondent: *Macfarlane & Boyle.*

SEATTLE CONSTRUCTION AND DRY DOCK COMPANY v. GRANT SMITH & CO. AND McDONNELL LIMITED.

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SEATTLE CONSTRUCTION CO. v. GRANT SMITH & CO.

Practice—Sunken dry dock—Samples of hull—Marginal rule 659.

On appeal from the refusal of an application to take samples of the hull of a sunken dry dock under marginal rule 659 for use on the trial in an action for damages for loss of the dry dock:—

Held, that the question is largely in the discretion of the judge below and that discretion was rightly exercised.

Per MACDONALD, C.J.A.: If such a course is permissible under the "sample" rule it should be ordered with great caution; an inspection and survey is preferable.

APPEAL from an order of MORRISON, J. of the 16th of December, 1915, dismissing the defendants' application for an order to take samples of the hull of a dry dock, the subject-matter of the action for use upon the trial. On the 20th of May, 1914, the plaintiff Company leased a floating dry dock to the defendants for two years at a yearly rental of $15,000, the lessee agreeing to insure against marine and fire risks for not less than $75,000. The defendants, who were engaged on a contract for the construction of certain piers at the outer wharf in Victoria, took the dry dock from Seattle to Esquimalt harbour and there proceeded to construct concrete pontoons thereon which were to be used on the construction of the piers. While the dry dock was being so used it collapsed and sank with a number of the concrete pontoons. The action was for $150,000 for damages for the loss of the dry dock owing to the defendants' negligence or in the alternative for $75,000 for breach of contract to insure. The defendants alleged that the dry dock was in a rotten and defective condition and was not fit for the purpose for which it was leased, and counter-claimed for the loss of the pontoons. The application for samples of the hull was made by the defendants under marginal rule 659. Upon the refusal of the order by the learned judge the defendants appealed.

Statement

The appeal was argued at Victoria on the 12th of January,

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1916, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Bodwell, K.C., for appellants: The application was made under marginal rule 659. The defendants had leased the dry dock and brought it to Esquimalt harbour where, as the plaintiff alleges, it was sunk through the defendants' negligence. The defence is that the hull of the dry dock was in an unseaworthy state and it was owing to this that it sank. The sole question is the condition of the bottom of the dock, and this is a case where the above rule is particularly applicable.

Maclean, K.C., for respondent: The Court of Appeal is slow to interfere with the trial judge's discretion: see *Civil Service Co-operative Society* v. *General Steam Navigation Company* (1903), 2 K.B. 756 at p. 765; *Colls* v. *Home and Colonial Stores* (1904), A.C. 179 at p. 192. If they did not have proper material before the Court below they cannot now succeed on appeal: see *King* v. *Sandeman* (1878), 26 W.R. 569; *Bradford Corporation* v. *Ferrand* (*No. 1*) (1902), 86 L.T.N.S. 497.

Argument

Bodwell, in reply.

7th March, 1916.

MACDONALD, C.J.A.: I would dismiss the appeal. The learned judge exercised his discretion in refusing to permit samples of the hull of the floating wharf (now sunk) to be taken for use at the trial, and I cannot say that that discretion was not rightly exercised. In saying this I do not wish it to be taken that I am of the opinion that it would be proper in any case to permit samples to be taken from a structure of this kind. I find it unnecessary to come to a settled opinion on that point in this case, but to me it sounds rather anomalous to speak of taking samples of a ship, for instance, or of the hull of a ship, or even of planks or pieces of planks from the hull for the purpose of exhibiting them in Court. If such a course is permissible under the "sample" rule it should be ordered with great caution. It seems to me the preferable course is to permit an inspection and survey.

MACDONALD, C.J.A.

IRVING, J.A.: I would dismiss this appeal, on the ground that the matter is one largely in the discretion of the learned judge below.

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MARTIN, J.A.: This is an application to take samples from the wreck of the floating dry dock in question which is now lying submerged in Esquimalt harbour. Nothing was said in the summons about an order for inspection of the *res,* which is something quite apart from the taking of samples, which in turn does not in general necessarily involve inspection, properly so called, nor does it in particular involve it in this case. All that I feel called upon to say is that it appears from the meagre materials before us that this matter is obviously one which under rule 659, was peculiarly within the discretion of the learned judge below and I do not think we should be justified in interfering with his exercise of it. There is a series of instructive decisions under the old rule 514, identical with 659, on inspection and experimental work in mines in *Centre Star* v. *Iron Mask* (1898), 6 B.C. 355; 1 M.M.C. 267; and *Star* v. *White* (1902), 9 B.C. 9, 422; 1 M.M.C. 468, 513.

With respect to the affidavits filed on the point of an alleged agreement between the solicitors to allow inspection, I express no opinion because that, as above noted, is an application of a different kind and should not be interjected into this one.

GALLIHER, J.A.

GALLIHER, J.A.: Without deciding whether Order L., r. 3, applies to a case of this kind, upon which I have some doubt, I am not inclined to interfere with the discretion of the learned judge below on the material that was before him, and would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would dismiss the appeal. As at present advised I am of the opinion that the case is not one in which it would be permissible to direct that a sample be taken. However, the matter should be open to be passed upon later upon a further application before or at the trial, and the dismissal of this appeal should be, in my opinion, without prejudice to any such application.

Appeal dismissed.

Solicitors for appellants: *Mackay & Miller.*

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

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IN RE BANKERS TRUST AND OKELL

IN RE BANKERS TRUST CORPORATION, LIMITED, AND OKELL.

Company law—Winding-up—Shareholder—Liability as contributory—Allotment of preference shares not regularly issued—Director of company—Estoppel.

Where the directors of a company pass a resolution creating new shares without having first obtained the sanction of the shareholders as required by the articles of association, and no resolution was passed creating any of them preference shares, a holder of such shares, which were applied for and issued as preference shares, is not liable as a contributory, upon the company going into liquidation.

Held, further, that his being made a director and taking part in directors' meetings after his shares were allotted to him by the company, did not estop him from setting up that he did not receive shares for which he had applied and there was no contract between himself and the company (MCPHILLIPS, J.A. dissenting).

Re Bankers Trust and Barnsley (1915), 21 B.C. 130 followed.

APPEAL from an order of HUNTER, C.J.B.C. of the 29th of November, 1915, declaring the defendant liable as a contributory to pay to the liquidator of the Bankers Trust Corporation the balance remaining unpaid upon the shares standing in his name or allotted to him on the books of the Corporation. As originally incorporated the capital stock of the Company (then called the Prince Rupert Savings and Trust Company, Limited) consisted of 60,000 ordinary shares of $5 each—$300,000. This capital was reorganized (by special resolution passed on the 9th of August and confirmed on the 24th of August, 1910) as follows:

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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 the reorganization took place 13,247 of the original $5 shares had been subscribed for and issued and were fully paid up; but the holders in order to perfect the reorganization,

surrendered them, receiving new shares in lieu thereof. On the 24th of July, 1912, the directors passed the following resolution:

"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. . . . ."

On the 12th of August, 1912, the shareholders passed a special resolution in the same words except as to the secretary's directions. On the 27th of August, 1912, the shareholders confirmed the special resolution. This resolution did not purport to create "preference" shares nor was there any subsequent resolution by the directors authorizing the same. The creation and issue of new shares is regulated by the following articles of the Company's articles of association:

"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.

"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.

"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."

Statement

The defendant applied for 100 shares and on the 15th of January received notice of an allotment of 100 ten per cent. preference shares. He made a second application for 50 shares of preferred stock and received notice of the allotment on the 28th of January, 1913, and a third application for 250 shares of the same stock receiving notice of allotment on the 30th of January, 1913. He was appointed a director of the Company on the 30th of January, 1913, and attended a directors' meeting on the 24th of February, 1913, in which he took part and moved certain resolutions. He also attended a meet-

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ing on the 13th of March, which meeting was continued from day to day until the 18th of March. The main contention of the defendant was that the Company had never legally created any 10 per cent. preference shares, for which he had applied and obtained certificates. The learned Chief Justice of British Columbia held that the defendant should be put on the list of contributories for all the shares allotted to him, from which decision the defendant appealed.

Statement

The appeal was argued at Victoria on the 7th of January, 1916, before MACDONALD, C.J.A., IRVING, GALLIHER and MCPHILLIPS, JJ.A.

McDiarmid, for appellant: The facts are the same as in *Re Bankers Trust and Barnsley* (1915), 21 B.C. 130, the only difference being that Okell was a director for a short time after the allotment to him of his shares. This we submit does not distinguish it from the former case: see *Oakes* v. *Turquand and Harding* (1867), L.R. 2 H.L. 325; *In re Lands Allotment Company* (1894), 1 Ch. 616; *Stace and Worth's Case* (1869), 4 Chy. App. 682. We say there was an absolutely void contract: see *In re Portuguese Consolidated Copper Mines* (1889), 58 L.J., Ch. 813; *In re Homer District Consolidated Gold Mines; Ex parte Smith* (1888), *ib.* 134; *In re Moore Brothers & Co., Limited* (1899), 1 Ch. 627; *Stone* v. *City and County Bank* (1877), 47 L.J., Q.B. 681.

Argument

Maclean, K.C., for respondent: The appellant was in no way defrauded; his application was in writing for 100 shares; these were common stock shares and the allotment was of common stock. In the *Barnsley* case it was held that the new issue was common stock: see *York Tramways Company* v. *Willows* (1882), 8 Q.B.D. 685. Okell being a director and acting as such renders the *Barnsley* case inapplicable: see *Glossop* v. *Glossop* (1907), 2 Ch. 370. On the question of estoppel see *Burkinshaw* v. *Nicolls* (1878), 3 App. Cas. 1004 at p. 1026.

McDiarmid, in reply: The parties were not *ad idem.* The subject-matter of the contract did not exist: see *In re London and Leeds Bank; Ex parte Carling* (1887), 56 L.J., Ch. 321.

Cur. adv. vult.

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MACDONALD, C.J.A.: I agree that the appeal should be allowed for the reasons to be handed down by my brother GALLIHER.

IRVING, J.A.: I think, with deference to the learned Chief Justice appealed from, that our decision in *Re Bankers Trust and Barnsley* (1915), 21 B.C. 130 must govern this case.

I would allow the appeal.

GALLIHER, J.A.: This Court has already decided in *Re Bankers Trust and Barnsley* (1915), 21 B.C. 130, following the decision of the Court of Appeal of Ontario in *Re Pakenham Pork Packing Co.* (1906), 12 O.L.R. 100, that the shares issued by the Company were common and not preferred shares, and that Barnsley was not liable as a contributory.

Unless a distinction can be drawn on the ground that Okell was a director and acted as such between the allotment of shares and the going into liquidation of the Company then this case is governed by our decision in the *Barnsley* case.

Okell made three applications for shares. The first application was for 100 shares of the capital stock of the Company without specifying common or preferred, and it would be open to the Company to allot him either. As a matter of fact these hundred shares allotted are described in the *interim* certificate which contains the notice of allotment as 100 ten per cent. preference shares. These were accepted by Okell and he says in his evidence that any conversations he had with the brokers for the sale of the shares was for preferred shares, so that their minds were *ad idem* as to the class of shares, but under our decision in the *Barnsley* case the Company had no preferred shares, and there was no basis for the contract. The notice of allotment of these shares is dated the 15th of January, 1913.

GALLIHER, J.A.

A second application was made by Okell for fifty shares of 10 per cent. preferred stock and notice of the allotment of these bears date the 28th of January, 1913. The third application of Okell is similar to the second only for 250 shares, and the notice of allotment bears date the 31st of January, 1913.

John Edward Allen, the liquidator, says in his evidence that

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Okell was appointed a director on the 30th of January, 1913, but that he (Okell) was not present at the meeting, and that no notice of his appointment was sent him, and Okell swears he knew nothing of the appointment until just before the meeting of the 24th of February, 1913, which he attended. Allen also says in answer to a question by the learned trial judge that Okell was appointed after his shares had been allotted to him.

At the meeting of the 24th of February, 1913, the first one attended by Okell, the minutes of the previous meeting, including a list of shares allotted among which was an allotment to Okell, were read and confirmed and Okell took part in this meeting and moved two or three resolutions. He attended again on the 13th of March, 1913, and then became aware for the first time that the Company was in bad shape. This meeting was continued from day to day until the 18th, the directors trying to devise ways and means to save the Company but without avail, and the Company then went into liquidation. Under these circumstances is Okell in a different position to Barnsley who was a shareholder simply? All his shares had been allotted to him before he was appointed a director. In this connection I quote from the judgment of the Lord Chancellor in *Oakes* v. *Turquand and Harding* (1867), L.R. 2 H.L. 325; 36 L.J., Ch. 949 at p. 964:

GALLIHER, J.A.

"In a still later case, that of *Ex parte Peel, In re Barned's Banking Company* (1867), 2 Chy. App. 674, Lord Cairns expressed an opinion on the subject to which I entirely subscribe. He said, 'It is the bounden duty of a person to ascertain at the earliest practicable moment what is the charter or title-deed under which the company in which he has agreed to become a shareholder is carrying on business. I think he ought to be held bound to look to the memorandum and articles of association before he applies for shares. But even when the memorandum and articles of association are not in existence at the time, I think at the very latest when he receives his allotment of shares, he ought to satisfy himself that there is nothing in the memorandum or articles of association to which he desires to make any objection.' This appears to me to lay down a clear and precise rule, which will render unnecessary the consideration in each case whether a reasonable time has or has not elapsed from which acquiescence may be assumed."

Had Okell when these shares were allotted to him searched the memorandum and articles of association, he would have found that the Company had power to issue preferred shares.

Was he bound to go further and search the books of the Company to ascertain if those shares were regularly and properly issued and if he did not do so, is he now estopped from setting up that they are not preference shares? Had he been a director at the time these so-called preference shares were issued, it may very well be that he would be taken to have had actual notice and would be estopped, but we have been referred to no case, nor have I been able to find one, where a shareholder who afterwards becomes a director is, in respect of his shares (unless he goes beyond the memorandum and articles of association and ascertains that the necessary steps were taken for the proper issuance of the shares) estopped from saying that there was no contract between the Company and himself. It is not a case of a voidable contract but no contract at all.

GALLIHER, J.A.

The appeal should be allowed and the plaintiff struck from the list of contributories.

McPHILLIPS, J.A.: In my opinion the appeal should be dismissed, the learned Chief Justice of British Columbia having arrived at the right conclusion.

The facts and the law are against the contention put forward by Okell that he is not liable as a contributory. He was a director of the Company and actively acted as such, in fact seems to have been the most active director; amongst other motions made by him and carried was one that the directors be paid a fee of $10 for each meeting attended; and he was present when applications for shares came before the directors and allotments made in conformity therewith. Further, taking all the facts and circumstances together, it can be well said that Okell is estopped from saying that the shares were not allotted to him. *York Tramways Company* v. *Willows* (1882), 51 L.J., Q.B. 257; *Royal British Bank* v. *Turquand* (1856), 6 El. & Bl. 327; *Owen and Ashworth's Claim* (1900), 2 Ch. 272. There was ratification upon the facts of the original allotment and if the board was at first irregularly constituted that was cured: see *In re Portuguese Consolidated Copper Mines, Limited* (1889), 42 Ch.D. 160.

MCPHILLIPS, J.A.

There is no doubt that shares were applied for and moneys paid upon the faith that the board of directors were business

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men of standing in the community. To admit of a rescission of contract now would be most inequitable especially after winding-up proceedings have been commenced. "It is impossible," as Lord Cairns said in *Lawrence's Case* (1867), 2 Chy. App. 412 at p. 417, "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": Palmer's Company Law, 10th Ed., 126. It is here contended that there was no such delay after knowledge of the irregularities contended for or invalidity of the allotment of shares disentitling estoppel being successfully set up; that contention in my opinion entirely fails upon the facts of the present case. We find this language in Palmer's Company Law, *supra,* at p. 352:

"Hence a very short delay after discovery, say a fortnight or so, may deprive him of the right to rescind. 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; *Skelton's Case* (1893), 68 L.T. 210. And the principle applies where he has the means of knowledge as well as actual knowledge."

It cannot be admitted that Okell did not have the means of knowledge; further he presumed to act as a director. And this further language at p. 353 is exceedingly apposite to the present case:

MCPHILLIPS, J.A.

"*A fortiori,* is winding-up a bar to rescission, for, on winding-up, the rights of the whole body of the company's creditors have intervened. Where, therefore, an allottee of shares waits until after the commencement of the winding-up, his right to rescind is gone. *Oakes* v. *Turquand and Harding* (1867), L.R. 2 H.L. 325. If on the register at the commencement of the winding-up, though under a voidable contract, he cannot escape unless he has commenced legal proceedings to enforce rescission before the date of the winding-up. *Oakes* v. *Turquand and Harding, supra; Burgess's Case* (1880), 15 Ch. D. 507; *Reese River Silver Mining Co.* v. *Smith* (1869), L.R. 4 H.L. 64."

In *In re London and Leeds Bank; Ex parte Carling* (1887), 56 L.J., Ch. 321, Stirling, J. at pp. 325-6 said:

"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. . . . . 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."

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Carrying out this rule as laid down by Lord Cairns upon the facts of the present case it would be inequitable to hold that Okell cannot rightly be placed upon the list as a contributory; the countervailing equities are overwhelming: *Fitzherbert* v. *Dominion Bed Manufacturing Co.* (1915), 21 B.C. 226; 23 D.L.R. 125.

The decision in *Re Bankers Trust and Barnsley* (1915), 21 B.C. 130, has no application if I am right in my opinion, that upon the facts of the present case, there is complete estoppel.

MCPHILLIPS, J.A.

I would therefore dismiss the appeal.

Appeal allowed, McPhillips, J.A. dissenting.

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

Solicitors for respondent: *Elliott, Maclean & Shandley.*

IN RE BRITISH COLUMBIA PORTLAND CEMENT COMPANY, LIMITED.

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IN RE BRITISH COLUMBIA PORTLAND CEMENT CO.

Company law—Debentures—Authorization by bondholders for second issue to pledge or sell—Second issue to have priority—Second issue then issued as collateral security—Priority.

Winding-up—Right of two bondholders of second issue to appeal—Winding-up Act, R.S.C. 1906, Cap. 144, Sec. 101—Can. Stats. 1907, Cap. 51, Sec. 1.

In a winding-up proceeding where counsel have been appointed under section 131A of the Winding-up Act to represent two conflicting classes of bondholders, and judgment has been given in the Court below, any bondholder who is dissatisfied with the judgment has the right of appeal.

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

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"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.

IN RE BRITISH COLUMBIA PORTLAND CEMENT CO.

Statement

APPEAL from the decision of MACDONALD, J. in an action tried at Vancouver on the 8th of June, 1915, to determine the priority as between the holders of a first and second issue of bonds by the British Columbia Portland Cement Company, Limited. The facts are set out fully in the judgment of the learned trial judge (21 B.C. 534). Two of the holders of the second issue of bonds appealed on behalf of themselves and all other holders of said issue, and counsel for the respondents raised the preliminary objection that under the Winding-up Act as amended in 1907 no appeal lies on behalf of the appellants as a body of debenture holders nor does any right or power exist for certain individuals to appeal on behalf of themselves and all others of their class of bondholders.

The appeal was argued at Vancouver on the 23rd and 24th of November, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

S. S. Taylor, K.C., for appellants (defendants).

R. M. Macdonald, for respondents (plaintiffs), raised the preliminary objection that there was no appeal. This is a proceeding by the liquidator in which solicitors and counsel were appointed to represent the two classes of bondholders. Two members of the class not successful apply for leave to appeal under section 101 they representing that class of bondholders. They have no right of appeal: see Palmer's Company Precedents, 11th Ed., Part II., p. 539, Form 423.

Taylor, contra, referred to Can. Stats. 1907, Cap. 51, Sec. 1, contending that any bondholder who is dissatisfied with the judgment below has the right of appeal under said section.

23rd November, 1915.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the preliminary objection should be overruled. The objection has given me a good deal of trouble, but I think the final solution is not only in accord-

ance with the intention of Parliament, but is also in accordance with sound common sense, and within the amendment of 1907 of the Winding-up Act, section 1 which enables a judge of the Supreme Court to appoint a solicitor and counsel to represent each class of bondholders or shareholders who are interested in the proceedings about to be taken.

In this case, Mr. *Stockton* was appointed to represent one class of bondholders, and Mr. *Macdonald* another class of bondholders. I think their representative capacity must be held to be limited to that of solicitor and counsel, that is to say, they are not representative in the full and wide sense of the term; they are not representative in a sense that a guardian of an infant, or a guardian *ad litem* or a committee of a lunatic would be of the person represented.

Now the issue having been tried, and having been found against those represented by Mr. *Stockton,* the question of the right of appeal arises. Mr. *Stockton* does not appeal in this case himself, as representing the class of bondholders he was appointed as solicitor and counsel to represent, but two of the bondholders who are bound by the judgment below, being dissatisfied with it, seek to take advantage of section 101 of the Winding-up Act which reads:

"Except in the Northwest Territories, any person dissatisfied with an order or decision of the Court or a single judge in any proceeding under this Act, may . . . . by leave of a judge of the Court, appeal therefrom."

MACDONALD, C.J.A.

Two of these bondholders being dissatisfied, applied to the learned judge below for leave to appeal. They are statutory clients of Mr. *Stockton's,* as I read the law, and they are entitled to appeal, being bound by the order of which they complain, and the learned judge has given them leave to appeal. It is true they appeal on behalf of themselves and all other bondholders of the same class, but the latter words are negligible. The result of the appeal, if they are successful, will enure to the benefit of all bondholders of that class. If they are unsuccessful, it may be that they alone will be responsible for costs.

In this view of the case I think the preliminary objection is

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not well founded and that these two parties have the right to have their appeal heard.

IRVING, J.A.: I would dismiss the preliminary objection on the ground that the B.C. Equipment Co. and McLennan-McFeeley who have obtained leave to appeal are persons dissatisfied with the order and that they have the right, although not specifically named in the proceedings below, to prosecute this appeal.

MARTIN, J.A.

MARTIN, J.A.: I agree.

GALLIHER, J.A.

GALLIHER, J.A.: I agree, but not on exactly the same grounds. I do not think the judge below had power to make the order which he did make, and that McLennan-McFeeley and the B.C. Equipment Co. are appealing in a different capacity, not in a personal capacity, but in the capacity defined by the judge below, which, to my mind, he had no right to do. However, as to that, I think the parties agreed below, and I rather think Mr. *Macdonald* then insisting on the order cannot come here and object now, on that ground, because as Mr. *Taylor* puts it, it practically amounts to an appeal from an order giving leave to appeal, and such an appeal has not been taken.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the solicitor and counsel represent a class not merely solicitor and counsel. The amending Act of 1907 reads:

"The Court if satisfied that, with respect to the whole or any portion of the proceedings, the interests of creditors, claimants or shareholders can be classified, may appoint a solicitor and counsel to represent each or any class for the purpose of the proceedings and all the persons composing any such class shall be bound by the acts of the solicitor and counsel so appointed."

I agree that the appeal as launched is supportable on the other grounds and that the preliminary objection is not well founded.

Objection overruled.

Taylor, on the merits: The second issue of bonds was absolutely regular as far as the manner in which they were issued is concerned, the only question is whether improper use was made of them. The issue itself cannot be attacked: *see Doctor* v. *People's Trust Co.* (1913), 18 B.C. 382; *Edelstein* v. *Schuler & Co.* (1902), 2 K.B. 144. We take these bonds as security and take them *bona fide* as being properly issued, the holders of the first issue agreeing to the second issue's priority. We had no notice of the terms under which the priority was agreed to: see Dart on Vendors and Purchasers, 7th Ed., 87-8.

Macdonald: The holders of the second issue had implied notice of the resolution as to priority as they knew they were getting a second issue: Palmer's Company Precedents, 11th Ed., Part III. 148. The *Edelstein* case was dealt with by the trial judge who said it did not apply here. [He referred to *In re Regent's Canal Ironworks Company. Ex parte Grissell* (1875), 3 Ch. D. 411; *Smith* v. *English and Scottish Mercantile Investment Trust* (1896), W.N. 86.]

Argument

Taylor, in reply, referred to *McKnight Construction Co.* v. *Vansickler* (1915), 51 S.C.R. 374 at p. 382.

Cur. adv. vult.

7th March, 1916.

MACDONALD, C.J.A.: I would dismiss the appeal.

MACDONALD, C.J.A.

IRVING, J.A.: I would adopt as my own the reasons for judgment of the learned trial judge, and dismiss the appeal.

IRVING, J.A.

MARTIN, J.A.: This appeal turns on the short point that the power to raise money by way of a loan (which I agree might have been done by pledging or selling the bonds in question) was not properly exercised by handing them over to creditors as security for existing debts. That, either in the ordinary business acceptance of the term, or in the circumstances of this case, cannot be fairly said to be a "pledge" of the bonds to raise money for the purposes of the company.

MARTIN, J.A.

It follows that the appeal should be dismissed.

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GALLIHER, J.A.: I agree in the reasons for judgment of the learned trial judge.

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

Appeal dismissed.

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

Solicitors for respondents: *Bird, Macdonald & Ross.*

MORRISON, J.

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Jan. 14.

QUEBEC FIRE INSURANCE CO. *v.* MACVICAR

QUEBEC FIRE INSURANCE COMPANY v. MACVICAR *ET AL.*

Mortgage—Assignment—Foreclosure by assignee—Right to proceeds of insurance policy—Mortgage clause.

V. having insured certain premises in the plaintiff Company for $1,800, mortgaged the property to R. Under an agreement for sale V. then agreed to sell to M. who insured the property in another company without notice to or consent of the plaintiff Company. V. later conveyed all his interest in the land to S. and M. assigned his agreement for sale to K. Some time later the premises were destroyed by fire. R. then assigned the mortgage to the plaintiff Company and S. conveyed the property to K., all the conveyances aforementioned being made subject to the mortgage. In an action for foreclosure K. claimed that there should be deducted from the amount unpaid under the mortgage $1,800, for which the premises had been insured in the plaintiff Company as the company had waived its right to plead that the policy was void by invoking the mortgage clause in the insurance policy.

Held, that as the contract of assurance was a collateral contract made solely between the plaintiff and V. who had disposed of his interest in the property before the fire took place and had never assigned the policy either to R., the mortgagee, or to M. or S. through whom K. claimed title, K. had no interest in the policy whereby he could raise any question as to its validity.

Statement

ACTION for foreclosure tried by MORRISON, J. at Vancouver on the 9th and 29th of March, 1915. The facts are set out fully in the head-note and reasons for judgment.

Killam, for plaintiff.
M. A. Macdonald, for defendants.

14th January, 1916.

MORRISON, J.: The defendant MacVicar, who owned certain lands and premises in Vancouver, mortgaged the same on the 16th of February, 1911, to one Robertson to secure the repayment of $2,100, the principal being payable on the 16th of February, 1914. The defendant Foster joined the defendant MacVicar in the covenant to repay. The premises were to the extent of $1,800 insured by MacVicar. On the 25th of February, 1911, MacVicar agreed to sell the said property subject to the mortgage to one Maurice who also insured the premises with another Company for $2,800 without notice to and without the consent of the plaintiffs. This agreement was duly registered. On or about the same date MacVicar sold his equity of redemption to one Stevens. On the 29th of March, 1911, MacVicar conveyed his interest in the lands and premises to Stevens subject to the mortgage. On the 24th of November, 1911, Maurice assigned his aforesaid agreement to the defendants Kelly, Douglas & Company. On the 29th of January, 1913, the premises were destroyed by fire. The policy was not assigned. On the 11th of April, 1913, Robertson assigned his mortgage to the plaintiffs. Notice of this assignment was given. On the 21st of October, 1913, Stevens conveyed the lands and premises subject to the mortgage to the defendants Kelly, Douglas & Company, who are now the owners, subject to the mortgage. Interest has accumulated since May, 1911, and remains together with the principal sum of $2,100 due and unpaid. This is an action for foreclosure in which the defendants Kelly, Douglas & Company claim to have deducted from the amount found to be unpaid under the mortgage the sum of $1,800 for which the premises had been insured. Mr. *Macdonald* for defendants Kelly, Douglas & Company contends that the plaintiff when it took over the mortgage from Robertson on the 11th of April, 1913, did not take the position that the policy was void, but treated it as alive by invoking the mortgage clause therein. That it should

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have claimed, that as against the assured no liability existed by reason of his alleged breaches of the condition of the policy.

It seems to me that the short answer to that submission is that the defendant MacVicar had parted with all his interest in the premises before the date of the fire. Robertson had not been assigned any interest in the policy. The policy was never assigned. The question of insurance was in no way a subject-matter of contract between him and MacVicar, express or implied. The contract of assurance was a collateral contract made solely between the plaintiff and MacVicar, for the payment of money.

There will be judgment for the plaintiff as claimed.

Judgment for plaintiff.

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MELLIS v. BLAIR.

Damages—Wrongful seizure of motor-truck—Lien note—Consideration—Measure of damages—New trial.

MELLIS v. BLAIR

M. bought a motor-truck from B. giving a promissory note for the balance of purchase price. Afterwards at B.'s request M. gave a new note and also a lien note both payable on the same day as the old note. The lien note authorized B. on M.'s default to take possession of the truck and hold it as a pledge or to sell it and apply the proceeds of sale in payment of the notes. On M. being in default B. took possession of the truck, used it for his own purposes and mortgaged it to another. M. sued B. for wrongful seizure of the truck.

Held, that there was no consideration for the lien note and that even if there had been there was a clear conversion of the truck and further that there should be a new trial for the purpose of assessing the damages, the proofs of damage not having been gone into at the trial.

In an action for damages for the wrongful seizure of a motor-truck the measure of damages is the value of the motor-truck so seized with any special damage that the plaintiff can prove.

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APPEAL from the decision of GREGORY, J. in an action tried at Victoria on the 26th of May, 1915, for damages for the wrongful taking away of a motor-truck by the defendant and converting the same to his own use. The plaintiff, who was a transfer agent and express man, bought a motor-truck from the defendant on the 12th of January, 1914, for $4,900, $1,800 was paid down and a promissory note was given for the balance for 90 days and then renewed. Subsequently the plaintiff made several payments on the note amounting in all to $759.77, the last payment being made on the 6th of November, 1914. On the 10th of July the defendant approached the plaintiff and asked him to make a new note to replace the one then current for the amount still owing (made on the 23rd of June, and due on the 27th of July), his excuse for wanting it being for use at his bankers. A new note was then made out in the usual form and a lien note both made payable on the due date of the old note. Under the terms of the lien note the holder could in case of default hold possession of the chattel until the note was paid or sell same by private or public auction and apply the proceeds in payment of the note. On the 7th of December, 1914, the lien note not being paid the defendant seized the truck, converted it to his own use and mortgaged it to another party. The learned judge held that the note was an accommodation note upon which the defendant had no right to seize the car and in any event he had no right to convert it to his own use. He gave judgment for the plaintiff for the amount paid on the car and the value of tires supplied by the plaintiff. The defendant appealed.

Statement

The appeal was argued at Vancouver on the 2nd and 3rd of November, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

S. S. Taylor, K.C. (*Arnold,* with him), for appellant: We say (1) that the lien note of July 10th was valid and subsisting at the time the seizure was made; (2) that Mellis acquiesced in the seizure as he offered a certain amount on account and when refused he said there was no other course than for them to seize the car; (3) the trial judge in assessing damages

Argument

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did not deduct anything for the use of the machine by Mellis; and (4) the trial judge agreed to reserve the question of amount of damages during the trial but in the end did not do so, awarding the amount of damages himself. We contend section 28 of the Sale of Goods Act does not apply as this is a lien agreement and was for the exact amount due on the truck. The only case made out is that we made an unlawful seizure. *Taeger* v. *Rowe* (1909), 2 Sask. L.R. 159 relied on by respondent can be distinguished. In any event the judgment was improper, as it ordered the return of all money paid on the truck in addition to the value of the tires.

Argument

Long, for respondent: The entire issue is the question of title. We have pleaded damages in depriving the plaintiff of the use of the car. Under the lien agreement the title was to remain in Blair until the $2,621.50 was paid, but as there was nothing due and payable on the 10th of July when the lien note was given there was no consideration and the agreement was void. It was given to accommodate Blair. When he took the truck he did not comply with the conditions of the lien note but used it for his own purposes and mortgaged it to a third party: *Bridgman* v. *Robinson* (1904), 7 O.L.R. 591; Halsbury's Laws of England, Vol. 10, p. 345, note (*a*).

Cur. adv. vult.

7th March, 1916.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The first question is that of consideration for the making of the lien note of the 10th of July, 1914. The indebtedness of the plaintiff to the defendant at that time was evidenced by the promissory note dated the 23rd of June, 1914, payable in 30 days at 8 per cent. interest. This note, adding the days of grace, would be due on the 26th of July, but at the top of the note are the words "due July 27th."

The plaintiff's evidence is to the effect that the defendant came to him on the said 10th of July, and asked him to make a new note to replace the said note of the 23rd of June, which was then current. He says defendant's plea was that he wanted to use it at his bankers. Plaintiff says he was willing to oblige him, and in consequence a new note in the common form and a lien note, both payable on the apparent due date of the old

note—27th July—were signed by him on the understanding aforesaid. Defendant on the contrary says that he asked the plaintiff for the lien note in order to get security for the debt, and that is the reason why the current note of the 23rd of June was replaced by the new promissory note and lien note, which were for the amount of the old one with interest up to the 27th of July. Accepting either the plaintiff's or the defendant's story, there was in my opinion no consideration for the making of the lien note. A feeble attempt was made by appellant's counsel to found the consideration on the apparent mistake in the due date of the old note and the three days' grace which would be allowed plaintiff in respect of the new note. I attach no weight to this argument; neither party dreamed of founding the new notes on such a consideration. Moreover, a lien note is not a negotiable instrument and would not carry days of grace. Defendant's object was to get security, but he gave no consideration at all for the instrument which he took for that purpose.

Moreover, even if the lien note be held to be made upon a valuable consideration, and assuming that as between the parties it would operate as an agreement authorizing the taking of the truck, although in fact not within the statute at all, the defendant did not pursue its terms. The defendant's right was, in case of default in payment of the debt, to "take and hold possession of such chattel until such note, or any renewal thereof is paid, or to sell the said chattel by private or public sale, and apply the net proceeds in payment of any such note or notes and interest."

MACDONALD, C.J.A.

Immediately after taking possession of the truck, the defendant converted it to his own use. He not only converted it by user for several months, but he mortgaged it to another, which mortgage had not been discharged at the date of the trial. He took the truck, but neither held it as a pledge, as he was entitled to, assuming for the moment the validity of the instrument, nor did he sell it and apply the proceeds as provided in the instrument. It was, to my mind, a clear case of conversion.

There was also an attempt made to shew that the plaintiff

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had consented to the taking of the truck by the defendant. I think the evidence fails to establish such consent.

The only remaining question is that of the damages. The action as framed is one for trover and conversion and for nothing else. The judgment appealed from decrees the return by the defendant to the plaintiff of the sums paid on the purchase price of the truck as if there had been a rescission of the contract. When counsel sought to cross-examine the plaintiff on his claim for damages the learned judge stopped him and said:

"You are dealing now with the damages that the plaintiff suffered by reason of the car being taken?

"Mr. *Arnold* [defendant's counsel]: Yes.

"The Court: Perhaps that had better be reserved for a reference.

"Mr. *Long* [plaintiff's counsel]: Yes, I am agreed."

The consequence is that the proofs of damage were not gone into and hence, in my opinion, there must be a new trial for the purpose of assessing them.

MACDONALD, C.J.A.

The measure of damages in an action of this kind is the value of the thing converted and any special damage which the plaintiff can prove. In such assessment the unpaid purchase-money could not be considered, but the defendant could, under the Supreme Court Act and Rules, claim the same by way of counterclaim or set-off: *Page* v. *Cowasjee Eduljee* (1866), L.R. 1 P.C. 127; *Gillard* v. *Brittan* (1841), 8 M. & W. 575; and as to set-off or counterclaim *Victoria and Saanich Motor Transportation Co.* v. *Wood Motor Co.* (1915), 21 B.C. 515; 31 W.L.R. 853. The defendant has done neither, but I would give him leave to amend in this respect as he may be advised.

IRVING, J.A.

IRVING, J.A.: I would allow this appeal, without interfering with the determination of the learned judge that there had been a conversion; the new trial to be confined to the question of damages.

MARTIN, J.A.

MARTIN, J.A.: While I agree with the learned judge's findings of fact yet there should be, in my opinion, a new trial on the ground that the damages were assessed on a wrong basis: *e.g.*, the actual value of the car at the time of its wrongful taking cannot be ascertained by awarding the plaintiff the amount

he had paid on account of it, irrespective of depreciation. The costs of the first trial to abide the result of the second.

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GALLIHER and MCPHILLIPS, JJ.A. concurred in the reasons for judgment of the Chief Justice.

Appeal allowed, and new trial ordered.

Solicitor for appellant: *C. S. Arnold.*
Solicitor for respondent: *G. Roy Long.*

NENO v. THE CANADIAN FISHING COMPANY, LIMITED.

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NENO v. CANADIAN FISHING CO.

Shipping—Towage—Negligence—Putting out from shelter with tow in storm.

In all contracts for towing there is an implied obligation that competent skill and the best endeavours shall be used in the work and the act of a master of a tug in venturing out from shelter in stormy weather is negligence which will render the owners of the tug liable for the consequences of the wrongful act (GALLIHER, J.A. dissenting).

Smith v. *St. Lawrence Tow-Boat Company* (1873), L.R. 5 P.C. 308 referred to.

APPEAL from the decision of SCHULTZ, Co. J. of the 23rd of March, 1915, in an action for damages for the loss of a fishing-schooner and damage to a gasoline launch through the defendant's negligence. The plaintiff contracted with the defendant Company to fish for the season at Toba Inlet, the defendant agreeing to tow his launch and fishing-schooner from Vancouver to the fishing grounds, buy the fish that he caught, and tow his boats back at the end of the season. On the night of the first day coming back the tug with the 20 boats in tow remained behind Grief Point. Next morning they

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started out in rough weather, the boats being hauled in two rows from a scow behind the tug. After going for half an hour they struck a squall and the master of the tug decided to turn back. In doing so the boats struck one another and the plaintiff's boats broke away, drifting on shore, the schooner being destroyed and the launch damaged. The trial judge found in favour of the plaintiff and assessed the damages at $500. The defendant Company appealed on the ground that there was no duty cast upon it to protect the plaintiff's boats and in any event there was no evidence of negligence.

Statement

The appeal was argued at Vancouver on the 12th of November, 1915, before MACDONALD, C.J.A., IRVING, GALLIHER and MCPHILLIPS, JJ.A.

Armour, for appellant: The fact is that about half an hour after they had left the shelter of Grief Point the captain of the tug found that, owing to a squall that had suddenly sprung up, he should turn back. Even if it was negligent to start out that was not the cause of the damage.

W. C. Brown, for respondent: We say there was evidence of

Judgment

negligence on the part of the captain of the tug in starting out. The trial judge has so found, and his judgment should not be disturbed. There was evidence that there were whitecaps beyond the point when they were about to start out on the morning of the accident. On the standard of care to be taken see Beven on Negligence, 3rd Ed., Vol. 2, p. 756.

Armour, in reply.

Cur. adv. vult.

7th March, 1916.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss this appeal. It was part of the contract that the plaintiff should be towed down at the end of the season. The learned judge had before him evidence that the master of the defendant's towing craft was negligent, of his duty to the plaintiff, in venturing out in the storm on the morning of the accident whereby the plaintiff suffered the loss complained of. I do not think it can be said that the damages allowed were not such as the learned judge could give on the evidence.

IRVING, J.A.: I would dismiss this appeal. It was open to the learned judge to find negligence on the evidence.

The defendant Company is not to be regarded as an insurer, but there were obligations imposed upon it—to have a suitable tug; that those in charge of it should exercise care and skill ordinarily exercised by those having experience in such matters; such care should be measured by the dangers and hazards to which the flotilla of small boats was likely to be exposed. It was in this respect that the defendant failed in the opinion of the learned trial judge. I think I should have regarded it as an error of judgment rather than negligence, but there is much to be said in favour of the view taken by the judge below. Undoubtedly it was incumbent on the defendant's master to have exercised care in determining whether he should or should not resume the trip on the morning in question, having before him the state of the weather, the character of the shore, the nature of the various boats he had in tow, the ability or (hampered as she was by a scow) the inability he had to render assistance to any of them in the event of their getting adrift.

IRVING, J.A.

Volens was not raised in the pleadings, but all the other points discussed before us seemed to have been raised.

GALLIHER, J.A.: I do not think there was any contract for the towing of the plaintiff's boats by the defendant. The defendant, however, notified the plaintiff that he could tie on and it would tow him down. In doing so it would be obligated to use ordinary and reasonable care. The question is then a very narrow one: Did they use such care?

The only negligence charged which we need consider is that the defendant put out from Grief Point with the tow in weather unfit for the purpose. As to the state of the weather there is a direct conflict of evidence, and the learned trial judge has found in favour of the plaintiff. The evidence most relied on by the plaintiff in this regard is that of Coughlin, a master mariner, who was himself in charge of a similar tow some five miles south of Grief Point, where he was anchored behind Myrtle Point, the substance of his evidence being that he did

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not proceed with his tow on the morning of the 16th (when defendant left Grief Point) because in his judgment it would be unsafe to do so.

In answer to a question put by plaintiff's counsel:

"What do you say as to his [defendant's captain] attempt to get around Grief Point?"

which was objected to but allowed, Captain Coughlin says:

"Well I wouldn't have pulled out had I been in that position. I wouldn't have tried to go by Myrtle Point under the conditions. I might have tried to but I would have had to turn back."

And again:

"Well that was optional to himself what he did in the matter; use his own judgment."

It is a matter of common knowledge that some competent captains will take their ships out in weather and deem it safe while other equally-competent captains will not. It is as the witness says a matter of judgment which each determines for himself.

Then Captain Coughlin would not be in as good a position to judge as to coming out from behind Grief Point as if he had been anchored there, and there is this further to consider, that at points even five miles apart it might be much more dangerous to come out from behind one point than another, depending on the lay of the land and the direction of the wind, and also in these narrow channels the nature of the currents or tide rips. Then there is the further evidence of the defendant's captain, and three or four other witnesses that when they got out a short distance beyond the shelter of Grief Point a sudden squall came up which caused them to turn round. This is not directly controverted by the plaintiff's witnesses, their evidence in substance being that the weather was too rough to start out at all. There is no suggestion that Captain Whitman was not a competent man for the discharge of the duties entrusted to him. His act in going out from behind the point was at most, as I view the evidence, even if the trial judge discarded the evidence as to the squall coming up, an error in judgment. I do not think it can be deduced from the evidence that that error in judgment might not reasonably have been made. On

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the whole I do not think that the evidence constituted in law liability on the part of a gratuitous carrier or mandatary.

I would allow the appeal.

McPHILLIPS, J.A.: I agree that the appeal should be dismissed. The learned trial judge has refrained from giving written reasons, which renders it somewhat difficult to quite understand the express findings of fact at which he arrived, yet there would appear to be sufficient evidence upon which to find that there was a breach of contract and that the legal obligation was not performed; further, in all contracts of towage there is an implied obligation that competent skill and best endeavours shall be used in doing the work. The responsibility which rested upon the appellant in the present case—the owner of the tug engaged in the towing—can be ascertained by referring to what Sir Barnes Peacock said in *Smith* v. *St. Lawrence Tow-Boat Company* (1873), L.R. 5 P.C. 308 at p. 314:

"The rule was clearly laid down by Lord Kingsdown in the case of *The Julia* [(1861), Lush. 224]. Speaking of the duties of a tug steamer, he says 'a tug is to use proper skill and diligence, and is liable for any damage by her wrongful act. When the contract to tow was made, the law would imply an engagement that each vessel would perform its duty in completing it; that proper skill and diligence would be used on board each; that neither vessel, by neglect or misconduct, would create unnecessary risk to the other or increase any risk which might be incidental to the service undertaken. If, in the course of the performance of the contract, any inevitable accident happened to the one without default on the part of the other, no cause of action could arise. If, on the other hand, the wrongful act of either occasioned damage to the other, such wrongful act would create a responsibility in the party committing it if the sufferer had not by any misconduct or unskilfulness on his part contributed to the accident.'"

MCPHILLIPS, J.A.

This case is not one where it could be said that the respondent had any control. He was not a master mariner skilled in towing or with any qualifications as a mariner—the whole responsibility was upon the tug. It was not a case of inevitable accident. I can only assume that the learned trial judge in finding for the plaintiff found the appellant guilty of negligence and held the respondent guiltless of any misconduct or unskilfulness contributing to the accident. It would appear from the evidence that the master of the tug undertook to pro-

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ceed in weather which was exceedingly dangerous, and this wrongful act occasioned damage to the respondent. The *quantum* of damages as allowed cannot be said to be such as would savour of being excessive in the circumstances.

I would dismiss the appeal.

Appeal dismissed, Galliher, J.A. dissenting.

Solicitors for appellant: *Davis, Marshall, Macneill & Pugh.*
Solicitors for respondent: *Ellis & Brown.*

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TECLA v. BURNS, JORDAN & WELCH.

Master and servant—Workmen drowned while crossing river—Colliding with cable—Foreman—Negligence of—Employers' Liability Act, R.S.B.C. 1911, Cap. 74, Sec. 3 (2).

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The fact that a foreman, in charge of railway construction, permits his workmen to cross a river in a rowboat without directing them as to the manner in which they are to cross or cautioning them of the danger of colliding with a cable which sagged into the water, does not, in the absence of evidence of unseaworthiness of the boat or incompetency of the boatmen in charge, support a specific finding of negligence on the part of the foreman under the Employers' Liability Act so as to render the employer liable for the drowning of the men owing to the capsizing of the boat when in collision with the cable (GALLIHER and MCPHILLIPS, JJ.A. dissenting).

Andreas v. *Canadian Pacific Ry. Co.* (1905), 37 S.C.R. 1 applied.

APPEAL from the decision of MURPHY, J. and the verdict of a jury in consolidated actions for damages owing to the drowning of three men in the Fraser River while in the employ of the defendants. The defendants under a contract with the Canadian Northern Railway were engaged in the construction of a portion of the road near Saddle Creek on the east side of the Fraser River, the men who were drowned belonging to

Statement

a construction gang at that point. The C.P.R. right of way was on the west side of the river alongside of which the construction gang had their camp. On the morning of the accident the men crossed in a boat to the east side to their work. At noon they had just finished putting a cable across the river, which sagged into the water. They were then ordered by the foreman to go across to the camp. Two boatmen had been hired by the defendants for the purpose of taking the men back and forth. The boat (containing six men) started at a point from 300 to 400 feet above the cable, and the two boatmen were rowing. There was no evidence as to the number of oars used. Upon nearing the middle of the river something appeared to have gone wrong with the rowing and the boat drifted against the cable and upset, five of the six men being drowned. The current at this point was estimated at six miles an hour. The jury found that the accident was due to the negligence of the foreman in not seeing that proper precautions were taken in recrossing the river when the cable was sagging into the water, their verdict being for the plaintiffs under the Employers' Liability Act. The defendants appealed.

Statement

The appeal was argued at Vancouver on the 2nd of November, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

S. S. Taylor, K.C., for appellants: The verdict was under the Employers' Liability Act, and we say there was no evidence to sustain the verdict under the Act. The boat started from the east side from three to four hundred feet above the cable. Two expert boatmen were employed and altogether there were six men in the boat. The allegation that the foreman should have done something to prevent their floating against the cable cannot be sustained, as the boatmen were employed for that purpose. The foreman having employed skilled men his duty was finished. There was no evidence of the number of oars in the boat.

Argument

Reid, K.C., for respondents: The evidence does not say the men were skilled boatmen. It was safe to go across below the cable and they should have been directed to go there. For a quarter of a mile both above and below the cable it was clear

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water. It was not a question of navigation; it was the danger of boats coming in contact with the cable.

Taylor, in reply: The foreman is a foreman for railway construction and not necessarily a skilled boatman.

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MACDONALD, C.J.A.

MACDONALD, C.J.A.: The judgment appealed from rests entirely upon the finding of the jury that the foreman was negligent in the exercise of superintendence within the meaning of subsection (2) of section 3 of the Employers' Liability Act. The deceased men were working on the east side of the river. At lunch time the foreman, who was on the west side, is said to have called to them to come across. There is no evidence that he gave directions as to how they were to cross, *i.e.,* what course their boat was to take in crossing. The means of crossing supplied by the appellants was a rowboat in charge of two rowers, whose skill is not in question, nor is any question raised as to the sea-worthiness of the boat and the sufficiency of its equipment. What evidence there is goes to shew that the rowers were skilful in that kind of navigation. The foreman in question was in charge of railway construction work, and it was not suggested that he had as good a knowledge of the dangers of navigating the river as had the two rowers who had been engaged to do that very work. It was just as apparent to the boatmen, in fact it ought to be more apparent to them than to the foreman, that the presence of the cable spanning the stream would make the crossing more dangerous than it had been theretofore. I do not think it was negligence on the foreman's part to refrain from directing the boatmen how they should navigate the river, or to refrain from calling their attention to the danger which was apparent to the boatmen and to the deceased men. Whether the crossing could be made with reasonable safety at a point on the river above the cable was a matter of judgment to be exercised by the boatmen—not by a foreman of railway construction.

But there is another difficulty in the plaintiffs' way: the evidence does not disclose what caused the accident; all that is disclosed is that the boat was seen drifting with the current

towards the cable, which it ultimately came in contact with. The boatmen had stopped rowing, but for what cause does not appear. It may have been because of an accident to the oars, or of misconduct of the boatmen themselves or of the deceased men. What caused the boatmen to cease rowing and lose control of the boat is a matter of mere conjecture. The jury must have felt this difficulty because they refrained from specifying in what the foreman's negligence consisted, they merely say that it consisted in not taking proper precautions in view of the cable being in the stream. The most that plaintiff's counsel could contend for was that the foreman ought to have told the boatmen to cross below the cable. The fact that it was safer to cross below does not prove that it was not reasonably safe to cross above. It is quite clear to me that the crossing could have been safely made above; it had often been made there prior to the accident and though the cable was not then across the stream yet it is not suggested that the boat had previously been carried down stream to the place where the cable was on that morning. But be that as it may, the boatmen and not the foreman were, in my opinion, the persons to decide how the crossing should be made. Moreover, there is no evidence that the foreman did not instruct the boatmen to cross below the cable, though I think the fair inference is that he left the manner of crossing entirely to the discretion and skill of the boatmen.

MACDONALD, C.J.A.

IRVING, J.A.: Three men, who were working for the defendants, contractors, engaged in the construction of the Great Northern Railway, were drowned in broad daylight in the Fraser River when returning in a rowboat from their work on the left or easterly bank of the river to the defendants' camp, which was on the right or westerly bank of the river. In order to transport their stores from the easterly to the opposite shore, the defendants had strung, or were engaged in stringing, a cable across the river, some 700 or 800 feet wide. It was in consequence of the rowboat having got foul of this cable where it sagged into the water, that the plaintiffs were drowned.

IRVING, J.A.

The plaintiffs, who represent the deceased men, brought their

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action for negligence at common law and alternatively under the Employers' Liability Act.

At the trial the following questions were submitted and answers given:

"1. Were the defendants guilty of negligence which was the proximate cause of the accident? No.

"2. If so, what was such negligence? [Not answered.]

"3. Was the accident caused by reason of the negligence of any person in the service of the defendants who had any superintendence entrusted to him whilst in the exercise of such superintendence? Yes.

"4. If so, who were such persons? Foreman.

"5. If so, what was such negligence? In not seeing that proper precaution was taken in recrossing river on account of danger from the sagging cable and also apparent loss of control of boat.

"6. The damages of Francesco Forte and Sofia Galassi $1,000; to Ranalli and his wife $1,500, to Bellabene Tecla, $2,000."

Evidence was given shewing that the river, which ran at about six miles per hour, could be crossed either above the cable or below. The crossing above the cable was the more convenient to the work then in hand. In either event the boat on starting to cross would work up close to the bank so as to take advantage of the eddies or slack water, and then when it had reached —in the opinion of the boatmen, an opinion based on experience—a point sufficiently high up, would turn into the middle of the stream where the current is strongest, and by its force be carried down obliquely to the other side, the men rowing all the time. The resultant force should bring it to the opposite bank above the cable.

IRVING, J.A.

The defence of *volens* was pleaded but no question was put to the jury on that point. In the grounds of appeal it is alleged that the learned judge should have taken the case away from the jury on this ground.

The ground mainly argued before us was that there was no evidence to go to the jury in support of the point upon which the verdict is founded.

The persons concerned were the three men whom the plaintiffs represent, a fourth Italian who was saved, and two men, Blaine by name, who were the men in charge of the boat. It was a large dory such as is used by fishermen on the lower Fraser. No fault is found with its capacity or its equipment. The evidence as to the fitness of the men was given by Welch,

one of the defendants, on discovery. "I employed these men —the best possible men I could get, on account of—We have some very bad places." The ability and experience of the Blaines was questioned in argument, but the only evidence to support that view is that they were new to the job, in fact this was the first day on which they had been employed on this particular job, but the trip which terminated in this unfortunate accident was not their first trip. They had that morning ferried these same three men across to the left bank, and the accident occurred as they were returning to the right bank for dinner.

The accident occurred some four years before the case was brought to a hearing. By discovery evidence it was established that these three men were acting under one Murphy, who was foreman in charge of the cable; that he had told them to cease work and return to the right bank for their dinner; that the usual distance to be made up-stream before launching out into the current was 500 or 600 feet; that the boat on this occasion instead of reaching the shore, struck the sagging cable at about 75 feet from the shore; with one exception all were drowned. The rescued man was not a witness.

The plaintiff called three eye witnesses to the accident. Forte, who was on the right bank, standing alongside the foreman, saw them start out; he said the Blaines pulled up the river 300 or 400 feet only, when they started to cross (the Swedes, he says, used to row up-stream 700 or 800 yards before they turned). The strong current took them down to the cable where the boat capsized after it struck the cable. Novello, who was also on the right bank, said he first saw the boat when it was about 150 feet from the cable, drifting. The men were not then rowing. It struck the cable, first one man and then another seized the cable, the boat tipped, one man fell overboard, and the boat capsized. Asked if they were not rowing because they had lost their oars, witness said: "They were not rowing because they had become so frightened, they had let the oars drop from their hands."

Scamorra, who was also on the right bank, said that when he first saw the boat it was right at the cable. That the occu-

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pants fell into the water; that one man saved himself by holding on to the cable till he was rescued by another boat.

That is the whole of the evidence as to the accident. It gives us little or no information as to how the accident occurred. I am unable to see any evidence of negligence on the part of the foreman so as to bring in the 2nd subsection of the 3rd section of the Employers' Liability Act.

To support the judgment plaintiffs must rely on the first part of the 5th answer—the latter part, "also apparent loss of control of boat" seems insensible. Now, under the rule laid down in *Andreas* v. *Canadian Pacific Ry. Co.* (1905), 37 S.C.R. 1, all negligence is negatived except the alleged specific default of the foreman in not having made proper precaution for the recrossing of the boat; but if the boat was sound and well found and the oarsmen qualified, I do not see how the foreman could anticipate that for some unknown reason the men were to be struck with a sort of paralysis, and that such an accident could occur.

IRVING, J.A.

I would dismiss the action.

MARTIN, J.A.

MARTIN, J.A.: After much deliberation I am unable to see upon what ground the verdict can be supported. I regard the case as not going beyond one of deplorable accident, but for which, upon the evidence, the defendants cannot be held responsible. There is, in short, in my opinion, no evidence upon which the jury could reasonably find the main ground of negligence relied upon as regards the foreman, and as to "the apparent loss of control of the boat," that is mere idle speculation.

Therefore the appeal should be allowed.

GALLIHER, J.A.

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

There was evidence upon which the jury might reasonably find that the foreman, Murphy, was negligent. The crossings above and below the cable presented no real difficulty to experienced boatmen providing no accident occurred. It appears that the crossing above was somewhat more convenient for the defendants, but the jury was entitled to take into consideration the fact that there was stretched across the river a

wire cable which at the time was whipping with the current, a veritable death trap, which must have been apparent to the foreman in case any accident occurred while crossing above it. Knowing that the crossing below could be negotiated without any danger from the cable, the fact that it was somewhat more convenient to cross above should not for a moment have weighed in the mind of the foreman against the danger that lurked in crossing above the cable. It has been urged that this was a matter for the boatmen to decide, but I disagree with that contention. Once started on their journey in the water, the foreman would not be justified in giving orders as to the handling of the boat, these boatmen having been engaged for that purpose, but the point is as the jury may have viewed it, and as I view it, that the foreman, knowing the conditions, should never have allowed them to cross above after the cable was stretched, and so when he gave his orders to them to come across he was negligent in not directing them to cross below.

GALLIHER, J.A.

I do not lose sight of the principle that the foreman is not bound to use such care as will provide against all possible accidents, but I say that here was an apparent and grave danger which should never have been encountered and which there was no reason for exposing men to.

MCPHILLIPS, J.A.: It may well be said that the evidence does not establish a strong case of the right to recovery under the Employers' Liability Act, R.S.B.C. 1911, Cap. 74, yet I cannot say that there was not sufficient evidence to warrant the jury in so finding. It was not a case that could have been withdrawn from the jury. In *Toronto Power Co. Limited* v. *Kate Paskwan* (1915), 84 L.J., P.C. 148, Sir Arthur Channell, at p. 152 said:

MCPHILLIPS, J.A.

"It is enough to say, as both the judge who tried the case and the judges on appeal in the Supreme Court have said, that there was a case which could not have been withdrawn from the jury, and that the jury have found against the defendants . . . . . It is unnecessary to go so far as Mr. Justice Middleton did in the Court below, and say that the jury have come to the right conclusion. It is enough that they have come to a conclusion which on the evidence is not unreasonable."

Then we have Lord Loreburn, L.C. saying in *Kleinwort,*

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Sons and Co. v. *Dunlop Rubber Company* (1907), 23 T.L.R. 696 at p. 697:

"To my mind nothing could be more disastrous to the course of justice than a practice of lightly overthrowing the finding of a jury on a question of fact. There must be some plain error of law, which the Court believes has affected the verdict, or some plain miscarriage, before it can be disturbed. I see nothing of the kind here. On the contrary, it seems to me that the jury thoroughly understood the points put to them and came to a sensible conclusion."

In my opinion there was not in this case any error of law or any miscarriage, and the verdict of the jury was not unreasonable; it was a sensible conclusion based perhaps on no overwhelming body of evidence, yet there is sufficient evidence upon which to support it.

MCPHILLIPS, J.A.

I would therefore dismiss the appeal.

Appeal allowed,
Galliher and McPhillips, JJ.A. dissenting.

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

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

SERVICE v. CENTRAL OKANAGAN LANDS, LIMITED, THOMAS H. MILNE AND DOMINION TRUST COMPANY.

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SERVICE v. CENTRAL OKANAGAN LANDS

Practice—Parties—Dominus litis—Defendant struck out and added as plaintiff—Marginal rule 290.

S., a debenture holder in the defendant Company with the Dominion Trust Company as a party plaintiff, sued the defendant Company on behalf of himself and all other debenture holders entitled to the benefit of a debenture trust deed made between the defendant Company, the Kelowna Irrigation Company, Limited, and the Dominion Trust Company, to have an account taken of what is due from the defendant Company to the plaintiffs and that the trusts embodied in the deed be carried into effect. The action was commenced on the 13th of April, 1915. At the instance of M., a debenture holder who purported to represent a majority of the debenture holders, an order was made on the 28th of May adding M. as a party defendant, striking out as a plaintiff and adding as a defendant the Dominion Trust Company, appointing L. as receiver and manager of the defendant Company and giving M. the conduct of the action. On the 10th of June S. served notice of discontinuance of the action. On the 14th of June an order was made, at the instance of M. and from which this appeal is taken, striking out the notice of discontinuance, striking out S. as a plaintiff and striking out M. as a defendant and adding him as a plaintiff. M.'s consent in writing to be added as a party plaintiff had not been obtained.

Held, on appeal (MARTIN, J.A. dissenting), that S. not being *dominus litis* he had no power to discontinue the action.

Held, further, that M. being already a party defendant and having filed a consent in writing signed by his attorney and sworn to as such, such consent may be accepted as sufficient upon which, at his own request he may be made a party plaintiff in the action.

APPEAL by plaintiff from an order of MURPHY, J. made at Vancouver on the 14th of June, 1915. The facts are set out fully in the head-note and reasons for judgment.

Statement

The appeal was argued at Vancouver on the 6th of December, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Martin, K.C., for appellant: The action was brought by Service and notwithstanding the order giving Milne the con-

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duct of proceedings he is entitled to discontinue. By the order appealed from Milne was made a plaintiff without his consent having been first obtained in writing.

Sir C. H. Tupper, K.C., for respondent Milne: Such an attempt to outwit the Court has never taken place in England so there is no precedent. It is a gross abuse of the process of the Court. In a debenture holder's action a defendant can be given conduct of the action: *In re Rhodesia Goldfields, Limited* (1910), 1 Ch. 239. On the question of *dominus litis* see *Stevens* v. *Theatres, Limited* (1903), 1 Ch. 857; *In re Alpha Company, Limited, ib.* 203 at pp. 207-8; *Johnstone* v. *Cox* (1881), 19 Ch.D. 17; *Silber Light Company* v. *Silber* (1879), 12 Ch.D. 717. Marginal rule 133 does not apply, as Milne was a party to the action when the motion was made and his written consent was not necessary: see *Debenture Corporation* v. *C. De Murrieta and Co. (Limited)* (1892), 8 T.L.R. 496; *Fraser* v. *Cooper, Hall & Co.* (1882), 21 Ch.D. 718. Once on the record the rule has no application and his position can be changed.

Argument

Cur. adv. vult.

7th March, 1916.

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

MACDONALD, C.J.A. and IRVING, J.A. dismissed the appeal.

MARTIN, J.A.

MARTIN, J.A.: It is submitted that the plaintiff has lost his statutory right at this stage to discontinue by notice (given on the 10th of June, 1915) under r. 290 because the conduct of the action had been given, by previous order of the 28th of May, 1915, to the defendant Milne. After a consideration of the authorities cited, I am unable to accept this submission, and find nothing in them to support it. "Plaintiff" in said rule means the plaintiff upon the record and he does not lose that character simply because he happens to be controlled in the conduct of his action by an order made under another rule. He still is, as such "plaintiff," a "person asking for . . . . . relief against any other person," as defined by section 2 of the Supreme Court Act, and because his actions are restrained by another who has been made *dominus litis* he is nevertheless still "asking relief" from the Court in which

his plaint is still pending. In my opinion he was entitled as of right at that stage to discontinue his action rather than submit to have it carried on through the control of another, and I think there was no jurisdiction to set aside said notice of discontinuance as was done in the order of the 14th of June, 1915, now appealed from. It is not, in my opinion, proper to refer to the exercise of a statutory right as an attempt to evade the said order of the 28th of May. On the contrary, and with every respect, I regard the order as having deprived the plaintiff of a clear statutory right by a side wind.

MARTIN, J.A.

The appeal, therefore, should be allowed.

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

On the 28th of May, 1915, MURPHY, J. made an order adding Thomas H. Milne as a party defendant and giving the said Milne the conduct of the action instead of the plaintiff Service. This order stands, and has not been appealed from. On the 10th of June, 1915, the plaintiff Service filed and served a notice of discontinuance of the action and this notice was set aside by order of MURPHY, J., dated the 22nd of June, 1915, and by the same order the writ of summons was amended by striking out the name of George Service as plaintiff and substituting therefor Thomas H. Milne as plaintiff, and by striking him out as an added defendant. It is against this order that the appeal is taken.

GALLIHER, J.A.

While it is true that a plaintiff even when he sues on behalf of himself and all other debenture holders can before judgment discontinue, he being *dominus litis,* such was not Service's position at the time he discontinued. The order of the 28th of May had transferred the conduct of the action to Milne.

Then it was objected that Milne could not be made plaintiff without his written consent, but it is pointed out that Milne was already a party defendant by the order of May 28th, and was at his own request made party plaintiff in the order appealed from, and filed a consent in writing signed by his attorney, sworn to as such, and which is not contradicted. I think such a consent is sufficient: see *Morton* v. *Copeland* (1855), 16 C.B. 517; 24 L.J., C.P. 169.

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McPHILLIPS, J.A. agreed in dismissing the appeal.

Appeal dismissed, Martin, J.A., dissenting.

Solicitors for appellant: *Cowan, Ritchie & Grant.*

Solicitors for respondent Milne: *Tupper, Kitto & Wightman.*

Solicitors for respondent Central Okanagan Lands, Limited: *Davis, Marshall, Macneill & Pugh.*

Solicitors for respondent Dominion Trust Co.: *Cowan, Ritchie & Grant.*

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SANDERS v. FRICK CO.

SANDERS v. FRICK COMPANY.

Master and servant—Compensation for injury—Employment within building under construction—Installing piping for ice plant—"Undertaker"—Workmen's Compensation Act, R.S.B.C. 1911, Cap. 244, Sec. 4.

SANDERS v. FRICK CO.

The installing of piping forms a necessary part of the construction of a cold-storage plant, with the building which was in the course of construction, and the contractor engaged in its installation is an "undertaker" within the meaning of section 4 of the Workmen's Compensation Act.

Mason v. *Dean* (1900), 69 L.J., Q.B. 358 followed.

APPEAL from the decision of MURPHY, J., of the 29th of September, 1915, upon a special case submitted by SCHULTZ, Co. J. acting as arbitrator to assess damages to which the applicant was entitled under the Workmen's Compensation Act for injury sustained while working for the Frick Company in installing piping for an ice plant in the building of the Mainland Ice and Cold Storage Co., Ltd. Said Company had entered into contracts with various contractors for different parts of the plant; one of these contracts was let to the Frick Company for furnishing and installing the pipings and fittings of an ice plant. The applicant had

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been employed by one Strang, now deceased, acting for the Frick Company, as a labourer engaged in installing the piping, the building exceeding the statutory height of 40 feet. He was injured while working owing to large coils falling on him. The arbitrator found (1) that the applicant's claim was one in which he was entitled to compensation under the Act; that the building was not completed for the purpose for which it was built and that the respondent was undertaking a substantial part of the construction of a cold-storage plant and was an "undertaker" within the meaning of section 4 of the Act.

The following questions were submitted for the opinion of the Court:

Statement

"(a) Whether I am right in the ruling that the respondents were undertakers within the meaning of the Workmen's Compensation Act?

"(b) Whether I am right in the ruling that the applicant's employment was one of the employments specified in section 4 of the Workmen's Compensation Act?"

The appeal was argued at Vancouver on the 17th of November, 1915, before IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

W. S. Deacon, for appellant (respondent Company): The first question is whether the Frick Company was an "undertaker" under the Workmen's Compensation Act; and secondly whether installing piping for the circulation of ammonia in an ice-making establishment is an employment as specified by section 4 of the Act. We contend that he was not engaged in constructing or erecting the building: see *Mason* v. *Dean* (1900), 69 L.J., Q.B. 358; *Percival* v. *Garner, ib.* 824.

Harper, for respondent (applicant): The case was decided on the principle laid down in *Mason* v. *Dean* (1900), 69 L.J., Q.B. 358; see also *Plant* v. *Wright & Co.* (1905), 1 K.B. 353. On the meaning of the word construction see *Hoddinott* v. *Newton, Chambers & Co., Limited* (1901), A.C. 49; *McCabe* v. *Jopling and Palmer's Travelling Cradle, Limited* (1904), 1 K.B. 222. As to what is scaffolding is a question of mixed fact and law: see *O'Brien* v. *Dobbie & Son* (1905), 1 K.B. 346 at p. 351.

Argument

Deacon, in reply.

Cur. adv. vult.

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

MARTIN, J.A.: I find myself unable to distinguish this case from the principle involved in *Mason* v. *Dean* (1900), 69 L.J., Q.B. 358; and *Plant* v. *Wright & Co.* (1905), 74 L.J., K.B. 331. It is often a very nice point of fact to determine whether or no a piece of work can fairly be considered as part of the construction of a building. In the present case there is evidence on which it was open to the learned arbitrator to reach the conclusion he did reach, and therefore his view should be affirmed.

The appeal should be dismissed.

GALLIHER, J.A.: In determining this question I think it is important that we should consider the purposes for which this structure was being erected, *viz.*, for cold storage and the manufacture of ice. It was in contemplation from the beginning that this piping had to be put in; in fact without it the building would have been useless for the intended purposes.

It was urged that the building as erected under the contract with Baynes & Horie was a completed building. It may have been a completed shell or outside structure, but not a completed building for the purposes for which it was designed. The piping for these purposes was just as necessary as the outer structure and was attached to and formed a part of it.

The cases of *Mason* v. *Dean* (1900), 69 L.J., Q.B. 358, and *Hoddinott* v. *Newton, Chambers & Co., Limited* (1901), A.C. 49, are in favour of the respondent applicant's contention.

I would dismiss the appeal.

MCPHILLIPS, J.A.: The appeal in my opinion fails. It is not a case of installing machinery in no way connected with the construction of the building itself. The building at the time of installation was still in the course of construction, and upon the questions of fact the learned arbitrator has found that "the respondents herein were undertaking a substantial and necessary part of the construction of a cold-storage plant and refrigerator warehouse and were undertakers within the meaning of section 4 of the Workmen's Compensation Act,

and the employment was one to which the said Act applies." Turning to the evidence it can well be said that there was sufficient evidence upon which this finding could be made. Upon the questions of law submitted to MURPHY, J. by the learned arbitrator, and answered by that learned judge in the affirmative, confirmatory of the learned arbitrator's decision, I am in entire agreement, the questions being rightly, in my opinion, answered in the affirmative. The building under construction was a cold-storage warehouse and to bring it to completion and capable of use as such, it was a matter of absolute necessity that the cold-storage plant should be installed consisting of a very considerable plant which in its installation cannot really be said to not form a part of the construction of the building, as much a part thereof as in these modern days the heating plant would be, consisting of piping, etc., carried through the floors and rooms; in fact, to even a greater degree in the case of a cold-storage plant, as it is of necessity a very substantial part of the building, and without it the building would to a very great extent be wanting in usefulness. The learned counsel for the appellant, in a very able argument, endeavoured to shew that the respondent was in no way an "undertaker" within the purview of the Act and relied greatly upon *Mason* v. *Dean* (1900), 69 L.J., Q.B. 358; and *Percival* v. *Garner, ib.* 824; that is distinguishing *Mason* v. *Dean* from the present case and relying upon the *ratio decidendi* of the decision and in particular relied upon *Percival* v. *Garner*. In my opinion, however, these two authorities do not assist the appellant in this appeal. In *Mason* v. *Dean, supra,* Collins, L.J. at p. 361 said:

MCPHILLIPS, J.A.

"I am of the same opinion. I think that the County Court judge made a mistake as to the application of the case of *Wood* v. *Walsh & Sons* (1899), 1 Q.B. 1009; 68 L.J., Q.B. 492 to this case. It is the work on which the respondent was engaged and not that on which the workman was engaged which it is material to consider. The arbitrator found as a fact that the work on which the respondent was engaged was work of construction, and I entirely agree with him. The words of the specification obviously embrace work which in any fair sense of the word must be called construction rather than decoration. . . . . Now in this case the workman was engaged in painting the ceiling of the theatre, but the particular work on which the workman was engaged is immaterial. In order to come within the Act, it is only necessary that he should be

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employed by the undertakers upon work, and the work of the undertakers should be within the Act."

And at p. 360, in the same case, A. L. Smith, L.J. said:

"Now it must be premised that the building on which the workman was employed was an uncompleted building, and the work which was put into the hands of the respondent was for the purpose of bringing the building which was in course of construction towards completion."

With reference to *Percival* v. *Garner, supra,* that was a case where the person sought to be charged with liability had merely supplied labour for the building to the building owner, the "undertaker" within the meaning of the Act.

MCPHILLIPS, J.A.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Deacon, Deacon & Wilson.*
Solicitors for respondent: *McCrossan & Harper.*

MARTIN, LO. J.A.

1916

March 22.

MORRISSETTE v. THE "MAGGIE" *ET AL.* (No. 2).

Admiralty law—Seaman—Consolidated actions for wages—Several ships joined as defendants — Costs — Joint or several liability —"Result" under rule 132.

MORRISSETTE v. THE "MAGGIE"

Where several seamen by consolidation, join their individual claims in one action for wages against the owner of one or more ships engaged in a common enterprise with resulting liens on different ships, each claimant is not thereby liable for costs consequent upon the failure of another claimant to establish a specific lien, which they never set up.

Statement

REFERENCE by the registrar and solicitors arising out of the taxation of costs pursuant to the judgment in this action delivered on the 25th of February, 1916, reported *ante* p. 424.

Wintemute, for four plaintiffs.
Brydone-Jack, for defendant Bampton.

22nd March, 1916.

MARTIN, LO. J.A.

1916

March 22.

MORRISSETTE v. THE "MAGGIE"

MARTIN, Lo. J.A.: This is a reference by the registrar and solicitors arising out of the taxation of costs after the judgment delivered on the 25th of February last. Nine plaintiffs joined in one consolidated action for wages alleged to be due to them by George Bampton on a fishing lay in connection with the gasoline fishing-boats Maggie, Eva and Echo, and the Maggie was arrested under a separate warrant issued at the instance of their joint solicitor, founded solely on an affidavit of Thomas Julius one of the plaintiffs, claiming a lien for $281.25 for his wages. By the indorsement of claim on the writ it clearly appears that only four of the plaintiffs, *viz.*, Chief Julius and his two sons, Thomas and Patrick, and Henry James Cook, set up any claim against the Maggie, the others "respectively" claiming against the Eva and the Echo. The various groups of claims against the respective vessels are properly segregated and alleged as being due to the respective laymen "while operating the ship Maggie," or Eva, or as the case may be. George Bampton entered an appearance and denied that he was the owner of the Maggie. His brother William Bampton claimed to be her owner, and was added as a defendant by consent and appeared by separate solicitor in order to support his claim.

Judgment

The action as regards the four claims for a lien upon the Maggie came on for trial on the 28th of February, and it resulted in favour of William Bampton, he being declared to be the owner thereof, and she was declared free from any lien and released from arrest. In my reasons for judgment it was ordered that "the action as regards the claim of the three Indians and Cook is dismissed with costs," which left the claims of the other plaintiffs against the other vessels open for future trial, as well as the claims of the present four plaintiffs against George Bampton. The formal judgment, when first submitted to me for approval, to see that it was in accord with my judgment, was marked "approved" by the solicitors, and, after setting out the full style of cause including the nine plaintiffs, read thus:

"The judge having heard the plaintiffs, Chief Julius, Thomas Julius, Patrick Julius and Henry James Cook, the witnesses on their behalf, and

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their counsel, and William Bampton, and the witnesses on his behalf, and his counsel, dismissed the action as against William Bampton and the ship 'Maggie,' and set aside the arrest of the ship 'Maggie,' and directed that the said ship 'Maggie' be released forthwith."

I approved this order, but later the solicitor for William Bampton applied to me, on the 9th instant, just as I was leaving the Law Courts to return to Victoria, and pointed out that by an oversight the direction as to costs given in my reasons had been omitted so I added the words "and condemned the plaintiffs in costs." On taxation of costs it was urged that these words extended to the other five plaintiffs named as such in the writ and warrant in addition to those recited in the said judgment as having been concerned in the trial against the Maggie. This contention, in my opinion, cannot be supported in the circumstances of this case, whatever might be the result in other consolidated actions where general and undefined claims are set up and persisted in by consolidated plaintiffs as a whole. From the very beginning the liens claimed against the various vessels were clearly distinguished and at no time upon the record was the Maggie alleged to be liable for any liens except those of the four plaintiffs, and it was their claim alone against her that was in issue and adjudicated upon at the trial. Therefore it follows that they alone should be answerable for the failure of their claims and, having regard to the issues, trial, and context, they are "the plaintiffs" who are referred to in my said addition to the judgment as being condemned in costs. This is the real "result," mentioned in rule 132, so far as they are concerned. There is, moreover, no hardship in this because if these four plaintiffs had brought this action apart from the other claimants the result would have placed the successful defendant William Bampton in no better and no worse position as regards the recovery of costs than he is now. It was quite proper, as well as convenient, to have consolidated all these claims according to the practice of this Court referred to in the judgment in *Cowan* v. *The St. Alice* (1915), 21 B.C. 540 at p. 544; 8 W.W.R. 1256 at p. 1260, for by so doing considerable costs might have been saved (and indeed may be so yet, as regards the other pending claims) and in any event no additional costs would have been incurred;

Judgment

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the various parties would have been and can be protected in this respect on taxation by a proper apportionment.

The point, in principle, and put briefly, is that merely because various seamen take advantage of the said convenient practice to join in one action their individual claims for wages against the owner of one or more ships engaged in a common enterprise with resulting liens on different ships, it does not follow that each claimant is liable for costs consequent upon the failure of another claimant to establish a specific lien which the former never set up. The costs in each case would be awarded according to the discretion conferred by said rule 132. To reverse the present position: if the four plaintiffs who alone participated in the trial of this particular lien had been successful, I should not have felt justified in also awarding costs to the other five plaintiffs who were not concerned, and took no part therein, and could derive no benefit therefrom.

The result is that the submission of the four plaintiffs is upheld and they are entitled to set off any costs occasioned by this controversy.

Judgment accordingly.

JAMES THOMSON & SONS, LIMITED v. DENNY AND ROSS.

MURPHY, J.

1916

April 4.

JAMES THOMSON & SONS v. DENNY

Novation—Individual security—Promissory note—Acceptance of—Original indebtedness—Partnership—Release.

Where partners are indebted as principals and it is afterwards agreed between them that as between themselves one of them shall assume the partnership debts, and this agreement is not made known to the creditors, the rule as to the discharge of a surety by giving time to the principal debtors does not apply.

ACTION tried by MURPHY, J. at Vancouver on the 28th of March, 1916. The facts are set out in the reasons for judgment.

Statement

MURPHY, J.

1916

April 4.

G. G. McGeer, for plaintiffs.
Mayers, for defendants.

4th April, 1916.

JAMES THOMSON & SONS *v.* DENNY

MURPHY, J.: I held at the trial that defendants had failed to prove that plaintiffs had agreed to accept Ross solely for the balance of the partnership debt. In my view what they did was to secure Ross's several liability as additional security to the joint liability of the firm. As to no notice of dishonour in my opinion the bills of exchange sued upon were accepted solely by Ross under his then trade name of Denny & Ross. As Denny's name, if that view is correct, does not as a matter of law appear upon them he cannot be sued upon them but as plaintiffs have them and produced them in Court as being unpaid in part they can, I think, sue Denny for the balance due on goods furnished the old firm and they have pleaded such claim in the alternative. As to giving Ross time, the case of *Rouse* v. *Bradford Banking Company* (1894), A.C. 586 shews that the doctrine of *Oakeley* v. *Pasheller* (1836), 4 Cl. & F. 207 only applies where the creditor knows of the arrangement between the partners that as between them the continuing partner is to be primarily responsible for the partnership debt. Here plaintiffs had no knowledge of such arrangement. As to election, I think the case of *Bottomley* v. *Nuttall* (1858), 28 L.J., C.P. 110, in my view of the facts conclusive in favour of the plaintiffs. Here, as there, to quote the words of Selborne, L.C. in *Scarf* v. *Jardine* (1882), 7 App. Cas. 345, an acceptance had been given which was evidence of a successive obligation and proof of it would by no means extinguish or destroy any right which the party might have upon the original debt and the original consideration. The proof filed under the Ross assignment was not on the joint debt but on the acceptances which I hold on the facts to be those of Ross alone and so the joint debt has never been dealt with.

Judgment

There will be a reference to the registrar to ascertain the amount due plaintiffs on the debt existing on the 1st of July, 1912. Costs reserved for consideration after report of registrar is made.

Judgment accordingly.

TOBIN v. COMMERCIAL INVESTMENT COMPANY LIMITED, DOUGLAS, SARGISON AND WHITE. COMMERCIAL INVESTMENT COMPANY LIMITED v. TOBIN, GREEN AND FORSYTHE.

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Appeal book — Approval of by respondent — Must be complete when approved.

Practice—Pleading—Counterclaim—Misfeasance of directors—Joinder of other parties in counterclaim—Inapt wording of alternative claim—Amendment.

It is the duty of a solicitor to see that an appeal book contains all material required on the appeal before approving of same.

Where an appeal book is approved by respondent's solicitor "subject to insertion of minutes as enclosed" and later the registrar settles the appeal book without including the minutes, the presumption is that the appeal book was properly settled, and the minutes cannot be used on the appeal.

In an action to recover money and securities alleged to have been obtained from the plaintiff by fraud and duress the defendant Company set up by way of defence that the plaintiff with G. and F. had been involved in a conspiracy to obtain certain sums of the Company's money, that they later agreed to make restitution and in pursuance thereof the money and securities that the plaintiff now seeks to recover were voluntarily handed over by the plaintiff to the Company. By way of counterclaim the foregoing allegations were repeated, G. and F. were joined with the plaintiff as defendants on the counterclaim, specific performance of the agreement prayed for, or in the alternative relief on the ground of conspiracy to defraud the Company. The defence and counterclaim were on motion struck out.

Held, on appeal (reversing the order of HUNTER, C.J.B.C. and dismissing the motion, MARTIN, J.A. dissenting), that the main object of the Judicature Act and Rules is to enable all matters arising out of one transaction, particularly where the same parties are involved, to be disposed of in one action, and thus prevent multiplicity of suits.

Frankenburg v. *Great Horseless Carriage Co.* (1899), 69 L.J., Q.B. 147 followed.

If an alternative claim in a counterclaim is embarrassing by reason of the inapt terms in which it is worded, it is a ground only for striking out the alternative claim but not the whole counterclaim, which can be amended.

Statement

APPEAL by the Commercial Investment Company, Limited, from orders of HUNTER, C.J.B.C. made on the 10th of Decem-

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ber, 1915, one striking out the defence and counterclaim of the defendant Company as against Arthur H. Tobin, the plaintiff in the action and a defendant on the counterclaim; and two orders striking out the counterclaims against the defendants John R. Green and Charles A. Forsythe. The plaintiff Tobin, who had been a director of the Commercial Investment Company, brought action against the Company, R. W. Douglas, A. G. Sargison and A. M. White, alleging that the Company, by virtue of its directors with the said White, Sargison and Douglas, by false and pretended charges of wrongdoing, fraud and criminality, did with menaces demand and obtain from him $5,000 in cash, an assignment of $1,500, being part of the moneys due him under a certain mortgage, and a surrender of the shares that had been purchased by him in the Company; the delivery of the money, assignment of mortgage and shares being effected by threats, intimidation and coercion at a meeting of the directors on the 11th of February, 1915. The plaintiff claimed repayment of the $5,000, a cancellation of the assignment of the mortgage moneys, and restitution of the shares. The defendant Company after denying the plaintiff's allegations claimed that the $5,000 payment, the assignment of the mortgage and the delivery of the shares was the voluntary act of the plaintiff under an arrangement with the Company. The Company then alleged that the plaintiff with Green and Forsythe, all of whom were made defendants on the counterclaim, were parties to a fraudulent conspiracy to obtain the moneys of the defendant Company, and did actually obtain for themselves over $20,000. The defence then disclosed the fraudulent transactions as follows: The Company was a lending Company, the defendant Green being president, a director, and its solicitor, and Forsythe was its secretary and also a director, and Green, Forsythe and Tobin formed a majority of the executive committee of the Company. The first act of conspiracy was that they procured one Sheldon Williams to make applications for three loans amounting in all to $8,400 upon the security of certain promissory notes and real estate and they as members of the executive committee of the Company approved of and passed these

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loans, Williams at the time being indebted to them in certain sums of money which were secured by the promissory notes and real estate which they accepted as security for said loans from the Company. The Company's money advanced on these loans was never in fact paid to Williams but was appropriated by the defendants ostensibly as a return of the indebtedness of Williams to themselves. These defendants as members of said executive committee also approved of and passed eleven other applications for loans to different parties the securities for which were in fact the properties of the defendants themselves and the moneys advanced on said securities were not paid to the applicants but went into the hands of the defendants. The securities obtained on all these loans were grossly inadequate; the promissory notes in question being worthless, and the property of very little value. At the end of February, 1915, the Company became aware of the particulars of the aforesaid transactions and demanded that they should be annulled; that the defendants take back the securities; and that they refund to the Company the moneys that they had obtained. An arrangement was then arrived at between the Company and Green (who acted on behalf of himself and as solicitor for Tobin and Forsythe) that Tobin should pay to the Company $5,000 in cash; assign $1,500 of the mortgage referred to and pay a further sum of $2,300 which should be secured by the deposit of the shares he held in the Company, and that Green and Forsythe should each resume certain portions of the securities given the Company and should pay the Company certain sums of money. The defendant Company counterclaimed repeating the allegations as above and alleging that Green, Forsythe and Tobin had not carried out the agreement in the way of paying the sums that they had promised to do under the agreement, and claimed that they were entitled to payment of the amounts specified in the agreement or in the alternative for damages for misfeasance and breach of trust. On the application to strike out the defence and counterclaim an affidavit was admitted including as an exhibit what purported to be a release from the defendant Company to Green, made on the 18th of March, 1915, whereby the Company and

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himself settled their differences, and each released and discharged the other from all claim, action, or demand of any nature. The defendant Company appealed on the grounds, first, that it would be seriously embarrassed in its defence against the three defendants to the counterclaim unless its counterclaim be allowed to stand and that the release produced by Green was a matter of defence and should not have been used upon the motion appealed from.

Statement

The appeal was argued at Victoria on the 11th and 12th of January, 1916, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

McDiarmid, and *A. Moresby White,* for appellant.

W. J. Taylor, K.C., for defendant Green, raised the preliminary objection that he had approved of the appeal book subject to the minutes of the meetings of the plaintiff Company being included and he now finds they are not in the appeal book. The words written by respondent's solicitor on the appeal book submitted for approval were: "Approved subject to insertion of minutes as enclosed." The practice of approving of the appeal book up to a certain point has always been followed; the appellant then knows what is wanted to complete.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: These appeal books were settled by the registrar and are supposed to contain everything that is relevant. It is an unsatisfactory way of passing appeal books. It may suit solicitors very well, but the idea of an appeal book is that all questions affecting it are settled before the appeal comes on, so that it is known what the material is, and it is known that all the material is in. To mark the appeal book settled subject to insertion is unsatisfactory, it is placing a burden on the registrar improperly. In other words you should have refused to mark the appeal book settled until these minutes had been inserted and then marked the appeal book as settled. There is a burden upon the solicitor to see that the rules of the Court are carried out. He has the responsibility and before settling the matter he should go before the registrar. If we were to enforce the rules now we would exclude

these minutes altogether. As you stand now as respondent you have no right to get these minutes in and it is your own fault. If it is in the interests of justice, and considering what was contained in them, we ought perhaps to allow the minutes to be used, but the practice should be followed. The sooner the profession here, if it has been the practice to approve of appeal books subject to additions, abondon that practice the better, because one of these times the solicitor will find that the Court will not permit him to set up any arrangement of the kind. It is a fallacy to suppose counsel has no responsibility in settling these books. He takes a fee of 10 cents a folio for reading and settling the appeal book. Is that a gratuity, or is he only doing his duty in the ordinary way by reading it?

MACDONALD, C.J.A.

IRVING, J.A.: He settled it without the minutes. This appeal was settled by the registrar on the 31st and Mr. *Taylor's* objection is on the 30th. The presumption is that they were satisfied if the registrar so settled it.

MARTIN, J.A.: The trouble is that this controversy instead of being settled below, as it ought to have been, by the matter being there taken up by both parties, is brought up here. If they were not satisfied with the settlement by the registrar they should have taken the matter before the judge in a summary way, so that he could have said of his own knowledge what material had in fact been before him.

GALLIHER, J.A.: The inference may be drawn that the registrar has not considered it proper to put it in.

MCPHILLIPS, J.A.: Then they would have an appeal to the judge from the registrar, and the whole thing could be settled. I would not like to impose the responsibility upon the respondent. I think the appellant has the responsibility of producing a proper appeal book. I think that is the sequel to what I have said. I agree with my brother IRVING that the consequence would be we have the right to assume that all those proper preliminary steps were taken, but apparently counsel says they were not.

White, on the merits: The charge is for blackmailing the plaintiff into paying certain moneys and the defence raises a

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straight charge of conspiracy against Tobin, Green and Forsythe and a joint conspiracy is alleged. The Company's case is one of conspiracy or nothing. On the question of embarrassment see *O'Keeffe* v. *Walsh* (1903), 2 I.R. 681; *The Kent Coal Exploration Company (Limited)* v. *Martin* (1900), 16 T.L.R. 486; *Mayor, &c., of City of London* v. *Horner* (1914), 111 L.T.N.S. 512; *In re Morgan. Owen* v. *Morgan* (1887), 35 Ch.D. 492; *Turner* v. *Hednesford Gas Co.* (1878), 3 Ex.D. 145; *Turquand and others* v. *Fearon* (1879), 40 L.T.N.S. 543; *Tomkinson* v. *The South-Eastern Railway Company (No. 2)* (1887), 57 L.T.N.S. 358. On the question of the necessity of bringing an independent action it is laid down in the judgment of Bowen, J. in *Knowles* v. *Roberts* (1888), 38 Ch.D. 263 at p. 270, that the right of a party to frame his action as he pleases is sacred.

Taylor, for respondent Green: They claim misfeasance against all three defendants and at the same time affirm the contract with Tobin. They cannot escape an inconsistency by adding the word "and" disjunctively, and the Court will not interfere with the judgment below in such a case unless he has acted on a wrong principle: see *Davy* v. *Garrett* (1878), 7 Ch.D. 473 at p. 486; Annual Practice, 1916, pp. 362 to 365; *Watson* v. *Rodwell* (1876), 3 Ch.D. 380.

Argument

Luxton, K.C., for respondent Forsythe: Forsythe was in the same position as Green except that there was no agreement. On the question of a third party being brought in see *McLay* v. *Sharp* (1877), W.N. 216; *Padwick* v. *Scott* (1876), 2 Ch.D. 736. The trial judge has a discretion in this case that should not be interfered with except in a very strong case: see *Huggons* v. *Tweed* (1879), 10 Ch.D. 359 at p. 363. Although the matters referred to are more or less connected they will not necessarily be allowed in the same action: see *South African Republic* v. *La Compagnie Franco-Belge du Chemin de Fer du Nord* (1897), 2 Ch. 487.

Bass, for respondent Tobin: It was held by the trial judge that their pleadings were too foreign and too disconnected with our case and should be struck out: see *Barber* v. *Blaiberg* (1882), 19 Ch.D. 473. This is a discretionary rule and the

judgment should be interfered with only on strong grounds: see *Central African Trading Co.* v. *Grove* (1879), 48 L.J., Q.B. 510; *Times Cold Storage Company* v. *Lowther & Blankley* (1911), 2 K.B. 100. The point was that they could not add an alternative defence: *Gray* v. *Webb* (1882), 21 Ch.D. 802.

White, in reply, referred to marginal rule 133 and *Frankenburg* v. *Great Horseless Carriage Co.* (1899), 69 L.J., Q.B. 147.

Cur. adv. vult.

7th March, 1916.

MACDONALD, C.J.A.: The plaintiff sues to recover money and securities which he alleges the defendant Company obtained from him by fraud and duress. The Company denies this and says that the plaintiff was at the times in question its president, that one Green was its solicitor, and one Forsythe its secretary, the three being members of its board of directors, and the majority of the executive committee of its board, which committee had all the powers of the board when the board was not in session. The defendant Company then alleges that these three persons were guilty of misfeasance in office, and of a fraudulent conspiracy to obtain a large sum of the Company's money, which they actually did obtain for themselves. The defendant Company further alleges that on discovery of the said conspiracy and misfeasance, the said Green on behalf of himself, the plaintiff, and Forsythe, offered that the three of them should assume by way of restitution certain obligations and pay certain moneys apportioned among them as set out in the statement of claim, and that the defendant Company accepted said offer, "and that in all negotiations looking towards restitution it treated the said restitutions as joint and not several, and had no knowledge of or concern in how the same were or was to be apportioned among the said plaintiffs, Green and Forsythe." It is further alleged by the defendant Company that in said agreement (which is not in writing) all and each of the said three directors agreed to use their best endeavours to protect and promote the financial credit and reputation of the defendant Company and to assist

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in the business of the Company. Defendant Company further alleges that the plaintiff and the said Green and Forsythe failed to perform their said obligations, whereby the consideration for making the agreement has failed, and also that each of them has wrongfully committed breaches of the said agreed matters, and committed other wrongful acts against the Company whereby the Company has suffered damage. It also alleges that said three directors have so dealt with certain securities which they took over from the defendant Company in pursuance of said agreement as to make it impossible to now return the same.

By way of counterclaim the defendant Company repeats all the allegations above outlined, joining the said Green and Forsythe in said counterclaim as defendants, pursuant to Order XXI., r. 11, of the Supreme Court Rules, and therein alleges that the plaintiff and the said Green and the said Forsythe, defendants by counterclaim, have each made default in the performance of his undertaking, and also that the said Green by his subsequent conduct violated his portion of the said agreement. And the Company prays that the agreement be performed on the part of these three defendants by counterclaim.

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Alternatively the defendant Company claims against the said three defendants "(a) Damages for the misfeasance and breaches of trust and of contract aforesaid, and (b) That an account be taken of all the various matters and things above set out, and such order of restitution made to the defendant Company by the defendants by way of counterclaim as may be just."

An order was obtained from a judge of the Supreme Court on motion to strike out the counterclaim, striking it out in so far as the said Green and Forsythe are concerned, and dismissing them entirely from the same, and from this order the appeal is taken. No reasons for the said order were handed down. It was suggested by counsel for the respondents at the bar that Chief Justice HUNTER, who heard the motion, thought it would be more convenient if the issue of conspiracy raised in the counterclaim were to be tried at all, that it should be tried in

a separate action. It was strongly pressed upon us that a discretionary order of this kind should not lightly be set aside, and with this I quite agree. It is clearly settled, however, that such discretion is a judicial one, and in a proper case may be reversed and overruled by an Appellate Court, as was done by the Court of Appeal in *Frankenburg* v. *Great Horseless Carriage Co.* (1899), 69 L.J., Q.B. 147. I do not think the order should be maintained. One of the paramount objects of the Judicature Act and Rules, after which our Supreme Court Act and Rules are fashioned, was to enable all matters arising out of one transaction, particularly where the same parties are involved, to be disposed of in one action, and thus prevent multiplicity of suits. In this case the three defendants by counterclaim were all involved in what is alleged to have been a fraudulent conspiracy against the defendant Company. They are alleged to have made a joint settlement, Green making the offer on behalf of the three, which was accepted. It is true that the restitution to be made was segregated and each was to do his part, but that does not affect the joint nature of the arrangement, but only the manner of its performance. But whether it be regarded in strictness as a joint settlement or not, which is an issue to be tried, it was referable to one transaction or series of transactions, and between all the parties concerned therein.

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Now, what relief does the defendant Company ask in its counterclaim? It alleges the non-performance of the agreement by these three men, and it asks to have it enforced against them. Even if each had to perform an integral part, all three might very properly be joined in one action, but the propriety of, if not the necessity for joining them is greater even than that. One of the three is in effect seeking to set aside the joint agreement. If he should succeed, the defendant Company seeks to fall back upon its claim for damages for the original torts, the conspiracy and misfeasance in office. It cannot succeed for the conspiracy unless Green and Forsythe are parties. Unless the order appealed from be reversed the defendant Company will be compelled to discontinue its counterclaim for conspiracy against the plaintiff. If the plaintiff

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should succeed in the action on grounds which would still leave him liable in tort, defendant Company might find itself in the position of having to pay whatever sum was awarded against it and yet not be able to set off what it might have recovered on its counterclaim had all issues been tried together. To my mind it is eminently a case in which all the parties in these alleged fraudulent proceedings should be before the Court in one action and counterclaim. On this point also *Frankerburg* v. *Great Horseless Carriage Co., supra,* is very much in point in appellant's favour.

An affidavit was admitted on the motion below exhibiting what purported to be a release from the defendant Company to the said Green, and it was urged upon us that if said Green had been released it was improper and embarrassing to make him a party to the counterclaim. Without deciding whether such an affidavit should have been received, there are two other answers to that contention: first, a release when proved is a defence. It is not ground for striking out a statement of claim or counterclaim that a defendant will plead satisfaction. The second answer is that it is alleged in the counterclaim that Green has failed to perform obligations which he undertook with the Company at the time of the said settlement, and which were to be performed subsequently to the settlement. These obligations, I take it, were the ones above recited, namely that he would use his best endeavours to protect and promote the financial credit and reputation of the Company and assist in its business.

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Respondent's counsel also argued that the alternative claim made in said counterclaim is embarrassing by reason of the inapt terms in which it is worded. If that be so, it is ground only for striking out the alternative claim, and not the whole counterclaim. I think the alternative claim is perhaps not happily worded, and if so advised I would give the defendant Company leave to amend it.

The appeal should be allowed and the order appealed from set aside.

IRVING, J.A.

IRVING, J.A.: I concur in allowing this appeal for the reasons set out in the judgment just read.

MARTIN, J.A.: Owing to the statement of defence being so prolix and involved and not being couched in legal phraseology in important respects, one is very likely to be led astray by it. But when properly understood and succinctly expressed it simply means that the defendants resist the claim of the plaintiff to have restored to him the moneys, securities, and shares in question on the ground that they were paid or transferred to them pursuant to an "arrangement," or "agreement" or "accepted offer" or "settlement" (as it is variously styled in paragraphs 12, 19, 22, 23, and in the counterclaim) made with the plaintiff, and two other directors of the Company, Forsythe and Green, after knowledge of certain alleged breaches of trust by them had come to the defendants' notice. This settlement the defendants not only do not repudiate or seek to have rescinded because of alleged failure on the part of the three directors to carry it out, or otherwise, but in paragraph 23 and in the counterclaim ask that it should be carried out and upheld, and state facts shewing the impossibility of making the restitution the plaintiff claims, *viz.*, because the defendants have "dealt with" the securities they obtained from him. The settlement made as set up in paragraph 20 was that each one of the three directors should do certain things and on the face of the defence I am of the opinion that the learned judge below rightly viewed the case as a settlement of the joint claim against the three directors by a several settlement with each of them, the effect of this being that the joint liability for the alleged tortious acts was discharged and the defendants must look to each of the three directors severally and personally to carry out his part of the settlement. In so saying I have not overlooked paragraph 21, but the allegations therein are clearly insufficient in law and as a matter of pleading to meet the belated claim they now seek to set up against the three directors jointly, despite the settlement. The language is so loose, ambiguous and vague that precise effect cannot be given to it. The expression that "in all negotiations looking towards restitution it treated the said restitution as joint and not several" is obviously inconclusive, uncertain and deficient because it is not stated how the other parties to the agreement

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"treated" them, and such alleged unilateral "treatment" is of no consequence and is moreover directly contrary to the allegations in the preceding paragraph 20. As is truly said in Odgers on Pleading, 7th Ed., 111, 118, "Pleadings are useless unless they state facts with precision," and "material facts must be alleged with certainty." And see the cases collected in the Yearly Supreme Court Practice for 1916, p. 248, particularly *West Rand Central Gold Mining Company* v. *The King* (1905), 2 K.B. 391 at p. 399, where Lord Alverstone, C.J., in delivering the judgment of the King's Bench Division, said:

"Upon all sound principles of pleading it is necessary to allege what must, and not what may, be a cause of action."

The position of the defendants, therefore, on their statement of defence is simply that they take their stand on the settlement and ask to have it upheld. And if that were all then it is clear that from no point of view could Green or Forsythe be made parties to this action, because it could only be fought out as between the plaintiff and the original defendants, the added ones, Green and Forsythe being liable only for their several obligations.

But on the assumption (erroneous in my opinion) that their joint liability still exists damages are claimed in the counterclaim generally but ineffectually (because no one is named who is to be made to pay them, paragraph 1) for breach of the settlement which by paragraph 1 it is again insisted "should be carried out"; and also in the alternative joint damages are claimed against the three directors for (a) "misfeasance and breaches of trust and of contract as aforesaid," based "upon the facts hereinbefore set out," *i.e.*, repeated "in the preceding portion of this pleading." This on the face of it is a self-contradictory averment (as distinguished from an alternative or inconsistent plea, which is quite a different thing) because the facts set out do not, in any event, shew any ground whatever for joint damages for breach of contract under the settlement, but only for breaches of trust before the settlement, and in my opinion, as already expressed, not even for the latter. And furthermore there could not, in any event, be at the same time damages for both breaches of trust "and" contract, they could only be awarded for the one "or" the other. But here

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in the same sentence the settlement is at once reprobated and approbated—an unheard of thing in pleading. It was admitted, indeed, on the argument, as it had to be, that there was error here which would require an amendment.

But any amendment of this nature to overcome this objection, even if it should be allowed now (and I think it could only be done at this late stage on payment of costs, as parties should not be allowed to bolster up their case at the eleventh hour of appeal without a corresponding penalty) would not save the situation because if the defence and counterclaim were allowed to stand they would still be demurrable (by means of the modern equivalent under Order XXV.) on the ground that no cause of action was disclosed as against Green and Forsythe because of the said several settlements.

I have not overlooked the allegation of the committal of "other wrongful acts," in paragraph 22, but those must be since and apart from the said agreed matters therein mentioned and embraced by said settlement and therefore may be disregarded as in no event could they properly be introduced into the present actions.

In my opinion the learned judge below adopted the only proper course on the pleadings as they stand quite apart from the release specially set up by Green, which I do not have to rely on at all, and to their four corners he was, and we are confined.

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The matter was mainly presented to us as one of discretion which ought not in any event to be interfered with, and this view is supported by the most recent decision cited of the Court of Appeal in England in the somewhat similar case of *Factories Insurance Company (Limited)* v. *Anglo-Scottish General Commercial Insurance Company, Limited* (1913) 29 T.L.R. 312, wherein the Lord Justices said that in the ordinary course they "would not think of interfering with such an exercise of judicial discretion" and even if they did not agree with it as far as they did they "should certainly not feel justified in overruling Mr. Justice Scrutton's discretion." This (confirmed by the still more apt cases cited *infra*) points out the course we ought to follow, and if this is a case of discretion at all it is

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eminently one in which the exercise of it under rule 199 as to the counterclaim being "conveniently disposed of in the pending action" should not be interfered with, even assuming it to be a case where the counterclaim could be set up jointly against the plaintiff, Green, and Forsythe, because that is particularly a matter "of opinion" as the rule puts it, for the learned judge below, and the assertion of any right there may be is not denied but merely deferred to be asserted by an independent action: see *Lynch* v. *Macdonald* (1887), 37 Ch.D. 227 at p. 234; and *Mutrie* v. *Binney* (1887), 35 Ch.D. 614 at p. 640.

But I am of the opinion that this matter rests on a higher ground than mere discretion: it rests on this, that if we allow this counterclaim to be restored to the record we shall be placing upon it something which is clearly demurrable as the pleadings now stand as disclosing "no reasonable cause of action" (rule 288) because in my opinion the defendants have put themselves out of Court as against Green and Forsythe on their own statement of their own settlement which they from first to last rely upon and seek to have enforced. On their own shewing all that they claim against these two men should be the subject of independent actions and it is further an onerous and unwarrantable burden upon Green and Forsythe as well as Tobin to embroil them in the original litigation between Tobin and the original defendants. There is no similarity between the state of affairs here and in *Frankerburg* v. *Great Horseless Carriage Co.* (1899), 69 L.J., Q.B. 147, which was cited to us for the appellant, because there, as Romer, L.J. said (p. 149), "in substance there is but one cause of action against all the defendants," whereas here there are since the settlement only distinct and several causes of action against Green and Forsythe in which the plaintiff is not concerned.

MARTIN, J.A.

So far I have not dealt with this matter from the point of view of the pleading being struck out as embarrassing under rule 223, but if it were necessary to resort to that, and even if the matter is to be considered from its aspect of "embarrassing" only, I apply as appropriate to this case the language of Pickford, L.J. in *Mayor, &c., of City of London* v. *Horner* (1914), 111 L.T.N.S. 512 at p. 514:

"Of course there are many reasons for which allegations may be embarrassing. For the purposes of the present case I take 'embarrassing' to mean that the allegations are so irrelevant that to allow them to stand would involve useless expense, and would also prejudice the trial of the action by involving the parties in a dispute that is wholly apart from the issues. In order that allegations should be struck out from a defence upon that ground, it seems to me that their irrelevancy must be quite clear and, so to speak, apparent at the first glance. It is not enough that on considerable argument it may appear that they do not afford a defence."

It follows that the appeal should be dismissed.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree with the Chief Justice and would allow the appeal.

Appeal allowed, Martin, J.A. dissenting.

Solicitor for appellant: *F. A. McDiarmid.*
Solicitors for respondent Green: *Eberts & Taylor.*
Solicitors for respondent Forsythe: *Pooley, Luxton & Pooley.*
Solicitors for respondent Tobin: *Bass & Bullock-Webster.*

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THE BORDER LINE TRANSPORTATION COMPANY v. McDOUGAL.

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Admiralty law—Channel—"Fairway" and "course," meaning of—Crossing vessels—Duty of vessel to avoid collision—Evidence—Deposition of deceased person—Charts, Admiralty and Naval Service—Collision Regulations, Arts. 19, 22, 25, 27, 29.

Two vessels will not come within the crossing rule whatever their bearings from one another while rounding a bend in a narrow channel, when there is no indication that either vessel is in fact crossing the channel and when they are keeping on opposite sides of the channel or one is keeping in mid-channel, so that the vessels, on the courses to be reasonably attributed to them, will pass clear of each other.

Canadian Naval charts issued under the orders of the Minister of the Naval Service of Canada are accepted in the Admiralty Court of Canada to the same extent as Imperial Admiralty charts.

The depositions of a deceased mate, taken before the Court of Formal Investigation respecting a collision under sections 782-801 of the Canada Shipping Act, the other side having been a party to and represented by counsel at such proceedings, are receivable in evidence in an action brought for damages due to the collision.

Semble, a "fairway" is practically the same as mid-channel.

Statement

ACTION brought by His Majesty the King against the steamship Despatch (170 feet long; R. N. McKay, master) and her owners, the Border Line Transportation Company, for damage done to the Canadian Government tug Point Hope by collision in Victoria Harbour on the 25th of October, 1913, at 4:25 a.m. There is also an action, tried at the same time, by the said Border Line Transportation Company against W. D. McDougal, master of the Point Hope, for damages to the Despatch arising out of the said collision which is alleged to be due to the negligence of the said McDougal. Tried at Victoria on the 17th and 18th of February, 1916, by MARTIN, Lo. J.A., assisted by two assessors, Rear Admiral W. Oswald Story, R.N., and Acting Captain Walter Hose, R.C.N. The facts appear in the judgment.

Moresby, for the Point Hope.
Bodwell, K.C., for the Despatch.

20th March, 1916.

MARTIN, Lo. J.A.: At the time of the collision the Point Hope was going out of the harbour with a scow (about 93 feet long), laden with about 250 tons of dredged-up mud and silt, lashed to and projecting ahead of her starboard bow, the intention being to dump the load in deep water beyond Brotchie Ledge. It is agreed that the weather was calm and clear; and the water at the end of an ebb tide, almost low water, with no appreciable current; and that the proper lights were shewn by both vessels.

The contention, in brief, of the Point Hope is that while she was keeping on her proper side of the fairway or mid-channel in navigating this narrow channel (as this part of Victoria harbour is admitted to be) off Shoal Point, she was negligently run into by the Despatch which, it is alleged, in entering the harbour and rounding said Point at too high a rate of speed, had got over into the wrong, port, side of the channel instead of keeping to her starboard side of it. The Point Hope invokes articles 19 and 25, but in so far as the former is concerned I think it may, in the circumstances of this case, be dismissed from further consideration because it cannot be said that within the true meaning of that article these were "crossing vessels." Both were in the channel and what each was attempting, properly, to do in rounding Shoal Point, across which they could see one another, was to follow the winding reaches of a narrow channel in the manner directed by article 25, and there was nothing to indicate that there was any other intention, either to cross the channel for any legitimate purpose (such as to call at a port there) or make for a pilot station, as in *The Perim,* cited in Marsden's Collisions at Sea, 6th Ed., 444, or otherwise, so in the sense that the word is used in article 21 there was no other "course" that either vessel could properly keep. There are, undoubtedly, cases where the crossing rule should be applied in narrow channels, but this is not one of them, *e.g., The Ashton* (1905), P. 21 at p. 28, and cases therein cited. Most of the cases on this

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subject are collected in Marsden, *supra,* at pp. 441, 443-6, and particularly in Halsbury's Laws of England, Vol. 26. pp. 438-9, where I find, after examining many authorities, that the following deductions from the decisions are well stated at p. 439, and are directly applicable to this case:

"First, it appears that the crossing rule can only apply when the lines of the courses to be expected with regard to the two vessels will in fact cross, and when there is risk of collision, that is to say, when both vessels will come to the point of crossing at or nearly at the same moment. Secondly, it appears that the two vessels will not come within the crossing rule, whatever their bearings from one another while rounding the bend may be, when there is no indication that either vessel is in fact crossing the river, and when they are keeping on opposite sides of the channel or one is keeping in mid-channel, so that the vessels, on the courses to be reasonably attributed to them, will pass clear of each other."

Since that was written the leading case of *The Olympic and H.M.S. Hawke* (1911-4), 83 L.J., P. 113; 84 L.J., P. 49, has come before the House of Lords and been affirmed, and the last word on the point now under consideration was spoken by Lord Atkinson, who, after referring to the judgment of the Privy Council in *The Pekin* (1897), A.C. 532; 66 L.J., P.C. 97 (cited in particular by Kennedy, L.J. below in connection with and as adopted by the Privy Council in *The Albano* v. *Allan Line Steamship Co.* (1907), A.C. 193; 76 L.J., P.C. 33); and quoting Sir Francis Jeune's observation that "vessels may, no doubt, be crossing vessels within article 22 in a river: it depends on their presumable courses," goes on to say (p. 52):

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"But all that is meant by this last expression would appear to me to be this: Where two ships are navigating a narrow channel so winding in its course that the physical features necessitate, or the rules of good seamanship require, that either should relatively to the other take for a time a course which if continued would intersect the course of that other so as to involve risk of collision, and it can be reasonably assumed by the one that the other will change her course so as to avoid this risk as soon as those physical features will, consistently with the rules of good seamanship, permit, the article as to crossing ships does not apply; but the circumstances of each case must determine whether this necessity exists or this assumption can reasonably be made. This is, I think, clearly brought out in the judgment of Lord Justice James in *The Oceano* (1878), 3 P.D. 60, at p. 63, where, in commenting on the case of *The Velocity* (1869), 39 L.J. Adm. 20; L.R. 3 P.C. 44, he says, 'What was decided really was, that in such a river the particular direction taken for a moment, or a few moments in rounding a corner or avoiding an obstacle, was not such an indication of the real course of the ship as to justify another ship in saying, I saw your course, I saw that if you continued in that course

we should be crossing ships, and I left to you, therefore, the entire responsibility of getting out of my way under the rule.' "

It follows from this that according to the collision rules and good seamanship, the submission of counsel for the Despatch that article 19 (and consequently article 22) does not apply to the situation at bar, is sustained.

It remains then to consider article 25, as follows:

"In narrow channels every steam vessel shall, when it is safe, and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

It was said by Lord Alverstone, C.J. in *The Kaiser Wilhelm der Grosse* (1907), P. 259 at pp. 264-5:

"I would point out that article 25 is not merely a rule which is to be obeyed by one vessel as regards another vessel, but is a positive direction that a steam vessel shall be kept as far as practicable on the starboard side of the channel."

And Fletcher Moulton, L.J. said, p. 270:

"It is the imperative duty of ships to get to the right hand in passing through such a channel."

Lord Justice Kennedy concurred, and said, p. 274:

"It is quite clear that the only possible excuse for disregarding the rule would be that there was something which rendered it neither safe nor practicable to follow that rule."

This "excuse" might, of course, arise "in special circumstances" under the "departure from the above rules necessary in order to avoid immediate danger" authorized by article 27, but as to the caution and limit to be observed in its application, and the burden of proof, see *e.g.,* the observations in Halsbury's Laws of England, Vol. 26, p. 366 *et seq.,* and 468-71, and on the history of preceding statutes on the point see the remarks of Dr. Lushington in *The "Sylph"* (1854), 2 Spinks 75 at p. 79. The decision also of this Court in *Charmer* v. *Bermuda* (1910), 15 B.C. 506, is in point.

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Here, however, both vessels contend that they were on their proper, *i.e.,* starboard, "side of the fairway or mid-channel" and the Point Hope places the point of collision well up to the northern edge of the channel, while the Despatch places it well to the south of mid-channel. The expressions "fairway and mid-channel" and "fairway" *solus,* as used in various statutes and rules, have been considered in several cases, such as *"The Panther"* (1853), 1 Spinks 31; *The "Sylph," supra*;

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and *Smith* v. *Voss* (1857), 2 H. & N. 97 (on "fairway and mid-channel" under former statutes); *The Blue Bell* (1895), P. 242 at p. 246 (on the Thames by-law *re* "fairway"); *The Clutha Boat 147* (1909), P. 36 at pp. 40-1 (on the Medway by-law *re* "fairway"); and *The Glengariff* (1905), P. 106; 10 Asp. M.C. 103, on "fairway and mid-channel" under the present article, wherein Bargrave Deane, J. says, p. 109:

"What is a fairway? A fairway is practically defined by this article to be mid-channel. There is no rule which says that you must keep in the fairway, but the rule says that you must keep to the starboard side of the fairway or mid-channel in narrow channels."

This view of the fairway as being practically the same as mid-channel is in accord with the direction of Pollock, C.B. to the jury in *Smith* v. *Voss, supra,* at p. 99, which was upheld *in banco.* It is true that in *The Blue Bell* case, *supra,* the Divisional Court gave a wider scope to the term "fairway" but the word there was used alone, from the Thames by-law, and not in conjunction with "or mid-channel," so if anything should turn here on the exact construction I should feel obliged to follow *The Glengariff* decision which is exactly in point. But in the present case it makes no difference, because if the Despatch had kept to the starboard side of the fairway, however viewed, or mid-channel, the collision would have been averted. I say this because after very careful consideration of the evidence and the assistance of the Assessors in laying out the various positions and courses on the chart and harbour plan before us, the only conclusion to reach is that the collision occurred at a point which, while not so far to the west or so near to the north edge of the channel as is claimed by the Point Hope, is yet well to the north of mid-channel and approximately on the line deposed to by Fletcher, master of the Petrel, viewed from his position at the stationary dredge Ajax (which he was alongside of) at the point indicated by A on the plan to the point he marked at H, and which line he was in the best position to determine as regards direction though not the length of it, yet the weight of the whole evidence warrants the conclusion that the Point Hope was at the time of the collision well on her proper side of the channel. The result of this is that the Despatch must be taken to have got over to the

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wrong side of the channel in the water of the Point Hope without excuse, in which case, as their Lordships of the Privy Council said in *Richelieu and Ontario Navigation Co.* v. *Cape Breton SS. (Owners)* (1906), 76 L.J., P.C. 14 at p. 18:

"The sole question left is whether anything was done or omitted to be done on board the [other ship] for which she ought to be held responsible."

Here it is alleged that in accordance with good seamanship under article 29 the Point Hope should have stopped her engines before she did (about 2 seconds before the collision, her engineer says) and reversed them. These contentions have received our very careful attention, with the result that I am advised by the Assessors that in all the circumstances, bearing in mind that the Point Hope had always been going at a slow speed, not over three knots, with a heavy scow lashed to her starboard bow, and the proximity of shoal water to starboard in a narrow channel, and that signals for a starboard crossing had been given and answered, that she could not reasonably be expected to act otherwise than as she did in regard to stopping, and that in continuing to port her helm as far as was prudent more should not be required of her, seeing that she was justified in assuming that the Despatch could and would pass her port side to port side; and as to reversing, that it would have been inadvisable in the circumstances as tending, owing to the position of the heavy scow, rather to have aided than averted the collision by bringing the bow of the Point Hope to port. My independent view of the matter is in accordance with this advice which I adopt. The difficulty of handling a tug with scow attached in a narrow channel is well known to mariners and to this Court—*cf. Charmer* v. *Bermuda, supra.* The Point Hope was placed in a position of doubt and uncertainty by the action of the Despatch in apparently taking a course in the channel which did not correspond with her signal, and was entitled to expect almost up to the last that she would take such action as would avoid the collision, and which could have been done if the Despatch had ported her helm earlier or harder than she did. My view of the real cause of the accident is that the Despatch had got further out into the channel than she intended owing to trying to round Shoal Point at

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too high a rate of speed. It is said in *The Tempus* (1913), 12 Asp. M.C. 396 at p. 398, that:

> "It has been pointed out over and over again that one ought to be careful not to be too ready to cast blame upon a vessel which is placed in a difficulty by another vessel."

The circumstances in which this language was used and applied were much more in favour of a liability being imposed than they are here. It must be remembered that, as Fletcher Moulton, L.J. put it, in *The Kaiser Wilhelm der Grosse* case, *supra,* p. 272, the signals given by the Point Hope should "have recalled the other vessel to her duty":

> "Not only was that possible, but it is what ought to have occurred."

And other observations follow which are largely appropriate to this case; and also those of Kennedy, L.J. on p. 275. Lord Alverstone, C.J. says in the same case, pp. 266-7, "that if article 25 applies . . . . then there is no article which gives any direction with regard to the course or speed of the Orinoco" (which vessel was charged with the same errors in seamanship as are charged here against the Point Hope) and so "it must depend upon the provisions of article 29," requiring good seamanship in all cases, and the advice given to the Court of Appeal by the assessors (p. 268) was the same as that which is given to me.

Judgment

Upon the whole case I can only reach the conclusion that the sole blame for the collision must be laid upon the Despatch and therefore there will be judgment for the plaintiff in the main case, with a reference to the registrar, assisted by merchants, to assess damages.

The cross-action will be dismissed.

It is desirable to put upon record two rulings on evidence. First. The practice of this Court respecting the admission in evidence of Canadian Naval charts issued under the orders of the Minister of Naval Service of Canada was stated and confirmed, *viz.,* that such charts are accepted as *prima facie* evidence to the same extent as Imperial Admiralty charts.

Second. The depositions of the mate of the Despatch, Haskins, deceased since they were given in December, 1913, before the Court of Formal Investigation, so styled by statute, held to

inquire into the collision now in question under sections 782-801, of the Canada Shipping Act, by the Commissioner of Wrecks, with assessors, with powers not only of "full investigation (section 789) into the casualty, and of awarding costs" (section 794) but of "charges of incompetency and misconduct on the part of masters, mates, pilots or engineers" (section 791) and of inflicting penalties by way of cancellation or suspension of their certificates (section 801) should now be received in evidence herein, in the main case, the plaintiff (the Crown) having been a party to, and represented by counsel at such proceedings, which on the authorities which follow were held to be judicial in their nature: *Cole* v. *Hadley* (1840), 11 A. & E. 807; *Baron De Bode's Case* (1845), 8 Q.B. 208; *In re Brunner* (1887), 19 Q.B.D. 572; *The Queen* v. *London County Council* (1895), 11 T.L.R. 337; *Re Grosvenor and West-end Railway Terminus Hotel Co.* (1897), 76 L.T.N.S. 337; 2 Roscoe's Nisi Prius Evidence, 18th Ed., 201; Taylor on Evidence, 10th Ed., 354 *et seq.*; 545-6 (note); 1268; Phipson, 5th Ed., 416-21; and Best, 11th Ed., 468.

Judgment

Judgment for plaintiff.

MURPHY, J. 1916

MOORE v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED, AND JOHNSTON.

April 5.

MOORE B.C. ELECTRIC RY. CO.

Negligence—Railway company—Crossing—Automatic bell alarm—Absence of—Motor-vehicles—Person entrusted—Onus—Motor-traffic Regulation Act, R.S.B.C. 1911, Cap. 169, Sec. 33.

Failure on the part of a railway company to maintain an automatic bell alarm at a crossing does not, in the absence of statutory requirement, constitute negligence in law.

Grand Trunk Rway. Co. v. *McKay* (1903), 34 S.C.R. 81 applied.

Where a passenger is injured in a motor-car licenced as a jitney while being operated by one of two joint owners as a jitney such owner is not a person "entrusted" with the motor by the other owner (who had a chauffeur's licence) so as to render the latter liable under section 33 of the Motor-traffic Regulation Act.

In an action for damages sustained while riding in a motor-car the onus is on the plaintiff to establish liability within section 33 of the Motor-traffic Regulation Act.

When the reckless action of a jitney driver put the motorman of an electric car in a position where he is suddenly and unexpectedly confronted with the imminent probability of killing the occupants of a jitney, and then in the agony of imminent collision caused by the jitney driver's recklessness the motorman makes what at the highest can only be termed an error of judgment, the law will not hold the company liable.

Statement

ACTION for damages for injuries sustained while riding in a motor-car operated as a jitney when in collision with a car of the British Columbia Electric Railway Company at a crossing in the City of Vancouver. Tried by MURPHY, J. at Vancouver on the 30th of March, 1916. The facts are set out in the reasons for judgment.

J. A. Russell (*J. M. McLean,* with him), for plaintiff.

McPhillips, K.C., for defendant Company.

Miss Paterson (*J. E. Bird,* with her), for defendant Johnston.

5th April, 1916.

Judgment

MURPHY, J.: The liability of Johnston depends upon the following admitted facts: (1) That Eakley and he, Johnston, were joint owners of the jitney car; (2) that Johnston had a

chauffeur's licence; (3) that the car was licenced as a jitney; (4) that it was at the time of the accident being operated as a jitney. There was no evidence given to shew agency or partnership and so there can be no common-law liability on Johnston. His liability, if any, is created by section 33 of the Motor-traffic Regulation Act. This section differs from the similar sections in the Alberta and Ontario Acts inasmuch as it contains the qualifying phrase "by any person entrusted with the possession of such motor" which they do not. It is also to be noted that by the Ontario Act at any rate the onus of proof in civil proceedings is shifted to the owner or driver whilst by the British Columbia Act such shifting takes place only when prosecutions for infractions are instituted. I am of opinion therefore that the onus is on the plaintiff to shew that Johnston comes within section 33. To satisfy this onus by inference can, I think, only be done where such inference is the only reasonable one to be drawn from the admitted or proved facts. That I consider is not the case here.

The first fact, *i.e.*, joint ownership, rather excludes than connotes the idea of entrusting. The second has no bearing for every person who falls within the definition of chauffeur under the Act must have a licence and that definition includes many persons other than jitney owners or drivers.

Judgment

The third and fourth do not necessarily imply that the car could only be used as a jitney, for it might well be that Eakley used it as a jitney and Johnston for his pleasure entirely independent of each other. Even if such was the only reasonable implication these facts would, I think, fall short of establishing that the only inference to be drawn from them was that Johnston entrusted Eakley with the car. It might well be that they each had loaned the other the use of their respective credits so that each could purchase a car thereby becoming joint owners of both cars but each having entire control of one. If these views are correct then taking all the admitted facts as a whole does not make out the plaintiff's case since such grouping together does not make entrusting the only necessary inference. It would have been a simple matter by a few questions on dis-

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covery to prove the entrusting of it was a fact. I hold plaintiff's case fails as against Johnston.

Then as to the British Columbia Electric Railway, the jury has found the Company guilty of negligence on two grounds, first, because of the lack of automatic bell alarm at crossing, and, secondly, going at too fast speed crossing roadway. As to the first ground, I do not think it amounts to negligence in law, and if it does I do not think on the facts of this case it can reasonably be said to have been a cause of the accident.

Neither the British Columbia Railway Act under which the British Columbia Electric Railway operates nor any regulations made thereunder require such a contrivance, and in my opinion the doctrine of *Grand Trunk Rway. Co.* v. *McKay* (1903), 34 S.C.R. 81 applies. Again it was proven by evidence which the jury, as their verdict shews, must have accepted, that several blasts of the whistle on the electric car were given before it reached the point where it was first seen by the occupants of the jitney. According to the plaintiff's own evidence these blasts were not heard by those in the jitney owing, probably, to the rate of speed and to the fact that the cover was all closed in except for a small portion of the side opposite to the direction from which the electric car was approaching—facts that would accentuate the noise caused by vibration. With such facts on the record I think the plaintiff should have had evidence to shew that an automatic alarm would have been heard by those in the jitney car, although the whistle blasts were not before it can be found that the absence of such automatic alarm was a cause of the accident. No such evidence was had and I hold there is no evidence on the record to support this finding.

Judgment

As to the second ground it also I think fails. In my opinion the evidence clearly establishes that the reckless action of the jitney driver put the motorman in a position where he was suddenly and unexpectedly confronted with the imminent probability of killing the occupants of the jitney. If then in the agony of imminent collision caused by the jitney driver's recklessness the motorman made what at the highest can only be termed an error of judgment the law will not hold the Com-

pany liable: Pollock on Torts, 9th Ed., 490, and cases there cited. It is to be noted that the jury declined to find that the electric car approached the crossing at too high a rate of speed or that the motorman did not keep a proper lookout, both of which grounds were urged upon them. I hold the Company on the findings not liable. The action is dismissed with costs.

Action dismissed.

IN RE LAND REGISTRY ACT AND STUDD.

Land Registry Act—Instruments—Execution by company—Compliance with Companies Act, R.S.B.C. 1911, Cap. 39, Table A, Art. 76.

Article 76 of Table A of the Companies Act requires that the seal shall not be affixed to any instrument except by the authority of a resolution of the board of directors, and in the presence of at least two directors and of the secretary or such other person as the directors may appoint for such purpose; and these two directors and secretary or other person as aforesaid shall sign every instrument to which the seal of the company is so affixed in their presence. The deed in question was in fact signed by two directors and by one of such directors as secretary.

Held, that as the article requires three distinct persons to be present who join in signing the instrument the deed in question was not properly executed.

APPLICATION by Edward Fairfax Studd for an order directing the registrar of titles at Vancouver to register a deed executed by the Burrard Trust and Loan Company, Limited, for lots 33 and 34 in block 2, district lot 185, City of Vancouver. Heard by MACDONALD, J. at Chambers in Vancouver on the 24th of March, 1916. The facts are set out fully in the head-note and reasons for judgment. Statement

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

The District Registrar, in person, *contra.*

MACDONALD, J. (At Chambers)

1916

April 11.

IN RE LAND REGISTRY ACT AND STUDD

16th April, 1916.

MACDONALD, J.: Petitioner applies for an order directing the registrar to register a deed from the Burrard Trust and Loan Company, Limited. The registrar refused to register such deed on the ground that it was not properly executed. It is admitted that Table A of the Companies Act, being Cap. 39, R.S.B.C. 1911, is applicable to and forms part of the regulations for the management of the Company. Article 76 thereof provides, as to execution of instruments, that

> "The seal of the Company shall not be affixed to any instrument except by the authority of a resolution of the board of directors, and in the presence of at least two directors and of the secretary or such other person as the directors may appoint for the purpose; and these two directors and secretary or other person as aforesaid shall sign every instrument to which the seal of the company is so affixed in their presence."

The deed in question has the seal of the Company affixed and is signed by H. M. Daly and E. A. C. Studd as directors of the Company and by the said Studd also, as secretary of the Company. The question is whether this execution is sufficient. The registrar was not required to inquire into the regularity of the proceedings antecedent to the execution of the instrument, and I am assuming that such proceedings are within the scope of the powers of the Company. If the deed is on its face regular, parties dealing with the Company have a right to presume that the seal has been duly affixed, that the directors were duly appointed and their signatures duly made: Palmer's Company Law, 9th Ed., 257. While this presumption exists, still the parties so dealing with a company must be taken "to have read the general Act under which the company is incorporated and also to have read the articles of association": see *In re County Life Assurance Company* (1870), 5 Chy. App. 288 at p. 293; so if the articles have not been followed in the execution of a deed and such non-compliance appears on the face of the instrument a registrar, examining the title, is bound to consider its effect. It is contended, as to this deed, that article 76 has not been complied with, and that it requires the instrument not only to be signed by two directors, but also by a secretary who is not one of such directors. In my opinion the seal only becomes effective to bind the Company when it is accompanied

Judgment

by such compliance with article 76. It requires that not only should the seal be affixed, but there should also appear the signatures of two directors and the secretary or such other person as may be appointed by the board of directors, to be present at the affixing of the seal. Counsel for the petitioner in the first place submits, that the signature of the secretary is only directory and is not essential, in order to render the instrument valid. It is apparently conceded that two directors must sign but that the secretary is in a different position. The cases of *Aggs* v. *Nicholson* (1856), 25 L.J., Ex. 348, and *The City Bank* v. *Cheney et al.* (1858), 15 U.C.Q.B. 400 (approving of the latter case) are cited in support of this contention. I do not think that they are in point and the facts are distinguishable from the cases supporting the statement of the law, found in Halsbury's Laws of England, Vol. 10, p. 392, as follows:

"Where by the constitution of a corporation any special mode of execution of its deeds is prescribed, or any particular formality is required to be observed in affixing the corporate seal, every deed of the corporation must, in order to be completely binding, be executed in the manner or with every formality so prescribed."

In *Aggs* v. *Nicholson, supra,* the note was "made" by the directors and only failed, after being so made, in not complying with the statute, through not being "countersigned" by the secretary.

Lord Cairns in his judgment in *In re Barned's Banking Co. Ex parte The Contract Corporation* (1867), 3 Chy. App. 105 at p. 116 held that the transaction, there in question, was not invalidated by the transfer of stock being incomplete in form but he drew attention to the law governing that particular trading company. The distinction is apparent between the right and manner of such a company executing an instrument and that of the Company here under consideration, and the following excerpt is appropriate:

Judgment

"The seal is affixed, and the document is *ex facie* regular in all respects. The seal is the seal of a trading corporation. Neither in the memorandum of association, nor by the articles, nor by the general law, are any particular formalities prescribed as to the mode in which, or the persons in whose presence, the seal shall be affixed to any document. The case, therefore, differs from the cases cited at the bar, where formalities were prescribed either by Act of Parliament, or by the constitution of the corporate body."

MACDONALD, J. (At Chambers)

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IN RE LAND REGISTRY ACT AND STUDD

Under said article 76 the instrument requires to be "signed" by all the parties referred to. So that it does not appear on its face as a properly-executed document without the seal and all of such signatures being attached.

Assuming then, that the signature of a secretary is compulsory and that it is necessary for all the persons referred to in the article to sign, can one of such persons act in two capacities? Parties dealing with this Company, being bound by the articles of association, must see that the instrument under which they expect to acquire title has been properly executed, so if Mr. Studd could not sign both as a director and secretary, the deed was ineffectual for the purpose intended. The only point for consideration is whether a party who is a director and who has been appointed secretary can fill both positions and comply with the provisions of article 76. This would mean that two persons would be sufficient to sign the deed. It may have been deemed advisable, in framing the clause in question, as a matter of precaution and for the protection of a company, that it should provide that three persons should be present at the execution of any instrument requiring the affixing of a seal. The presumption is that words mean as they appear. I am not assisted by any authority on the point. I must form my own conclusion and I think the plain reading of article 76 requires that there should be three distinct persons present, who join in signing the instrument. A contrary decision would be opposed to the words as they appear in the article. In my opinion the deed in question was not properly executed.

Judgment

Application dismissed.

LYON AND LYON v. MORGAN AND NORTH WEST TRUST COMPANY, LIMITED.

GREGORY, J.

1916

April 10.

LYON v. NORTH WEST TRUST CO.

Arbitration and award—Party does not sign submission—Takes part in proceedings and calls witnesses—Subsequent repudiation—Award binding on such party.

An award is binding upon a party who took part by his counsel in the arbitration proceedings and accepted the award before the Court of Appeal although he had not signed the submission.

ACTION tried by GREGORY, J. at Vancouver on the 4th of May, 1915, and 21st of March, 1916, for damages for injuries sustained through a motor-car collision. The plaintiff was injured and his motor-car damaged in a collision with a car owned by the defendant the North West Trust Company, and driven by the defendant Morgan. The matter had been submitted for arbitration to GRANT, Co. J. who found that both parties were at fault and gave no damages. This finding was set aside by HUNTER, C.J.B.C. but restored by the Court of Appeal. The plaintiff seeks to avoid the award on the ground that the defendant Company had not signed the submission.

Statement

G. Cameron (*Downie,* with him), for plaintiff.
S. S. Taylor, K.C. (*DesBrisay,* with him), for defendants.

18th April, 1916.

GREGORY, J.: After consideration I am still of the opinion expressed by me at the trial on the 4th of May, 1915, and the 21st of March, 1916, *viz.,* that the matter has already been disposed of by the restoration by the Court of Appeal of GRANT, Co. J.'s award in the arbitration proceedings.

Mr. Lyon's contention that the award is no award because it is not binding on the defendant Company cannot, I think, be sustained, for the award was, I think, binding upon the Company although the submission was not signed by it, for it is inconceivable that in the circumstances of this case the Com-

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pany could, if it desired, repudiate the award. It attended and took part by its counsel in the arbitration proceedings and accepted the award before the Court of Appeal, and is, in my opinion, firmly bound by it, and, if the Company is bound, so, I think, are the plaintiffs.

At the trial I heard the evidence offered by the plaintiff; by consent the evidence for the defence consisted of the transcript of evidence of Messrs. Penser, Harrison, Brodie and Morgan, appearing in the appeal book, all of which I have carefully read as well as the evidence therein put in by the plaintiff. From all the evidence before me I am unable to say that the accident was caused by the negligence of the defendants, but in saying this I desire to state that I make no reflection whatever upon the veracity of Mr. Lyon (who impressed me as being, though somewhat eccentric, a scrupulously honest witness) but I cannot resist the conclusion that in the excitement of the occasion he may have become somewhat confused. I would have greatly preferred if the defendant had called the witnesses in the usual way and had them examined orally before me.

Judgment

The action must be dismissed with costs.

Action dismissed.

RE ALPHA MORTGAGE AND INVESTMENT COMPANY, LIMITED.

MURPHY, J. (At Chambers)

1916

April 19.

RE ALPHA MORTGAGE AND INVESTMENT CO.

Solicitor and client—Company—Costs—Solicitor's lien—Books of account—Companies Act, R.S.B.C. 1911, Cap. 39, Table A, Art. 104.

The solicitor of a company cannot acquire a lien for costs upon such books of the company as under the provisions of the Companies Act ought to be kept at the registered office of the Company.

APPLICATION for the recovery of the books of account of the Alpha Mortgage and Investment Company, Limited, upon which the Company's solicitor claimed a lien for costs. Heard by MURPHY, J. at Chambers in Vancouver on the 5th of April, 1916. Statement

Martin, K.C., for the application.
T. E. Wilson, contra.

19th April, 1916.

MURPHY, J.: I am of opinion no solicitor's lien exists, first because it is not shewn that the books came into the possession of Messrs. Deacon as solicitors in the course of their business as solicitors for the Company, and secondly because article 104 of the Companies Act I think prevents the directors from parting with the control of the books in question: *In re Anglo-Maltese Hydraulic Dock Co.* (1885), 54 L.J., Ch. 730; and *In re Capital Fire Insurance Association* (1883), 53 L.J., Ch. 71. Judgment

Application dismissed.

MACDONALD, J.

1915

July 12.

COURT OF APPEAL

1916

March 7.

POWELL v. THE CROW'S NEST PASS COAL COMPANY, LIMITED.

Master and servant—Injury to workman's eye—Loss of eye owing to neglect of either workman or doctor as to treatment—Workmen's Compensation Act, R.S.B.C. 1911, Cap. 244, Sec. 6, Subsec. (2) (c).

An injured eye of a workman was treated with good results for two or three days, but through a misunderstanding between the doctor and the patient was neglected for the following six days and the sight of the eye was in consequence permanently lost. The arbitrator found that the applicant's present condition was due to non-treatment of the eye during the six days following the last treatment and the applicant was guilty of serious neglect in not attending for treatment.

Held (MCPHILLIPS, J.A. dissenting), that a finding by the arbitrator that the workman's present condition was brought about by his own serious neglect, discharges the onus cast upon the employers of shewing that but for such neglect the accident would not have brought about the present condition, and the employers are relieved from responsibility.

Per MACDONALD, C.J.A.: The meaning of the words "serious neglect" in section 6, subsection (2) (c) of the Workmen's Compensation Act in their ordinary and non-statutory sense import more than ordinary negligence, but the section has no application to the conduct of the injured after the accident.

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APPEAL by the applicant from the decision of MACDONALD, J. upon a special case submitted by THOMPSON, Co. J., acting as an arbitrator under the Workmen's Compensation Act. Heard at Vancouver on the 18th of June, 1915. The stated case submitted by the arbitrator was as follows:

I found the following facts:

"(1) The accident arose out of and in the course of the man's employment. (2) The accident was not caused by the applicant's serious and wilful misconduct or serious neglect. (3) Had the treatment continued the eye would in a short time have healed and the applicant would have been able to resume work. (4) The man's present condition is owing to the non-treatment of the eye during the six days when he did not visit the doctor. (5) Dr. Weldon is an employee, not of the respondent Company, but of the applicant himself, as a member of the Miners' Union. (6) The man believed when he saw Dr. Weldon either the second or third time that the doctor was to attend him at his own house. (7) The doctor believed that the applicant would come to his office for treatment."

Statement

The questions submitted are:

"(a) Having found that the accident arose out of and in the course of the applicant's employment and was one causing injury for which compensation was payable under the Act, am I right in holding that the subsequent neglect on the part of the applicant or of Dr. Weldon disentitled the applicant to recover compensation?

"(b) Have I misdirected myself (a) in finding that there is evidence sufficient to support my view that the applicant was guilty of serious neglect in not attending upon the doctor for treatment, (b) in finding that if the doctor is negligent the respondents are not in law liable for the result originally caused by the accident and consequently brought about by such negligence, (c) in not determining whether or not the applicant's present condition was brought about by his own neglect or by the negligence of the doctor?"

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S. S. Taylor, K.C., for applicant.

W. S. Lane, for respondent Company.

12th July, 1915.

MACDONALD, J.: This is a special case submitted for decision by THOMPSON, Co. J. acting as an arbitrator under the Workmen's Compensation Act. It appears that Frank Powell, the applicant, in the course of his employment with the respondent Company was injured by a piece of coal striking him in the eye. He was treated for his injury by the doctor employed by the Union to attend on workmen employed by such Company. The doctor treated him for three days at his office, though the applicant says that there were only two visits for that purpose. This contradiction is immaterial, however. The fact is that either from the second or third day the applicant did not attend at the doctor's office until the ninth day after the accident. In the meantime the cornea of the eye had become so diseased that the eyesight could not be saved, so that the applicant has permanently lost the use of one eye and is in danger of losing the sight of the other. He is quite unable to work. The respondent Company paid compensation for a time and then ceased paying some eight months after the accident, taking the ground that their liability had ceased. The arbitrator found that the accident arose out of or in the course of the applicant's employment and was not caused by his serious and wilful misconduct, or serious neglect. Assuming that, in any event, the injury would have incapacitated the applicant from work for more than two weeks, then the respond-

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ent became liable to pay compensation under the Act on account of the accident. The question is to what extent did such liability exist? Had the liability terminated at the time when the respondent objected to make payment of further compensation? Counsel for the respondent admitted in his argument that the onus rested upon the employer of shewing such a break in the chain of causation as would relieve the employer from further liability. The doctor was engaged by the applicant and not by the respondent. It is found that he believed that the applicant would come to his office for treatment while the applicant, on the contrary, believed that the doctor would attend at the applicant's house. Then there is the finding of the arbitrator that "had the treatment continued the eye would in a short time have healed and the applicant been able to resume his work," also "that the man's present condition is owing to the non-treatment of the eye during the six days when he did not visit the doctor." There is the further finding that the mistake which resulted in non-treatment arose out of a misunderstanding between the doctor and the applicant and that the applicant was guilty "of serious neglect in not attending upon the doctor at his office." The questions then submitted are as follows:

"(a) Am I right in applying the provisions of the Act as to serious neglect to the after conduct of the applicant?"

MACDONALD, J.

With reference to this question I do not think that the words "serious neglect" in subsection (*c*) of section 2 of the Act apply to the after conduct of an applicant. They refer to the exemption from liability through an injury to a workman attributable to his serious neglect at the time of the accident, so this question should be answered in the negative.

The other questions submitted are:

"(b) Is there any evidence to support my findings that the applicant's present condition is owing to the non-treatment during the six days when the doctor did not attend upon him?

"(c) Is there any evidence to support my findings that the applicant was guilty of serious neglect as to the treatment of his eye?"

When this matter first came before me as a stated case, it was agreed by both counsel engaged that the questions then submitted did not fully cover the points that were apparently intended to be dealt with. The stated case as submitted was

consequently referred back to the arbitrator with certain directions as to supplementing his findings. These directions have not been fully complied with; but I think it better to deal with this important and long-delayed matter on the material now before me.

The applicant had come for treatment to the doctor's office, and with such a delicate organ as the eye one cannot assume that he would not be greatly concerned as to its condition and means to be taken for its cure. The arbitrator has found, however, that he misunderstood the doctor's directions; that there was a mutual misunderstanding, resulting in non-treatment for the period mentioned. If such non-treatment caused the deplorable loss of the eye, then the neglect on the part of the applicant to attend the doctor was serious. Subject to this qualification, I think there was evidence to support the finding of the arbitrator in question (c), and it should be answered in the affirmative. Such action or neglect of the applicant does not affect the liability of the employer unless it has aggravated the injury so that the condition of the applicant is no longer due to the injury caused by the accident, but arises from such neglect or unreasonable conduct on his part. Even if the arbitrator had found that the chain of causation from the accident was broken by neglect of the doctor, I do not think this would affect the question. The employer is not responsible for the actions of the doctor engaged by the workman: see *Humber Towing Co., Ltd.* v. *Barclay* (1911), 5 B.W.C.C. 142 at p. 143, *per* Cozens-Hardy, M.R.:

"In this case we have been asked by Mr. Owen to say not only that the employer is liable in the words of the Act for personal injury by accident arising out of and in the course of the employment, but that he is an insurer of the medical man, the chemist, and the nurse who attended the man, and is liable in the event of any of them being guilty of gross negligence, which gross negligence might be found as a fact to be the real cause of the disability at the time the matter came before the County Court Judge."

It thus follows that the answer to question (b) determines whether the finding referred to in question (c) has any bearing upon the respondent's liability. To put it shortly—if the applicant would, as a result of the accident, have lost his eyesight, even though treated during the interval, then it is imma-

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terial whether the applicant was neglectful or unreasonable, or not. As in *Humber Towing Co., Ltd.* v. *Barclay, supra,* the issue here is as to whether the applicant's present condition was due to the original accident or to his subsequent negligence, or that of the doctor. The onus of shewing that the subsequent neglect brought about such condition rests upon the respondent.

"There was an accident, and it is for the employers to shew that something has happened the result of which is that the loss of the finger is not due to the accident. The burden is upon the employers to break the chain of causation. In a case like this it seems to me that it is impossible for this Court to say there was not evidence upon which the learned County Court judge was entitled to say that the burden of proof was not discharged, that the original liability arising from the accident remained upon the employers, and that the workman was therefore entitled to compensation":

Cozens-Hardy, M.R. in *Marshall* v. *Orient Steam Navigation Company, Limited* (1910), 1 K.B. 79 at p. 83. Fletcher Moulton, L.J. at pp. 85-6 said:

"I was not throwing any doubt on its being necessary to shew that the continued incapacity was due to this unreasonableness. That was taken for granted throughout our judgments. All that I was pointing out was that the reasonableness is not the abstract reasonableness of the operation, but the reasonableness of the conduct of the man. For these reasons I am of opinion that this case is completely covered by authority. *Prima facie* the accident was the cause of the loss of the finger. If the owners could have shewn that the loss of the finger was not due to the accident, but was due to the unreasonableness of the man in refusing to submit to the operation—a refusal found to be unreasonable—they would have succeeded, but they have failed to prove that."

MACDONALD, J.

Here the arbitrator has found that the present condition of the applicant is owing to the non-treatment of the eye. If such finding be sustained, then the onus cast upon the respondent has been discharged and it is freed from further liability. This is a question of fact. Under the English Act the Court can deal with questions of fact and also mixed questions of law and fact. It is clear that where the arbitrator finds only upon the facts his finding is not open to review, unless there was no evidence to support such finding: *Ferguson* v. *Green* (1901), 1 K.B. 25. The British Columbia Act only enables the arbitrator to state a case for a decision on a question of law, so the matter must be considered in the light of the distinction between the two Acts. The arbitrator not only finds

the facts but also the proper inferences to be drawn therefrom—*Armstrong* v. *St. Eugene Mining Co.* (1908), 13 B.C. 385. It is necessary for the applicant to shew that the finding in this question was wrong as a matter of law; in other words, that the arbitrator, without any facts or proper inferences from fully-established facts, found that the non-treatment of the eye brought about its destruction. My attention has been drawn to certain portions of the evidence in support of the contention that such a result occurred. I will not deal fully with such evidence but only that portion of the doctor's which seems most pertinent. After referring to the treatment during the first visit of the applicant and the instructions given for bathing and other applications, he then speaks of the condition of the eye at the time of the second visit.

"Did he come back? Yes, he came back and the ulcer looked decidedly better and I was very much pleased with it.

"Did you treat it the next day? Yes, I applied the iodine next day. Did not have to curette. On the third day it was healing rapidly, looking as if it would be nearly healed in two or three more days."

The doctor then stated that he was quite positive that he told the applicant as to coming back the next day. The misunderstanding, already referred to, occurred, so that the treatment deemed necessary by the doctor did not continue. Then the following appears:

"What was your opinion, Doctor, on the third day as to the nature of his injury, its probable duration? I was very pleased indeed, because if there is one thing I do dread it is spreading out of the cornea. If it keeps on spreading you cannot get hold of it."

He then referred to the lapse of time and that the applicant did not come to his office for about a week. He then found that he had an abscess in the cornea and if it healed he would never have sight in that eye again. He found fault with the applicant who could not speak English, and directed his conversation to the secretary of the Union (Burrell) who was present, and said:

"It is a terrible thing, that man has lost his eyesight and it seemed to me an awful thing because so unnecessary."

These words are stated as they appear in the evidence but it is to be noted that the latter portion could be treated more as a statement of the doctor then being made to the arbitrator than as something he had mentioned to Burrell. The evidence

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shews that the applicant was admitted to the hospital but all efforts to save the eye proved fruitless. Bearing in mind that the onus rested upon the respondent of satisfying the arbitrator that the non-treatment had the effect indicated, I might have come to a different conclusion. He was, however, the tribunal appointed to decide the matter. Applying even the test invariably adopted with respect to juries I cannot say that his finding was wrong in the sense that as a reasonable man he should have decided otherwise. In considering an arbitrator's finding Earl Loreburn in *Kerr or Lendrum* v. *Ayr Steam Shipping Company, Limited* (1914), 84 L.J., P.C. 1 at p. 5; (1915), A.C. 217 at p. 223, said:

"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 to the conclusion. . . . . I shall always be slow to say that no reasonable person could think differently from myself."

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Under these circumstances I do not think the finding of the arbitrator should be disturbed and question (b) should be answered in the affirmative. The respondent is entitled to its costs.

The appeal was argued at Vancouver on the 8th of November, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

S. S. Taylor, K.C., for appellant: The Company paid compensation for six months and then ceased paying: see *Hill* v. *Granby Consolidated Mines* (1906), 12 B.C. 118. The first case was sent back to the arbitrator with certain directions as to supplementing his findings. These directions were not fully complied with but the learned judge decided on the material before him. We contend the burden is on the Company to establish by affirmative testimony that his condition is due to something other than the accident: see *Marshall* v. *Orient Steam Navigation Company, Limited* (1910), 1 K.B. 79 at p. 81. Would the eye have got better if properly treated? The burden is on the Company and the evidence is far short of sufficient to shew this.

Mayers, for respondent: We have the arbitrator with us and

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the Court will not interfere unless there is no evidence on which the arbitrator could so find: *Kerr or Lendrum* v. *Ayr Steam Shipping Company, Limited* (1915), A.C. 217. If it can be shewn that the incapacity is not due to the accident then he is not entitled to compensation. The doctor's statement that he upbraided the man for not coming to be treated and that if he had done so he would have been all right, should be accepted as evidence that the loss of the eye was due to Powell's neglect.

Taylor, in reply.

Cur. adv. vult.

7th March, 1916.

MACDONALD, C.J.A.: This is an appeal from a judgment of MACDONALD, J. on questions of law submitted to him by THOMPSON, Co. J. acting as an arbitrator under the provisions of the Workmen's Compensation Act. The question before us turns on the conduct of the injured man and his medical attendant in relation to the treatment of the injury. The injured eye, after being treated with good results for two or three days, was neglected for the following six days, and the sight thereof was in consequence, as found by the arbitrator, permanently lost.

The learned arbitrator found that the man was guilty of "serious neglect" within the meaning of those words as used in section 6, subsection (2) (*c*) of said Act. In my opinion that section has no application to the conduct of the man subsequently to the accident. But while this is so, it does not follow that the serious neglect, or negligence of the injured man subsequently to the accident and apart from the statute, may not deprive him of compensation, when, but for such neglect, he would have recovered. I think this case is covered by authority. I cannot distinguish it in principle from *Humber Towing Co., Ltd.* v. *Barclay* (1911), 5 B.W.C.C. 142. The question there was, "whether or not the man's present condition is due to the original accident or to the negligence of the bonesetter?"—and it is clear from the report that if the arbitrator had found that it was due to the negligence of the bonesetter, the injured man could not have succeeded.

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In the case at bar the arbitrator found that the man's present condition is due to the want of treatment of the eye for the said period of six days, and that he was guilty of serious neglect in failing to attend the doctor during that period. Now, if the negligence of a bonesetter in setting a broken arm will deprive the injured workman of compensation subsequently to the period when but for such negligent treatment the arm would have become as good as ever, it must *a fortiori* follow that the negligence of the man himself may do so.

While the learned arbitrator was in error in thinking that said section 6 was applicable to the case, I think that error was harmless. It was not error in the finding of fact but in the manner of applying the finding, and as it would be equally fatal to the workman's claim whether the finding was applied with reference to the Act or without reference to it, the legal result has not been affected by the error. The meaning of the words "serious neglect" in their ordinary or non-statutory sense import more than ordinary negligence, as the equally indefinite words "gross negligence" do. In the *Barclay* case, *supra,* Cozens-Hardy, M.R. in his opinion in one place speaks of gross negligence, while in the portion quoted above he speaks of negligence simply. I do not think he intended to draw a legal distinction between the two. In any case I think a finding that the workman's present condition was brought about by his own serious neglect, or even by his neglect simply, would be sufficient to deprive him of further compensation.

MACDONALD, C.J.A.

I think there was evidence upon which the arbitrator could make his finding. The appeal, should, therefore, be dismissed.

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

As to the sufficiency of the doctor's evidence, I have entertained considerable doubt. The onus was on the Company to prove that the chain of causation was broken, and the doctor's evidence on that point is not satisfactory; but as the learned judge who heard him accepted his vague, as it appears to me to be, statement in one sense, I think I must accept his view of the matter.

IRVING, J.A.

The other point presents no difficulties. The section relied on does not touch the matter we are dealing with.

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MARTIN, J.A.: This appeal should, I think, be dismissed because there is evidence on which the learned arbitrator could base his finding of fact which is sufficient to sustain his award.

GALLIHER, J.A.: I agree with Mr. Justice MACDONALD that question (a) should be answered in the negative. I also agree that question (b) should be answered in the affirmative. There is evidence upon which the arbitrator might reasonably find that the employers had discharged the onus cast upon them of proving that the accident was not the cause of the eye being in its present condition, but that the neglect of either the applicant or the doctor, it matters not which, was such cause.

As to (c) I think the arbitrator probably used the word "serious" in view of his finding that subsection (*c*) of section 2 of the Act applies (with which I disagree).

It seems to me that once there is a finding of neglect by the arbitrator on the part of either the applicant or the doctor, and the onus cast upon the employers of shewing that but for such neglect the accident would not have brought about the present condition has been discharged, the employers are relieved from responsibility and I agree that there is evidence upon which he could so find here.

GALLIHER, J.A.

MCPHILLIPS, J.A.: In my opinion all the questions submitted by the learned arbitrator should have been answered in the negative, and the applicant (appellant) should have been awarded compensation under the provisions of the Workmen's Compensation Act, and a reference back should be made for the due fixing of the amount of the weekly payment. I observe that in the reasons for judgment of MACDONALD, J. that learned judge was not really in accord with the learned arbitrator in his findings of fact, but felt constrained to support the findings believing that the decision of the arbitrator was upon the facts and under the circumstances final.

And *Kerr or Lendrum* v. *Ayr Steam Shipping Company, Limited* (1914), 84 L.J., P.C. 1; (1915), A.C. 217 was referred to upon the point of the reasonableness of the conclusion of the arbitrator. In the present case though as I read the evidence there was not sufficient evidence (*Kleinwort,*

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Sons and Co. v. *Dunlop Rubber Company* (1907), 23 T.L.R. 696 at p. 697) to warrant the arbitrator in finding as he did "that the applicant's present condition is owing to the non-treatment during the six days when the doctor did not attend him." In *Humber Towing Co., Ltd.* v. *Barclay* (1911), 5 B.W.C.C. 142, Cozens-Hardy, M.R. (now Lord Cozens-Hardy, M.R.) at p. 144, said:

"He ought to have found one way or the other whether the condition of the man when he came before him was or was not due substantially to the original accident or to the mismanagement of the bonesetter."

There was upon the part of the applicant no serious neglect within the provisions of the statute. It was admitted that the applicant had suffered personal injury within the purview of the statute, nor was there any serious neglect or negligence upon the part of the applicant after suffering the injury. At most the arbitrator finds that there was a misunderstanding as between the doctor and his patient, the patient believing that the doctor would give him further attention at his (the applicant's) own home, that the patient in believing this was guilty of such serious neglect or negligence as would now disentitle his being granted compensation is wholly unsupported by the evidence. Nor can it be stated upon the evidence that (adopting the language of Cozens-Hardy, M.R. in the *Humber* case, *supra*) "that the condition of the man" (the applicant) "when he came before him" (the arbitrator) "was not due substantially to the original accident." This was not a case of negligence upon the part of the doctor or a case of serious neglect or negligence upon the part of the applicant, and there has been error in law in the findings as made by the arbitrator. In *Kleinwort, Sons and Co.* v. *Dunlop Rubber Company, supra,* Lord Loreburn, L.C. said at p. 697:

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"There must be some plain error of law, which the Court believes has affected the verdict, or some plain miscarriage, before it can be disturbed."

That error in law and miscarriage in the present case occurs—by reason of the unreasonableness (*Toronto Power Co., Lim.* v. *Kate Paskwan* (1915), 84 L.J., P.C. 143) of the findings of fact—when the evidence is carefully scanned and weighed. In truth there is no evidence or no sufficient evidence to support the findings of fact of the arbitrator. The evidence must be of a conclusive nature to admit of it being held that there is not

the right to compensation when personal injury has ensued, especially in the case of such a delicate organ of the body as the eye.

Upon the evidence, it is absolutely impossible upon any view of it to say that the applicant's condition as he appeared before the arbitrator was not substantially due to the personal injury suffered, which personal injury was admitted, and being admitted carried the right to compensation, only to be displaced by the strongest of evidence establishing that the applicant by conduct upon his part or conduct of others for whom he was responsible, had disentitled himself to compensation, *i.e.*, conclusive evidence that but for that negligence the eye would have wholly healed. Here the employer had notice of the injury, and had every opportunity of examining the applicant, its doctor might have examined him, and when it is considered that the injury was serious in its nature, and to the eye, which would reasonably affect one in going about, and when the applicant was well entitled to believe that the doctor would visit him, his failure to visit the doctor cannot be held to be evidence sufficient to prevent recovery of compensation. The employer was in no way prejudiced; it was for them to apprise themselves of the nature of the injury: *Hayward* v. *Westleigh Colliery Company, Limited* (1915), 31 T.L.R. 215. It cannot reasonably be said that the evidence warrants the holding that if the applicant did attend daily upon the doctor the eye would have been saved or the continued disability obviated. In this connection reference may effectively be made to what Cozens-Hardy, M.R. said in *Marshall* v. *Orient Steam Navigation Company, Limited* (1909), 79 L.J., K.B. 204 at p. 206, and Fletcher Moulton, L.J. in the same case (as quoted by MACDONALD, J. in his reasons for judgment) at p. 207.

MCPHILLIPS, J.A.

In the present case all rests upon the neglect or negligence of the applicant in not attending daily upon the doctor, although the arbitrator finds:

"The applicant believed when he saw Dr. Weldon either the second or third time that the doctor was to attend him at his own house."

All the circumstances point to the *bona fides* of the claim of the applicant, and I fail to see in what way the respondent can be said to be absolved from a liability that arose and was

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existent in consequence of the injury—and the loss of the eye ensued—*prima facie* referable and only referable to the injury sustained to the eye. To in part adopt the language of Lord Moulton, "If the [respondents] could have shewn that the loss of the [eye] was not due to the accident, but was due to the unreasonable neglect of the man in not attending daily upon the doctor, a neglect found to be unreasonable, they would have succeeded; but they have failed to prove that. Therefore the award is good." And see *per* Farwell, L.J. in the same case at p. 208.

It is abundantly clear that there is no sufficient evidence that the neglect of the applicant in not attending daily upon the doctor caused the loss of the eye—in the language of Farwell, L.J., "because it is not shewn that the treatment would have saved it."

Being of the opinion that the onus which rested upon the respondent was not discharged, *i.e.*, failure to shew that the loss of the eye was due to the omission of the applicant to attend daily upon the doctor, the findings of fact as submitted were wrongly decided. Upon the facts the findings were wrong in law (*Miller* v. *Richardson* (1915), 3 K.B. 76 at p. 81). The learned arbitrator upon the facts before him was bound in law to find that the applicant—the injured workman—was entitled to compensation.

MCPHILLIPS, J.A.

It follows that the appeal, in my opinion, should be allowed.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellant: *Alexander Macneil.*

Solicitors for respondent: *Herchmer & Martin.*

GALE AND GALE v. POWLEY.

GALLIHER, J.A. (At Chambers)

1916

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GALE v. POWLEY

Costs—Order nisi of foreclosure—Interlocutory appeal from—Costs limited to $50—County Courts Act, R.S.B.C. 1911, Cap. 53, Sec. 122, Subsec. (1).

An order *nisi* of foreclosure of an agreement for sale is an interlocutory judgment within the meaning of section 122, subsection (1) of the County Courts Act, and the costs of the appeal from such judgment are limited to $50.

APPLICATION for review of the certificate of the registrar of the Court of Appeal at Vancouver, heard by GALLIHER, J.A. at Chambers in Victoria on the 2nd of March, 1916. The defendant had appealed to the Court of Appeal from an order *nisi* of foreclosure of an agreement for sale made by LAMPMAN, Co. J., and the appeal was allowed (see *ante,* p. 18). The defendant taxed his costs of appeal at $145.05. Statement

D. M. Gordon, for the application: The judgment appealed from is interlocutory; there must be an order absolute, which is obviously final, and there cannot be two final judgments in an action. For definitions of an interlocutory order see *Bozson* v. *Altrincham Urban Council* (1903), 1 K.B. 547; *Standard Discount Co.* v. *La Grange* (1877), 3 C.P.D. 67; *In re Jerome* (1907), 2 Ch. 145; and Annual Practice, 1916, notes on Order LVIII., r. 15. Form 64 (*c.*) in the Appendix A to the County Court Rules, and Order IX., r. 7, of the County Court Rules shew plainly such a judgment is interlocutory, and the costs of appeal are, therefore, limited to $50. Argument

G. H. Meredith, contra: The only reported case bearing directly on the point is *Smith* v. *Davies* (1886), 31 Ch. D. 595, which decides such a judgment is final for purposes of appeal. [He also referred to *Ex parte Moore. In re Faithfull* (1885), 14 Q.B.D. 627.]

Gordon, in reply: The restrictive wording of the judgment in *Smith* v. *Davies* shews that judgments may be final for one purpose and interlocutory for another. This is expressly stated

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by Buckley, L.J. in *In re Page. Hill* v. *Fladgate* (1910), 1 Ch. 489 at p. 494.

16th March, 1916.

GALLIHER, J.A.: The authorities shew that judgments may be final for some purposes and interlocutory for others. *Smith* v. *Davies* does not decide that this judgment is final for any purpose except computing the time for appeal. In many respects it seems interlocutory. The real question is, is it interlocutory within the meaning of section 122, subsection (1) of the County Courts Act? The intention of the Legislature is the whole matter to be decided. In view of this, it seems to me that when Form 64 (*c.*) in the Appendix A to the County Court Rules is considered, the conclusion is irresistible that the Legislature meant such a judgment to be considered interlocutory within the meaning of that section, for this form differs only in the formal parts from the judgment in question, and it is distinctly labelled "interlocutory" and also referred to in Order IX., r. 7, of the County Court Rules as interlocutory. There can be no better indication of the Legislature's intention than what it has unambiguously stated. The judgment being interlocutory within the meaning of that section, the costs of the appeal must be limited to $50.

Order accordingly.

DONKIN *ET AL.* v. THE CHICAGO MARU.

MARTIN, LO. J.A. (At Chambers)

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DONKIN *v.* THE CHICAGO MARU

Admiralty Law — Evidence — Foreign witness — Interpreter — Right to — Question of fact—Appeal from Registrar.

The propriety of the employment of an interpreter on the examination of a witness is a question of fact, and the tribunal before which he is to be examined must decide whether he possesses a sufficient knowledge of the English language to really understand and answer the questions put to him.

Semble, objection to the use of an interpreter should not be lightly taken as the value of the testimony might be later reduced or otherwise rendered unsatisfactory by the introduction of an element of uncertainty.

APPEAL from the ruling of the registrar as to the employment of an interpreter upon the examination *de bene esse* of Keichi Hori, the Japanese master of the steamship Chicago Maru. Upon the opening of the examination a Japanese interpreter was sworn, and after five questions had been put and answered through the interpreter objection was taken that the witness had a sufficient knowledge of English to answer without an interpreter, and his former examination was relied upon in support of the contention, to which it was replied that while said examination had been conducted in English, yet it was unsatisfactory because the witness did not in truth have a sufficient knowledge of English to understand the questions put to him, though he thought he had, and therefore a qualified interpreter had been brought for the purposes of the present examination to remove any doubt.

Statement

The registrar ruled that if the witness said he understood the questions that were put to him in English then he should answer in that language, and as he said he did understand them, the services of the interpreter were not necessary.

The examination was then adjourned at the request of the defendant to enable the question to be referred to the Judge in Admiralty.

The appeal was argued before MARTIN, LO. J.A. at Chambers in Victoria on the 23rd of March, 1916.

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Mayers, for the motion.
Robert Smith, contra.

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MARTIN, LO. J.A.: It depends upon a question of fact as to whether or no an interpreter should be employed, and that fact is, does the witness possess a sufficient knowledge of the language to really understand and answer the questions put to him, whatever the witness's opinion may be? There is no one so well able to determine that question as the tribunal before which the witness is being examined, and I should hesitate long before I felt justified in disturbing such a determination, and in the present case no justification exists. But, as it is often not an easy matter to determine it, and as the question has come up before in this Court, it is desirable to point out for future guidance the course pursued in *Parratt & Co. and Hind, Rolfe & Co.* v. *The Ship Notre Dame d'Avor* (1911), 16 B.C. 381; 13 Ex. C.R. 456 (though not reported on that point), where, on the trial, I finally directed that the French master of a ship should be examined through an interpreter after his examination had been conducted for some considerable time in English, because it became apparent to me, from my knowledge of the French language and otherwise, that he did not possess the requisite knowledge of English to warrant the conduct of his examination in that language. It would, of course, be open to the registrar, in determining the question, to call to his assistance, for example, the statement of the sworn interpreter as to the witness's knowledge, where the registrar's own knowledge of the foreign language was insufficient to enable him to decide the question. As a word of warning, I add that objection to the use of an interpreter should not be lightly taken because the result might be that the value of the testimony would be later much reduced, or otherwise rendered unsatisfactory by the introduction of an element of uncertainty. Each party is in strictness entitled to an interpreter: *Rex* v. *Walker and Chinley* (1910), 15 B.C. 100 at pp. 124-6, wherein will also be found observations upon the competency of interpreters and their selection.

Judgment

The ruling of the registrar is affirmed.

Ruling affirmed.

IN RE ESTATE OF LAURA S. MILLER, DECEASED.

MACDONALD, J. (At Chambers)

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IN RE LAURA S. MILLER, DECEASED

Will, construction of—Legacies—Estate of real property only—Intention of testator.

In construing a will there is a presumption against a testatrix dying intestate; all the surrounding circumstances must be considered, including the terms of a former will which had been revoked by the latter, in arriving at the testatrix's intentions.

Held, in the circumstances of the case under review that it was the intention of the testatrix that legacies were to be paid out of the real estate which formed substantially the whole of the assets of the estate.

APPLICATION for a declaration as to the construction of the will of the late Laura S. Miller. Under the will, dated the 29th of November, 1913, she purported to bequeath certain sums to various legatees. She made no disposition of her real property, and her estate consisted substantially of real estate only. Heard by MACDONALD, J. at Chambers in Vancouver on the 11th of April, 1916. Statement

McTaggart, for plaintiff.

Martin, K.C., and *Reid, K.C.*, for respondents.

29th April, 1916.

MACDONALD, J.: The opinion of the Court is sought as to the effect of the will of the late Laura S. Miller. By her will, dated the 29th of November, 1913, she purported to bequeath certain sums of money to various legatees. The will speaks and takes effect as if it had been executed immediately before the death of the testatrix, unless a contrary intention appears in the will. Mrs. Miller had practically no personal estate at the time and her property consisted almost entirely of real estate. The question is whether she died intestate as to such real estate, so as to pass it to the heir-at-law or whether it was available for the purpose of satisfying these general or pecuniary legacies. There is a presumption against the testatrix dying intestate as to such property, but it is merely a presumption. It appears Judgment

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from the material filed on the application that Mrs. Miller had previously made a will, dated the 6th of December, 1912, also bequeathing certain legacies to different beneficiaries, but this will contained a residuary bequest "of all the rest and residue of my real and personal estate." She did not at the time possess personal estate to any appreciable extent, and had the effect of such will required to be determined, difficulty would have arisen in the same manner as with respect to the present will. The last will, in terms, revoked the previous will, and such revocation ensues, even though it were held that there was intestacy as to the real estate owned by the deceased or that it could not be charged with payment of the legacies: see *Sotheran* v. *Dening* (1881), 20 Ch. D. 99.

There was no evidence offered as to the instructions given with respect to either of the wills. It would have been preferable if oral evidence had been adduced instead of affidavits. The first will is different in its phraseology to that of the last one, but the general purport seems to be the same in both cases, *i.e.*, that the parties mentioned were (using the words of the second will) to "have" the respective sums mentioned in the wills. It does not appear to have been considered necessary, in order to effect this object, to designate the source from which the moneys would arise. The real estate is not referred to nor charged with the payment of these amounts. Without such a specific direction, can I come to the conclusion that the will should be so construed and the real estate so dealt with? I should in the first place determine what was the testatrix's intention. Chancellor Boyd in *Lobb* v. *Lobb* (1910), 22 O.L.R. 15 at p. 16 deals with the matter as follows:

Judgment

> "The question is as to the testator's intention, and by this is meant such an intention, as a reasonable man, placing himself, as has been said, 'in the testator's chair,' would suppose the testator had, having in view all the surrounding circumstances."

Lord Cairns, in *Charter* v. *Charter* (1874), L.R. 7 H.L. 364 at p. 377, says that in considering the terms of a will,—

> "The Court has a right to ascertain all the facts which were known to the testator at the time he made his will, and thus to place itself in the testator's position, in order to ascertain the bearing and application of the language which he uses, and in order to ascertain whether there exists any person or thing to which the whole description given in the will can be, reasonably and with sufficient certainty, applied."

As to the surrounding circumstances, if they are given their proper weight, it would seem that the testatrix, being desirous of disposing of her property, sought to divide it as shewn by the different legacies. In support of the submission, that the real estate should be charged with the payment of moneys, and that she may have concluded that her property was converted from land into money, it was shewn that the testatrix had, in the year preceding her death, given an option for sale of her land, but this option expired long before her death. I am satisfied she was well aware before her decease that the intending purchaser did not intend to exercise his right of purchase. The fact that the testatrix had thus attempted to deal with real estate is only an incident in connection with the matter. There was no evidence that such an option existed at the time that she made the first will and sought to bequeath sums of money to different legatees, without having any money in hand or directly charging the payment of the legacies upon the real estate. The testatrix, in making her will, could be as unreasonable as she pleased, and do as she wished with her own. I am not forming any opinion as to what disposition ought to have been made of the property. To do so would be improper, even if I had material upon which to form a determination. I am trying as a reasonable man to put myself in the position of the testatrix and arrive at her intention—to decide what was her will. She was apparently endeavouring by her last will to dispose of all her property without reference to its nature. This conclusion is strengthened by the desire of the testatrix, to even provide for the disposition of all her clothes and things by giving them to her daughter, Mrs. L. L. Atkinson.

Judgment

Intestacy is not favoured, and it would not be even suggested that the testatrix had any intention of not disposing of her property, or that she had two wills prepared at different places which she knew would be fruitless, in accomplishing the results indicated. Lord Esher in *In re Harrison. Turner* v. *Hellard* (1885), 30 Ch. D. 390 at pp. 393-4 said:

"There is one rule of construction, which to my mind is a golden rule, *viz.*, that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce—that he did not

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intend to die intestate when he has gone through the form of making a will."

I feel confident that Mrs. Miller did not intend to die intestate. The relation existing between herself and those whom she was purporting to benefit was not opposed to a disposition of her property to such persons.

I have been referred to many decisions relating to the construction of wills, but there has been no direct authority cited to me on the point in question. I do not consider any good purpose would be served by my discussing these decisions, as it is admitted that they differ from the present case. *Re Farrell* v. *Farrell* (1906), 12 O.L.R. 580, is, however, of assistance. There the testator devised certain lands to a sister, but the devise lapsed, and the opinion of the Court was sought as to whether they passed to Andrew Farrell under the last clause of the will, reading as follows:

"All the rest and residue of my estate, consisting of money, promissory note or notes, vehicles and implements, I give and bequeath to my brother Andrew," etc.

Notwithstanding this specific description of the character of the estate, and these words being applicable to personal estate, the Court held that the will should be construed so as to avoid intestacy as to such lands, and that Andrew was entitled to them.

Judgment

In *Hellem* v. *Severs* (1876), 24 Gr. 320 at p. 330, Proudfoot, V.C., in construing a will, deals with a somewhat similar case to the one under consideration as follows:

"The testator also bequeathed, 'As soon as Francis Wiseman Esmond arrives at the age of 14 years, my will is, that he be sent to the college at Toronto for three years, and that all the college fees for boarding, lodging, and tuition fees, &c., and also all his clothing, washing, and all other necessaries that may be requisite for him during the said three years, are to be paid for out of my estate by my executrix or executors or survivors of them.'

"As the estate of the testator consisted only of land, after taking out the specific bequest of the furniture and the $100 odd spent on his funeral, the land must be deemed charged with this bequest. Difficulties have often arisen in determining whether the land was charged with legacies where the estate consisted of both personalty and realty, but that vanishes when the estate is all real."

In view of the surrounding circumstances, and bearing in mind the terms of the first will, I think that it is abundantly

clear that the intention of the testatrix was to dispose of all she possessed in the manner stated. There is not the slightest contrary intent evinced by the testatrix. She intended to have her property thus divided amongst the different legatees. Her wishes should be followed in preference to ignoring them and deciding that intestacy occurred, with respect to the real estate, or that it is not affected by the will. This would result in depriving almost all the persons sought to be benefited of any portion of the estate. The legacies should, in my opinion, to implement this intention of the testatrix, be payable out of the estate of the deceased, and the land be resorted to for that purpose.

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As to costs, I think an heir-at-law has a right, especially with such a loosely drawn will as the one in question, to proof that the legal right of heirship has been properly dealt with and destroyed by a testator. Costs of all parties should be payable out of the estate.

Order accordingly.

IN RE LAND REGISTRY ACT AND ANTHONY.

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IN RE LAND REGISTRY ACT AND ANTHONY

Will—Trust—Power of sale—Sale of undivided interest in real estate—R.S.B.C. 1911, Cap. 232.

A testator devised all his real and personal property to trustees "upon trust to sell and convert into money such real and personal estate." The trustees sold an undivided three-eighths part or share of a block of the land so devised.

Held, that the power given the trustees did not authorize the sale of an undivided interest in real property.

APPLICATION for an order directing the district registrar of titles at New Westminster to register a conveyance for an undivided three-sixteenths part or share of the south-westerly 20

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acres of lot 10, part of lot 136, New Westminster District. Heard by MACDONALD, J. at Chambers in Vancouver on the 11th of May, 1916. The facts are set out in the reasons for judgment.

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Baird, for petitioner.
Brydone-Jack, for trustees.
The district registrar, in person.

25th May, 1916.

MACDONALD, J.: It appears that William Seidelman, by his will, devised all his real and personal property to certain trustees "upon trust to sell and convert into money such real and personal estate." The trustees were duly registered as the owners of a certain south-westerly 20 acres and subsequently new trustees were appointed, who, by indenture of conveyance, in July, 1915, purported to grant unto the petitioner an undivided three-sixteenths part or share. Upon application for registration of such conveyance, the district registrar declined to register, giving as his reason that the trust for sale under the will, gave no power to the trustees to sell undivided shares of the property. It is contended that the conveyance of such share was beneficial to the estate, and counsel appearing on behalf of the trustees so stated.

Judgment

There is no doubt that the trustees could sell the property in its entirety or in parcels, but the question is whether the disposition of an undivided share would be a proper exercise of the trusts contained in the will. In Dart on Vendors and Purchasers, 7th Ed., p. 73, the matter is dealt with as follows:

> "It may be doubted whether, even at law, a power of sale, unless it contains expressions pointing to such a mode of dealing with the estate, would be well exercised, where the entirety is settled, by a sale of an undivided share."

In our Trustee Act, R.S.B.C. 1911, Cap. 232, Sec. 6, trustees may sell all or any part of the property and either together or in lots, but there is no provision allowing a sale of an undivided share or interest. In *Buckley* v. *Howell* (1861), 30 L.J., Ch. 524; 29 Beav. 546, it was held that a power to sell or convey in exchange, all or any part of the lands, did not enable the trustees to sell lands with a reservation or exception of the

mines or minerals under the same. In *Cholmeley* v. *Paxton* (1825), 3 Bing. 207 at p. 213; 4 L.J., C.P. (o.s.) 41 at p. 44, Best, C.J. refers to the power of trustees as follows:

"The trustees must substantially comply with the authority given to them; if they do not, the act done by them will not be a good execution of the power, and the conveyance will be altogether void. They might sell different parcels of the estate at different times, and make separate conveyances of each parcel so sold; that is the extent of their authority. They cannot sell part of a parcel, they must not sell the land without the timber, or the timber without the land on which it grows. The sale of the one without the other would be a cause of confusion and litigation, which could not fail to be injurious to both the vendor and the vendee, and such a sale is a material departure from the power, injurious to the reversioner, and therefore altogether void."

It is contended that these decisions are not authorities opposed to the right of the trustees to sell a share or interest in the land, on the ground that they depend upon the particular circumstances of the cases. I can see no real difference between these two cases and that of a trustee selling an undivided share or interest. I think the principle to be deduced from these cases, strengthens the contention that such an interest cannot be sold by trustees.

Notwithstanding the position taken by the trustees, and which they are naturally bound to assume, it appears to me that a sale of an undivided share in land is not beneficial to the estate, and if such sale took place the value of the balance of the property would be prejudicially affected. It is far different to dividing and selling the property in parcels or lots. It might involve the introduction of opposing interests. Such a likely condition of affairs would affect a prospective purchaser, if the balance remaining unsold were offered for sale.

Judgment

The undesirability of disposing of an undivided share in land, is indicated in the case of *Trower* v. *Knightley* (1821), 6 Madd. 134, where the Court refused to direct a conveyance to certain children, who had come of age, of a moiety of land, on the ground that it would affect the balance of the property and that "an undivided moiety could not advantageously be sold or leased." This case, together with a number of others, is referred to in *In re Horsnaill* (1909), 1 Ch. 631; 78 L.J., Ch. 331, where it was held that owners of a one-third share were "not entitled to call for any conveyance of an undivided third part of the free-

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hold," nor could such owners insist upon immediate exercise of the trust for sale by the trustees of the entire property.

In Prideaux's Precedents in Conveyancing, 20th Ed., Vol. 2, p. 240, after the case just cited had been referred to, the benefit to be derived from disposing of property in its entirety and not in shares is thus stated:

"The reason is that when land is held on trust for sale it can be disposed of to better advantage as an entire estate. To split it up into undivided shares would damage the interests of the beneficiaries."

In my opinion, the power given to the trustees herein did not authorize the sale of an undivided three-sixteenths share or interest to the petitioner, and the district registrar was justified in refusing to recognize the conveyance as valid.

Order refused.

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IN RE LAND REGISTRY ACT AND THE STANDARD TRUST COMPANY.

Mortgage—Assignment of—Not registered—Second assignment—Application to register—Requirements.

The assignee of an assignee of the holder of a registered mortgage may have his title registered without the necessity of registering the first assignment.

Statement

APPLICATION for an order directing the district registrar of titles at Vancouver to register an assignment of certain mortgages. The mortgages in question were registered in the name of the British Columbia Permanent Loan and Savings Company (called the old company). Subsequently the British Columbia Permanent Loan Company (called the new company) was incorporated by private Act, which provided that it should acquire all the property of the old company, and that a convey-

ance and assignment in the form in a schedule to the Act should be sufficient. A conveyance was duly executed and deposited in the registry office, but was never registered. The new company then assigned the mortgages in question to the petitioner, whose application for registration of the assignment was refused on the ground that the assignment from the old to the new company had not been registered. Heard by MACDONALD, J. at Chambers in Vancouver on the 17th of April, 1916.

A. E. Bull, for applicant.

The district registrar, in person.

31st May, 1916.

MACDONALD, J.: Applicant, by its petition, seeks to obtain an order directing the district registrar of titles at Vancouver to register its title with respect to certain mortgages on the lands, referred to in application No. 94124F. The district registrar has refused to effect registration on the ground that the mortgages were made in favour of the British Columbia Permanent Loan and Savings Company (called the old company) and that no application has been made to register the transfer of such mortgages to the British Columbia Permanent Loan Company (called the new company), under which the applicant is claiming title. The new company was incorporated by a private Act in 1909 (Cap. 49), which provided that it should acquire all the property, real and personal, of the old company, and that a conveyance and assignment in the form shewn by a schedule to the Act, or to the like effect, should be sufficient.

Judgment

Upon the argument of the matter it was further contended by the district registrar, that the assignment or conveyance, though in the form prescribed, did not operate so as to vest the property in the new company without further conveyance. I think the mode adopted for transferring the assets of the old company to the new company was effective, without a further subsequent transfer or conveyance. The proviso for further assurances does not detract from the effect of the conveyance given in pursuance of the statute.

The question then remains, if the new company thus acquired all the assets, rights and credits of the old company, whether it

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could, without registration, transfer mortgages to the petitioner in the manner shewn by the documents referred to in said application. Able written arguments have been submitted to me dealing with the matter, which is important to the company as involving considerable expense, and also to the district registrar in its relation to the revenue.

I would prefer to have dealt in detail with the points raised by counsel, but find that the time at my disposal will not permit of my doing so. If I were to postpone my decision until after the New Westminster Assizes closed, the result would be that if the party dissatisfied desired to appeal, an application could not be made to have such appeal heard in June. Delay until November might be very prejudicial to those interested in completing registration. I think it well, under these circumstances, to shortly give my decision. I do not think that the fact that the conveyance from the old company to the new company was deposited in the registry office is important, except that it might thus gain some strength, so far as being notice to those concerned.

Judgment

Assuming that I am correct as to the effect of the conveyance given in pursuance of the statute, it should prove to the satisfaction of the registrar, in passing the title, that the new company has acquired all the assets of the old company, and that the petitioner now seeks to utilize the combined position of the old and new companies to obtain an interest in the mortgages registered in the name of the old company. It seems to me that the holder of a mortgage, duly registered, can assign such mortgage to another party, and such assignment would not require to be registered. It would be perfectly valid between the parties without registration. Then the assignee might make a further assignment, and his assignee could utilize the first assignment without its registration. It would hardly be contended that if such a course of proceedings with respect to a mortgage had been accomplished by one document, registration in favour of the first assignee would be required. Why, then, should it become necessary (unless there is express statutory provision to that effect) where the same result is sought to be attained by two separate documents?

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In my opinion, the provisions of sections 104 and 105 do not prevent the petitioner from now applying for and obtaining the registration in its favour, pursuant to its application. The registrar should grant the application without requiring the further registration contended for. There are no costs to either party.

In thus deciding that the district registrar should comply with the application for registration of the petitioner, I am drawing a distinction between an application to register the title to land and the registration, sought to be effected by the application in question.

Order granted.

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COTTONWOOD TIMBER CO. *v.* MOLSONS BANK

COTTONWOOD TIMBER COMPANY, LIMITED v. MOLSONS BANK.

Mortgage — After-acquired property — Clause in mortgage including — Inserted by mistake—Proof of.

In order to establish that by a mistake mutual and common to both parties an "after-acquired" clause was inserted in a mortgage, the evidence must be such as leaves no shadow of doubt upon the mind of the Court, and where a mortgagee has changed his position by paying out money on the strength of the "after-acquired" clause it would be inequitable to strike it out.

Campbell v. *Edwards* (1876), 24 Gr. 152 followed.

Statement

ACTION for the recovery of certain lumber seized under a mortgage held by the defendant Bank on the property of the plaintiff Company. Tried by MURPHY, J. at Victoria on the 9th of June, 1916. The circumstances under which the action arose are that during July, 1912, P. A. Wilson and M. J. Scanlon entered into a written agreement with the Molsons Bank for

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the purchase of the property of the Kelliher Lumber Company, Limited, at Deroche, the Bank to advance certain sums of money, for which they were to receive a mortgage on the property when acquired. Subsequently, solicitors acting for Wilson and Scanlon incorporated the Cottonwood Lumber Company, Limited, which was to be the real purchaser of the property, and also prepared the mortgage. This mortgage was drafted and redrafted several times, and was finally approved both by the solicitors for the Cottonwood Lumber Company and for the Bank, although it was not executed until March, 1913. The Company took possession of the plant immediately after the agreement was entered into and proceeded to make many changes, installing many thousands of dollars' worth of new machinery. In order to transfer the title free from all incumbrances it was necessary for the Bank to expend in all about $32,000. A large portion of this was paid during the latter part of 1912, and after the Bank had been advised by its solicitor as to its rights under the clause in the mortgage covering after-acquired property. Early in 1915 the mortgagor made default in payments under the mortgage, and the Bank, after some negotiations, entered into possession under the mortgage, seizing, *inter alia,* several million feet of lumber, cut for the greater part from the limits covered by the mortgage, but piled on adjoining property not covered by the mortgage. The Bank relied in part on the clause in the mortgage covering after-acquired property, and the Cottonwood Lumber Company asserted that this clause had been inserted in the mortgage by common mistake of both parties, and contrary to the intention of the parties, as evidenced in the agreement of 1912. The defendant pleaded no mistake and waiver, and that the Bank had acted under the mortgage relying upon the fact of this clause being in there in making considerable advances for the purpose of clearing the title to the property.

Statement

Bodwell, K.C., for plaintiff.

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

16th June, 1916.

Judgment

MURPHY, J.: To succeed, plaintiff must shew that by a mistake mutual and common to both parties the "after-acquired"

clause was inserted in the mortgage. The evidence to establish this must be proof which leaves no shadow of doubt upon the mind of the Court: *Campbell* v. *Edwards* (1876), 24 Gr. 152 at p. 171, and authorities therein cited. The Court is entitled to consider all the circumstances surrounding the making of the instrument, and whether it accords with what would reasonably and probably have been the agreement between the parties: *Clarke* v. *Joselin* (1888), 16 Ont. 68 at p. 78.

As to the mortgage itself, it is, in my opinion, not open to the Court, on the record, to hold that the Bank at any rate did not intend, and indeed insist, that the after-acquired clause should be inserted. But it is argued that as the mortgage was executed in pursuance of the agreement of July 15th, 1912, if it can be shewn that that agreement does not contemplate such a clause in the mortgage therein provided for, plaintiff is entitled to succeed. I think this position correct, subject to what is hereinafter stated as to its being inequitable, on the facts of this case, to give effect to it, but, in my opinion, bearing in mind the principles above cited, the necessary proof has not been adduced. I agree that no evidence as to intention is admissible, and that the agreement, being in writing, must be interpreted within its four corners in the light of surrounding circumstances and probabilities to be gleaned therefrom. The agreement provides for a mortgage back as security. By what I regard as admissible evidence it was proved that the real purchaser was to be a company to be incorporated by Scanlon and Wilson. No discussion apparently took place as to the proposed capital or possible resources of this company. The Bank was to get no cash or consideration other than the mortgage for a property the purchase price of which was $77,500. This figure is arrived at by excluding from the purchase price set out in the agreement the price agreed upon for the logs and lumber then on hand, immediate release of which was effected by the agreement. The property sold was, *inter alia,* a sawmill, machinery, timber, etc. Timber in the agreement, I think, means standing timber, as logs and lumber are also mentioned, and, I consider, refer to logs and lumber then on hand. The words "mortgage back" are, in my opinion, not sufficient to constitute the "irrefragable

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evidence" required by the authorities. In order to be so, I think the words "only on the property hereinbefore enumerated," or words of like import, would have to be interpolated. The agreement was drawn hurriedly by a layman, and the expression "mortgage back" may well have meant, and in my opinion was intended to mean, if thought was given to its meaning at all, that such mortgage was to be given to the Bank contemporaneously with the formal transfer. At any rate its use under the circumstances, and considering the nature of the property sold, falls far short, in my opinion, of being proof that leaves no shadow of doubt upon the mind that it was meant to exclude the "after-acquired" clause. The document itself shews, as above stated, the Bank was getting nothing for its property except this mortgage from a proposed company, as to the resources of which it had no idea. The mill, as operated by its previous owners, had been a failure. Wilson and Scanlon were experienced operators of sawmills in a large way. Would not extensive changes of plant, such as actually took place, be reasonably anticipated, and if they were, would not the Bank require an "after-acquired" clause to make sure their security would not be impaired? Again, by the terms of the agreement, the logs and lumber then in existence were excluded from the security. Would the Bank, without any consideration other than the mortgage, transfer the timber limits to a proposed company of which it knew nothing, giving it thereby power to destroy their value entirely by depletion, and yet not retain at any rate some power or control in connection therewith? The terms of payment were spread over a period of three years and a half, and the later payments aggregate by far the larger part of the purchase price. In the nature of things the mill, machinery, etc., must deteriorate and call for considerable replacement in that length of time. Would the Bank not reasonably be expected to stipulate for a charge on such replacement? It might well be the timber limits would be exhausted before these later payments became due, leaving the company with no standing timber, and, if no replacement of machinery took place, with a plant depreciated by years of wear and tear as possibly the only assets wherewith to meet same.

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Evidence which I think was admissible was given that in such deals as this mortgages invariably contain the after-acquired clause. All these considerations, instead of establishing beyond a reasonable doubt in my mind plaintiff's contention, raise a presumption against such contention. I therefore hold the plaintiff fails to bring itself within the above-cited legal principles.

Further, having regard to the evidence of McKim, which I unreservedly accept, the Bank changed its position on the strength of this after-acquired clause being in the mortgage by paying out several thousand dollars. This being so, it would, I think, be inequitable to now strike it out. The action is dismissed.

Judgment

Action dismissed.

IMPERIAL BANK OF CANADA v. ROSS *ET AL.*

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Banks and banking—Promissory notes—Consideration—Transfer of lands and further advance from bank—Incumbrances subsequently appear to be void—Right to sue on loan.

The fact that a person who has agreed to take a conveyance of land subject to certain incumbrances as part of the consideration for a promissory note might not have done so had he known the incumbrances were void, is no defence to an action upon the note where no representations, innocent or fraudulent, were made respecting the incumbrances.

The taking of a void mortgage does not prevent a bank from suing to recover the loan in respect to which the mortgage was taken.

Rolland v. *La Caisse d'Economie N.-D. de Quebec* (1895), 24 S.C.R. 405 referred to.

Statement

CONSOLIDATED ACTION upon certain promissory notes against T. H. Whalen & Company, Honourable W. R. Ross

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and J. R. Pollock, tried by MURPHY, J. at Victoria on the 9th of June, 1916. The facts relevant to the issue are that prior to the 15th of May, 1914, T. H. Whalen & Company were indebted to the Imperial Bank of Canada at Fernie, B.C., for an advance amounting to $16,805.54. A large portion of this money was obtained by them at different times running over three or four years, commencing in 1910, to enable them to build and complete their hotel at Fernie, the original intention being to supply simply a temporary loan whilst they were obtaining a loan from a mortgage company. Ross had been indorser for the Whalens in respect of their advances, for which he held two mortgages. The defendant Pollock had a second mortgage upon the property. The Whalens were not making a success of the hotel. Ross and Pollock desired to get the Whalens out of the property, and arranged for a new advance of $3,159 to enable them to buy their interest out and pay their current debts against the hotel business. The Bank, however, would not release the Whalens, and therefore the Whalens and Ross signed a new promissory note on the 15th of May, 1914, for the old advance of $16,805.54. Ross signed, on the same date, a note for a new advance of $3,159, and Pollock signed and Ross indorsed a covering note for the two advances, which covering note amounted to $19,964.54. On the trial the Whalens made default. The defendant Ross claimed that as the new note was taken from Pollock for $19,964.54 and the Bank did not sue him, the said Ross, as indorser on the last-named note, that the new note was intended as a substitution for the old advance and the new advance, namely: for the notes signed the same day as the Pollock note for the above respective sums of $16,805.54 and $3,159. The defendant Pollock, in his defence, claimed that the original advance was made by the Bank contrary to the Bank Act, also that he, Pollock, never intended to sign any note except the note for $3,159, and that the obtaining of his signature to the note for $19,964.54 was a fraud, or, in the alternative, was a mistake. He also denied that he had any interest in taking over or assuming the prior indebtedness and mortgages of the Whalens.

Statement

S. S. Taylor, K.C. (*J. W. de B. Farris,* with him), for plaintiff.

H. W. R. Moore, for defendant Ross.

M. A. Macdonald (*H. W. Herchmer,* with him), for defendant Pollock.

MURPHY, J.: Consideration has led me to conclude that it is unnecessary to decide the matter of the legality of the mortgages given to Ross. I find the bargain made at Fernie on the 15th of May, 1914, to have been: Whalen to convey the hotel property to Ross, subject to the two Ross mortgages and to the Pollock mortgage; Ross to convey the property to Pollock, subject to the same incumbrances; Ross and Whalen to give a note to the Bank for the then total of Whalen's indebtedness to the Bank, *viz.*: $16,805.54; The Bank to advance $3,159 to be used to satisfy certain debts of Whalen, the balance to be retained by Whalen; Ross to give a note to the Bank for this $3,159. Pollock, in consideration of the conveyance to him subject to the incumbrances mentioned, and of the further advance of $3,159 and of possession by Ross and himself of the property, to give a note to Ross for the aggregate of the two notes above mentioned, *viz.*: $19,964.54; Ross to indorse this and hand it to the Bank. Ross to allow Whalen to redeem within twelve months, despite the absolute conveyance, on Whalen paying the amount of this last note, and other payments set out in exhibit 23. Pollock to agree that this agreement by Ross be binding on him; Whalen to give possession to Ross and Pollock. Pollock to have the real control of the property. This bargain was actually carried out and all the documents signed and delivered and all moneys paid over, and possession given to Ross and Pollock. Within a day or two Pollock, fearing that his mortgage would merge if he acted on the conveyance—which I find he had already accepted—requested that Ross forward a power of attorney to enable the same bargain to be carried out in such a way as would prevent the merger question arising. The method apparently (though, in my view, this is immaterial) was that Pollock assign his mortgage to the Bank, and then take a new deed subsequent in date from Ross. This deed was proffered, but by this time Pollock had repented of his

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bargain and was looking for a way out, and he refused it. He still, however, continued to control the property—Ross doing whatever he requested. As a side light on the case it is to be observed that what were apparently notarial acknowledgments attached to the conveyance Ross to Pollock, and the assignment Pollock to the Bank, have been torn off. Pollock having taken this stand, Ross apparently arranged with Whalen that Ross might convey to some other person, and the alterations were made. This was done without consulting the Bank, and cannot be held in any way to alter the concluded and executed bargain of the 15th of May, 1914, in so far as the Bank is concerned.

This being my view of the facts, I fail to see how the question of the invalidity of the mortgages arises in this action. Pollock's consideration for executing the note was the conveyance by Ross, subject to the three mortgages of the property to him, and the further advance by the Bank of the $3,159 to get Whalen out, and the giving up of possession by Whalen to Ross and himself. He received this consideration. It may be he would not have made the bargain assuming the Ross mortgages are void, and further assuming he had known such to be the fact, but the Court is not concerned with that. No representations of any kind, innocent or faudulent, respecting the mortgages were made to him, and no such case was raised on the pleadings. Though I do not think the principle necessary to the decision, it is clear law, apparently, that taking a void mortgage does not prevent a bank from suing for the loan: *Rolland* v. *La Caisse d'Economie N.-D. de Quebec* (1895), 24 S.C.R. 405.

Judgment

On the claim by Ross for indemnity, I can find nothing in the evidence proving any such contract to have been made, or even discussed.

Judgment for plaintiff against Ross and Pollock as claimed, with costs. Witness fees of Fisher and Phipps to be allowed to plaintiffs.

Judgment for plaintiff.

BROWN v. MENZIES BAY TIMBER COMPANY, LIMITED, *ET AL.*

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BROWN v. MENZIES BAY TIMBER CO.

Company — Conspiracy against — Right of shareholder to sue — Direct damage to plaintiff necessary.

Conspiracy to defraud a company does not give a shareholder a right of action on the ground that owing to the conspiracy his shares have become worthless, where there is no allegation that the company is prevented, by the control of the intended defendants or some of them, from taking action.

Burland v. *Earle* (1902), A.C. 83 applied.

APPLICATION by defendants to set aside a writ of summons on the ground that it discloses no cause of action. Heard by MURPHY, J. at Chambers in Victoria on the 16th of June, 1916. Statement

Harold B. Robertson, for the application.
Mayers, contra.

20th June, 1916.

MURPHY, J.: I have carefully read the affidavit used in support of the writ. All the alleged wrongs therein set forth are wrongs against various companies. The intended plaintiff is, or was, a shareholder in some of these companies, and the alleged damage to him is that, as a result of such wrongs, his shares have become worthless. I can find no right of action in the affidavit vested in the intended plaintiff. All the facts set up shew causes of action only in some of the companies named. The intended plaintiff admittedly does not seek to recover for any such wrongs, in fact, could not, as he does not allege the companies wronged to be prevented, by the control of the intended defendants, or some of them, from taking action themselves. Judgment

He alleges, if I understood counsel, that whilst the various wrongs set out in the affidavit give rights of action to some of the companies, they also make out a case of conspiracy for the plaintiff individually. Study of the affidavit fails to convince

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me of this. The facts alleged may shew a conspiracy, but if so, such conspiracy is against the companies, not against the plaintiff. There is no direct damage to him. His loss results from the wrongs alleged to have been done to the companies in which he is a shareholder.

Whilst the essential elements of an action of conspiracy are apparently still open to discussion (see Pollock on Torts, 8th Ed., p. 319 *et seq.*), no case has been cited to me, and I know of none where plaintiff was held to recover unless he could shew damage suffered by himself directly.

In the absence of any such authority, and in view of such decisions as *Burland* v. *Earle* (1902), A.C. 83, in my opinion the writ must be set aside.

Application granted.

MURPHY, J. (At Chambers)

1916

June 27.

HOWE v. HOWE

HOWE v. HOWE AND COLLYER.

Mortgage—Foreclosure for non-payment of interest—Application for relief —Right to on payment of principal and interest due with costs— Acceleration clause implied—B.C. Stats. 1915, Cap. 35; R.S.B.C. 1911, Caps. 167, and 133, Sec. 2 (14).

Although an acceleration clause is not actually set out in a mortgage made in pursuance of the Act respecting short forms of mortgages it is imported into the mortgage by operation of law.

Canada Settlers' Loan Co. v. *Nicholles* (1896), 5 B.C. 41 followed.

The fact that the acceleration clause is not expressly inserted but is included in the mortgage only by operation of law, does not preclude the application of section 15 of the Second Schedule of said Act.

The Court has power to relieve against penalties and forfeitures under section 2 (14) of the Laws Declaratory Act.

Statement

APPLICATION by a mortgagor in arrears in payment of interest for relief under chapter 35, B.C. Stats. 1915, heard by MURPHY, J. at Chambers in Victoria on the 26th of June, 1916.

MURPHY, J. (At Chambers)

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A writ of foreclosure was issued on the 17th of March, 1914, and on the 22nd of April, 1915, judgment was given in favour of the plaintiff and an order *nisi* granted. On the 2nd of March, 1916, the registrar's certificate was taken out, certifying that $6,708.50, including costs, was due and payable under the order *nisi*, and fixing the last day for payment and redemption as the 2nd of September, 1916. The defendant Howe now applies for an order setting aside the order *nisi* and permitting her to keep up the performance and fulfilment on her part of the terms, conditions and covenants in the mortgage, and reinstating her as if the foreclosure proceedings had not been brought, she alleging her readiness and willingness to pay the sum of $2,150, the amount due for principal and interest up to the 1st of June, 1916, also $208.50, the plaintiff's costs in the action.

Statement

A. S. Johnston, for the motion.
Maclean, K.C., contra.

27th June, 1916.

MURPHY, J.: Whilst the case of *Canada Settlers' Loan Co.* v. *Nicholles* (1896), 5 B.C. 41, decides that failure to pay interest gives a right of foreclosure, it does not deal with the matter from the standpoint of equity. The equitable view is set out in the judgment of Spragge, V.C. in *Cameron* v. *McRae* (1852), 3 Gr. 311, the case relied upon in *Canada Settlers' Loan Co.* v. *Nicholles, supra.* The Court there, apparently, as the law then stood, could not give effect to the equitable view, and a new order was introduced conferring this enabling power, which was acted upon in *Knapp* v. *Cameron* (1858), 6 Gr. 559, and see particularly p. 563. The mortgage herein is made in pursuance of the Mortgages Statutory Form Act. It contains no acceleration clause, but it is argued the case of *Canada Settlers' Loan Co.* v. *Nicholles* imports such a clause. If it does, and I agree that is its effect, section 15 of the Second Schedule shews if the clause had been expressly incorporated in the mortgage that the mortgagor would, on payment of all arrears, with lawful costs and charges, be relieved from the consequences of non-payment. It is argued that because the clause is not expressly set out, but is inserted by operation of law, the clause

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can have no application. This would be, I think, a strange view for a Court of Equity to take, but assuming it to be correct, by subsection (14) of section 2 of the Laws Declaratory Act, Cap. 133, R.S.B.C. 1911, the Court has ample power to relieve against penalties and forfeitures. What is contended for here is clearly one or the other, and further, is imported by operation of law, for the documents themselves make no provisions in reference thereto. In my opinion, I am bound in equity to grant relief (see judgment of Spragge, V.C., *supra,* and *McLaren* v. *Miller* (1874), 20 Gr. 637). If the matter were at large, I confess my inclination would be to allow interest at the statutory rate on the instalments in arrear from the dates they respectively fell due. In view of section 15 of the Mortgages Statutory Form Act, *supra,* which, if not directly applicable—a debatable question in my opinion—is at any rate an indication of the mind of the Legislature in the premises, I do not think that course open to me. The application is granted on the terms of the offer set out in defendant Edward Collyer's affidavit, and on payment by the defendants, in addition, of plaintiff's taxed costs herein, for, though defendants succeed, I think payment of costs a just term, particularly as the money admittedly due was never, so far as the record shews, actually tendered. To enable plaintiff to appeal, if he is so advised, I desire to state that my action herein is not based on discretion, but on what I conceive to be the legal principles which I must enforce.

Judgment

Order granted.

ROACH v. GRAY.

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April 4.

ROACH v. GRAY

Principal and agent—Secret profit—No evidence of agency.

R. listed property for sale with the stenographer of G. (a real-estate broker) knowing that she would thereby share the commission on a sale. The property was sold to S. a member of G.'s staff, at the listed price and on the same day was sold by S. to W. at an advance of $100. In an action by R. for the $100 as secret profit and the recovery of $90 he had paid as commission judgment was given in his favour for $100.

Held, on appeal, that the stenographer of G., and not G. was R.'s agent and that secret profits could not be recovered from G.

APPEAL from the decision of SCHULTZ, Co. J. of the 2nd of June, 1915, in favour of the plaintiff in an action for the recovery of secret profit obtained by the defendant on a sale of real property. The plaintiff listed a lot in Vancouver district for sale with the stenographer in the defendant's office where he carried on a real-estate brokerage business, knowing that by an arrangement in the office any employee bringing business received a portion of the commission. The plaintiff admitted that he listed the lot with the stenographer and not with the defendant, and that the stenographer was his agent. After the property was so listed it was by agreement of sale sold to one Sumner, a member of the defendant's office staff, for the listed price, and on the same day by agreement of sale from Sumner to Mrs. Fanny Wells it was sold at an advance of $100. The plaintiff sued for this $100 and for the recovery of the $90 commission that he had paid. Judgment was given for the sum of $100. The defendant appealed on the ground that he was not the plaintiff's agent, there being no evidence of any fiduciary relationship between them. The plaintiff cross-appealed for a refund of the commission he had paid.

Statement

The appeal was argued at Vancouver on the 12th of November, 1915, before MACDONALD, C.J.A., IRVING, GALLIHER and MCPHILLIPS, JJ.A.

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R. L. Reid, K.C., for appellant: The question is wholly one of agency. The listing was given by the plaintiff to the stenographer in defendant's office: see Bowstead on Agency, 5th Ed., 113; *Canadian Financiers* v. *Hong Wo* (1912), 17 B.C. 8. The plaint is founded wholly on agency: see *New Zealand and Australian Land Co.* v. *Watson* (1881), 7 Q.B.D. 374 at p. 379; *De Bussche* v. *Alt* (1878), 8 Ch. D. 286. The evidence does not shew where the additional $100 claimed went to.

Argument

H. S. Wood, for respondent: It is not a question of agency but one of employer and employee. Roach listed with Miss Leonhardt, the stenographer, but Gray carried on the business and actually sold the property in question. The question is whether there was a fiduciary relationship between the plaintiff and Gray: see *De Bussche* v. *Alt* (1878), 8 Ch. D. 286 at p. 290; *Canadian Financiers* v. *Hong Wo* (1912), 17 B.C. 8; *Powell & Thomas* v. *Evan Jones & Co.* (1905), 1 K.B. 11; *Fry* v. *Yates* (1914), 19 B.C. 355.

Reid, in reply: There is no evidence as to where the money went; all we have is the fact that a sale was made to Mrs. Wells.

Cur. adv. vult.

4th April, 1916.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal should be allowed, and the cross-appeal dismissed. The question involved in the appeal is entirely one of fact. The plaintiff's own evidence is conclusive in shewing that the only person recognized by him as his agent in the transaction was the defendant's stenographer. The plaintiff could not succeed in recovering a secret profit unless he could shew that the defendant stood in a fiduciary relationship towards him. He might have done so by shewing a partnership between the stenographer and the defendant, but he has not succeeded in doing so.

IRVING, J.A.

IRVING, J.A.: I concur.

GALLIHER, J.A.

GALLIHER, J.A.: I would allow the appeal and dismiss the cross-appeal.

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The evidence establishes that Gray was not the agent of Roach, and is not, in my opinion, sufficient to establish a partnership between Gray and Miss Leonhardt.

McPHILLIPS, J.A.: I concur in allowing the appeal, and in the dismissal of the cross-appeal. In the result the action is dismissed.

Appeal allowed.

Solicitors for appellant: *Bowser, Reid & Wallbridge.*
Solicitors for respondent: *McPhillips & Wood.*

HANNA v. CORPORATION OF THE CITY OF VICTORIA.

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1915

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HANNA v. CITY OF VICTORIA

Municipal law—Expropriation for opening lane—Plans filed and notice to treat served—When land is "taken."

Limitation of actions—Application to appoint arbitrator—Not "an action"—Municipal Act, R.S.B.C. 1911, Cap. 170, Secs. 391, 398, 399, 401, 405, 513, and 53, Subsecs. (145) and (176).

Land is "taken" by a municipality when plans and specifications are filed and notice to treat is served in pursuance of section 399 of the Municipal Act.

An application to appoint an arbitrator is merely a step in the statutory proceedings to determine compensation and not an "action" within the meaning of section 513 of the Municipal Act, barring actions against the municipality if not commenced within a year.

APPEAL by defendant Corporation from an order of CLEMENT, J., of the 25th of November, 1915, appointing an arbitrator for the City at the instance of Hanna, under section 394 of the Municipal Act. In April, 1912, the City Council passed a by-law to open up a ten-foot lane between Pandora Avenue and Johnson Street and also passed a by-law to expro-

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priate, and notice was served on the owners under section 99 of the Act. Nothing further was done until three years and nine months after, when Hanna appointed an arbitrator under the Act and the City not having appointed one Hanna applied under said section for the appointment of an arbitrator for the City. CLEMENT, J. made an order appointing an arbitrator, from which order this appeal is taken.

McDiarmid, for the application.
R. W. Hannington, contra.

25th November, 1915.

CLEMENT, J.: I think the order must go as asked. In my opinion section 513 of the Municipal Act which limits to one year the time within which actions are to be commenced against a municipality in all cases not covered by section 512, does not apply to proceedings under Part XV. of the Act. I think that Part is a code of procedure in itself.

In *The Queen* v. *Corporation of Mission* (1900), 7 B.C. 513, MCCOLL, C.J. held that proceedings by way of *mandamus* (whether by action of *mandamus* or by application for the prerogative writ does not appear) fell within the then counter-part of section 513. He referred to the Interpretation Act and the Supreme Court Act for a definition of the word "action," as meaning "a civil proceeding commenced by writ or in such other manner as may be prescribed by Rules of Court." Our Rules of Court do provide for *mandamus* proceedings, but they make no specific provision for the commencement of proceedings under the compensation clauses of the Municipal Act. The *Mission* case, therefore, does not, in my opinion, stand in the way of my giving effect to the view I stated above.

CLEMENT, J.

The appeal was argued at Victoria on the 10th of January, 1916, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

R. W. Hannington, for appellant: The by-law was passed expropriating the land in question and the notice required by

section 399 of the Municipal Act was served in accordance with section 401. Hanna then duly filed his claim for damages. Nothing further was done for three years and nine months when, on the City not appointing an arbitrator, Hanna made this application for the appointment of one for the City. The City did not proceed with the work of constructing the lane, as 17 out of a total of 21 owners petitioned for the repeal of the by-law and an abandonment of the work. We say, first, Hanna's land was not taken and he has suffered no damage. Secondly, he is too late in taking action and is barred by sections 398 and 513 of the Municipal Act: see *In re Walker and South Vancouver* (1913), 18 B.C. 480. This is an action within the meaning of section 513 and he is out of Court: see *The Queen* v. *Corporation of Mission* (1900), 7 B.C. 513. On the interpretation of the word "action" see section 405 of the Municipal Act. Under section 394 of said Act compensation is given only when damage is done, and there is no damage in this case as the City has not acted: see *Burkinshaw* v. *The Birmingham and Oxford Junction Railway Company* (1850), 20 L.J., Ex. 246. A corporation doing a work for the benefit of the public is not liable in the same manner as a private company and the cases can be distinguished: see *The Queen* v. *The Commissioners of Her Majesty's Woods, Forests, &c.* (1850), 19 L.J., Q.B. 497; *Corporation of Oak Bay* v. *Gardner* (1914), 19 B.C. 391. The only case against us is *The King* v. *The Hungerford Market Company* (1832), 4 B. & Ad. 327, but in that case the Act is different, as their Act provides for the assessment of the value of the property, whereas ours is for the damage sustained. The fact that we gave notice does not constitute taking the property.

Argument

McDiarmid, for respondent: Every point except as to limitation is decided in the case of *Davie* v. *Victoria* (1912), 17 B.C. 102. Possession took place on service of notice to treat: see *Esquimalt Waterworks Company* v. *City of Victoria Corporation* (1907), A.C. 499. Section 53, subsection (145) of the Municipal Act is complete authority for the statement that the municipality can immediately enter on the property without taking any further proceeding, and section 53, subsection (176)

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refers to the effect of the Registry Act. By virtue of the Act the title has become vested in the Municipality and the respondent is relieved of all interest he had in the property: see Dillon's Municipal Corporations, 5th Ed., Vol. 3, pp. 1651-2. Whether we come within the sections referred to as to the limitation of actions, section 402 of the Municipal Act throws light on the question; see also *Jones* v. *The Stanstead Shefford, and Chambly Railroad Company* (1872), L.R. 4 P.C. 98.

Hannington, in reply.

Cur. adv. vult.

4th April, 1916.

MACDONALD, C.J.A.: The point of law involved is a very narrow one. The City passed a by-law for the opening of a lane which would involve the taking of a strip of Hanna's property. The City in due course filed plans and specifications and served notice to treat, and Hanna made his claim within 60 days thereafter. From that time on nothing was done by either party until recently, when Hanna appointed an arbitrator, and in default of the City doing likewise moved a judge of the Supreme Court to appoint the City's arbitrator. The order was made, and from that order the City is appealing.

Two points were taken before us by appellant's counsel. He said that as the land had not yet been actually entered upon, but was still in the respondent's possession, he has suffered no injury and is not entitled to compensation. I think the City took the land in the statutory sense when it filed plans and specifications and served the notice to treat in pursuance of section 399 of the Municipal Act. When the respondent filed his claim the City could then accede to his demand or arbitrate. It did not accede to his demand, and it was therefore open to either party to appoint an arbitrator and force along the proceedings at any time unless barred by delay. We are not in this appeal concerned with the question of damages or compensation: that is a matter to be decided in the arbitration proceedings.

MACDONALD, C.J.A.

This brings me to the second contention in the appeal, namely, that respondent's claim is barred by one or other of the limitation sections in the Municipal Act. Now, it cannot

be barred either by section 398 or by section 402, because the claim admittedly was made within the shortest of the periods therein specified. The only other section relied on is 513, which declares that all "actions" against the municipality shall be barred unless commenced within a year from the accrual of the right of action. In my opinion the respondent's application to a judge to appoint an arbitrator was not an action within the meaning of that section: it was merely a step in the statutory proceedings to determine the compensation.

I cannot see how the respondent's delay can affect the matter. The appellant was more to blame for this delay than respondent was. Unless, therefore, it can be said that the scheme of opening the lane was abandoned with the acquiescence of the respondent, which on the material before us it cannot, then respondent's position is as strong today as it was three years ago.

The appeal should be dismissed.

MACDONALD, C.J.A.

IRVING, J.A.: I agree.

IRVING, J.A.

MARTIN, J.A.: I think the learned judge below came to the right conclusion on the effect of section 513. That was the only point on which I entertained any doubt during the argument. In view of the decisions of this Court, then cited, the submissions that the land was not "taken" by the City, and that it can withdraw from its position are hardly open to argument: the difference on the latter point between the English and American authorities is noticed in Dillon on Municipal Corporations, 5th Ed., Vol. 3, p. 1651.

MARTIN, J.A.

GALLIHER, J.A.: The applicant Hanna has applied under section 8 of the Arbitration Act to have the judge appoint an arbitrator on behalf of the City, the City having refused to do so. The learned judge made the order and from that order this appeal is taken.

GALLIHER, J.A.

On the 4th of April, 1912, the City passed a by-law to open up a lane through certain property of the applicant and others, and served notice upon Hanna that they would require certain portions of his property for the undertaking. Hanna replied

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to this notice on the 5th of August, 1912, sending in his claim for damages. The City did not proceed with the work, nor did they take actual possession of the lands, and nothing was done by either party until September, 1915. Hanna through his solicitor, Mr. *McDiarmid,* on the 16th of September, 1915, notified the City that he had appointed A. M. Bannerman as his arbitrator, and called upon the City to appoint an arbitrator representing them. This the City failed to do, hence the application.

Mr. *Hannington,* on behalf of the City, objects that the land was never taken, and secondly, that Hanna is too late in making this application. I think the land is taken under the Act when the notice to treat is served. The City cannot serve and file notices affecting lands and assume dominion over them, and prevent the owners from dealing with them, and withdraw at pleasure without more. The serving of the notice under our Act is, I think, equivalent to an agreement to purchase the lands. On that ground the appellants fail.

GALLIHER, J.A.

On the second ground, this is not an action within the meaning of section 513 of the Act, nor does section 398 apply. It was contended that as the land was not actually taken and no work proceeded with, no damage has accrued to the applicant. That does not necessarily follow. In any event the applicant is entitled to a reference to arbitration.

The appeal should be dismissed.

MCPHILLIPS, J.A.

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

Solicitor for appellant: *R. W. Hannington.*
Solicitor for respondent: *F. A. McDiarmid.*

Appeal dismissed.

THE CORPORATION OF THE DISTRICT OF NORTH VANCOUVER v. VANCOUVER POWER COMPANY, LIMITED.

MURPHY, J.

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DISTRICT OF NORTH VANCOUVER v. VANCOUVER POWER CO.

Contract—Agreement between district and power company—Option to district to take over franchise—City incorporated in portion of district assume liabilities—Rights of district to take up option—B.C. Stats. 1906, Cap. 35; 1907, Cap. 30.

The plaintiff Corporation entered into an agreement with the defendant Company for the construction and operation of an electric lighting, heating and power system within the district. The contract contained a clause giving the Corporation the right to assume ownership of the system at the expiration of ten years upon certain terms. In the meantime a portion of the district was incorporated into a City, and by the Act of incorporation the City assumed the liability of the district to the defendant Company in so far as its own area was concerned. In an action for a declaration that the District Corporation was entitled to assume ownership of the Power Company's system:—

Held, that the right still remained with the District to assume ownership and was enforceable under the terms of the agreement.

APPEAL from the decision of MURPHY, J. of the 25th of June, 1915, by way of stated case agreed to by the parties in an action for a declaration that the plaintiff Corporation is entitled to assume ownership of the defendant Company's electric lighting, heating and power system within the District of North Vancouver as such limits existed on the 16th of August, 1905. Under and by virtue of an agreement entered into on the 16th of August, 1905, between the plaintiff Corporation and the defendant Company said Company constructed and operated an electric lighting, heating and power system within the district of North Vancouver. The contract contained a clause giving the Corporation an option to purchase the system at the expiration of ten years upon their giving one year's notice of their intention to do so. By B.C. Stats. 1906, Cap. 35, and 1907, Cap. 30, the City of North Vancouver was incorporated, the area comprising the same being within the plaintiff Corpora-

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tion. The Act provided that the City should assume all liabilities borne by the District Corporation under its agreement with the Power Company in so far as the area within the City was concerned. On the 14th of June, 1914, the District Corporation notified the Power Company of its intention to assume ownership of the power system under the terms of the aforesaid agreement. The question submitted for the opinion of the Court was whether the plaintiff, by reason of having given the said notice of intention to purchase, is entitled at the expiration of ten years from the 16th of August, 1905, to assume ownership of the electric lighting system of the defendants situate within the area comprising the City of North Vancouver and within the area comprising the District of North Vancouver, together with all the real and personal property of the defendant used, in use, or to be used in the operation of the said lighting system within the said areas upon payment therefor in the manner provided in the said agreement? The learned trial judge answered the question in the affirmative and judgment was entered for the plaintiff Corporation. The defendant Company appealed.

Burns, for plaintiff.

McPhillips, K.C., for defendant.

29th June, 1915.

MURPHY, J.: In my opinion, the question submitted should be answered in the affirmative. By the agreement of the 16th of August, 1905, the plaintiff was given an option to assume the ownership of defendant's lighting system. The exercise of that right would terminate all the other provisions of the contract. Nowhere in the Acts relating to the incorporation of the City of North Vancouver can I find any provision abrogating or in any way specifically dealing with this right of plaintiff to assume such ownership. What is done, in my view, in that legislation is to provide for the due carrying out of the contract so long, and only so long, as it exists. If terminated under the power of taking over granted in the original document, then all the legislative provisions dealing with its carrying out also cease to be operative. This would, if correct, answer any contention that defendant might find itself open to

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attack by the City of North Vancouver because of such legislation. To adopt the other contention, that the Legislature intended to vest the right to assume ownership in the City and District jointly, would be to read into the Acts what is not there, and what would practically amount to an abrogation of the right itself, as the difficulties of exercising such right and carrying on the enterprise on joint account would be well nigh insurmountable since the legislation provides no machinery for such purposes.

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

McPhillips, K.C., for appellant: When the City was incorporated the obligations of the agreement between the Municipality and the Power Company were assumed by the City within the City limits, and the question is whether the Municipality now has a right to the benefit of its agreement without its obligations. My contention is, the Municipality has no jurisdiction beyond its present limits, and have no status to enforce the agreement within the City. Under the 5th section of the ratepayers' report which is part of the agreement between the Municipality and the City, and is embodied in the Act (Cap. 35, B.C. Stats. 1906), the Legislature has created novation by substituting the City for the Municipality in so far as the land within the City's boundaries is concerned. Our works within the City must be subject to the statute which gives the City jurisdiction and takes it from the Municipality. There can be a statutory novation: see Brice on Ultra Vires, 3rd Ed., 530. As to the meaning of the word "adoption," see *McArthur* v. *Times Printing Co.* (1892), 51 N.W. 216; *Schreyer* v. *Turner Flouring Mills Co.* (1896), 43 Pac. 719 at p. 720; and Cyc., Vol. 1, p. 913.

Argument

Davis, K.C., for respondent: The question is the construction of the agreement of the 16th of August, 1905, between the Power Company and the Municipality, particularly the rights of the Municipality under section 11 thereof, and how it is affected by the statutes incorporating the City. The only right given under the agreement is to purchase the whole system. A

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division of the system is impossible, and could not be worked out owing to the different localities in which portions thereof are situate, and without which the Company's operations could not be carried on. He must shew clearly that the right to purchase has been taken away from us by the statute. Section 5 of the report of the ratepayers' committee, which is part of the agreement between the Municipality and the City, is the basis upon which section 23 of the Act (B.C. Stats. 1906, Cap. 35) was passed, and the Act contains nothing that interferes with the right of the Municipality to carry out the agreement with the Power Company. It is a case of a vested right, and before it can be taken away the statute must be absolutely clear. Raising the question of "novation" only clouds the issue. We contend the statute is only carrying out the terms of the original agreement.

McPhillips, in reply.

Cur. adv. vult.

4th April, 1916.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal for the reasons given by Mr. Justice GALLIHER.

IRVING, J.A.

IRVING, J.A., concurred in dismissing the appeal.

MARTIN, J.A.

MARTIN, J.A.: In my opinion, this appeal should be dismissed for the reasons given by the learned trial judge. Section 23 and the 5th clause of Schedule A should be read together, and really mean the same thing. The word "adopted," used in said section 23, on which much stress was laid for the appellant, has several meanings which do not conflict with this view: see Murray's New English Dictionary. There are often difficulties in the practical operation and carrying out of powers and contracts in cases where traction, power, light and water properties and franchises are situate in different municipalities, but that is contemplated by section 50, subsections (12) and (15) of the Municipal Clauses Act, B.C. Stats. 1906, Cap. 32, passed in the same year as Schedule A, and one municipality is none the less "adjacent" to another because the latter happens to be surrounded by the former.

GALLIHER, J.A.: Had there been no incorporation of the City of North Vancouver there could be no doubt but what the District of North Vancouver could take over the defendant's undertakings in the terms of the agreement. We have then to examine what effect (if any) such incorporation has had upon the agreement.

The Schedule A to the Act of incorporation, being Cap. 35 of 1906, proceeds first to grant and convey from the District Municipality to the City Municipality certain properties set out in clauses 1 to 13 inclusive, none of which sections in any way affect the matter in issue herein.

The fifth clause of the Schedule, at p. 306, deals with the agreement between plaintiff and defendant in these words:

"The City covenants to carry out and give effect to all the undertakings of the District Corporation so far as they relate to any part of the City area under the agreements entered into between the District Corporation and the B.C. Electric Railway Company for tramway service, electric lighting, heating and power system, and street lighting service. . . . ."

Of course, when the area included in the City Municipality was cut off from the District Municipality, and the City incorporated, the District Municipality could not exercise any powers within that area, and in order to keep faith with the Company under the agreement, clause 5 was inserted, which, as I view it, creates no rights in the City under the agreement other than (in the area comprised in the city) administrative and regulating rights, and imposes on the City the obligation of carrying out within that area the agreement entered into between the plaintiff and defendant.

GALLIHER, J.A.

Section 23 of the Act ratifies and confirms the agreements between plaintiff and defendant.

The adoption and carrying into effect of these agreements by the City does not, as the learned trial judge puts it, affect the rights of the District Corporation to take over the undertakings of the Company at the expiration of the ten-year periods.

What has taken place under the Act is, as regards the City area, to substitute the City for the District to carry out and give effect to the District's undertakings with the Company. It was optional with the District whether they took over the undertaking or not; there was no obligation as between them

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and the Company that they should do so, and hence, no such obligation was imposed on the City by the Act. That option, which was a right held by the District, was never transferred, still exists, and, in my opinion, is enforceable.

The appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *McPhillips & Wood.*
Solicitors for respondent: *Burns & Walkem.*

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FLETCHER v. PENDRAY.

FLETCHER v. PENDRAY

Sheriff—Levy and seizure—Exempt property—Sheriff's sale of—Nullity—Homestead Act, R.S.B.C. 1911, Cap. 100, Secs. 17 and 18.

A sheriff's sale under execution of property upon which exemption has been claimed under sections 17 and 18 of the Homestead Act is an unlawful act in defiance of the statute and void, and the owner can treat the purchaser who has taken possession of it as a trespasser, and either recover the goods or damages for their conversion.

APPEAL from the decision of LAMPMAN, Co. J., of the 25th of August, 1915, dismissing the plaintiff's action for damages against the sheriff of the County of Victoria for refusing to allow exemption, under the Homestead Act, on the sale of a crop of oats seized under execution. In the month of May, 1915, the sheriff seized certain goods and chattels of the plaintiff's under two writs of *fi. fa.* When the exemption under the Homestead Act was claimed, the sheriff allowed the exemption and withdrew from possession of the property he had seized. In August following the sheriff seized the crop of oats in question in this action under one of the writs of *fi. fa.* upon which the seizure in May had been made. The plaintiff became aware of the seizure

Statement

on the 4th of August, made claim for exemption on the 5th, which was refused, and then served the sheriff with notice of appeal to the County Court judge on the same day. On the following day the sheriff sold the oats to the defendant Pendray for $167. On the 7th of August the County Court judge allowed the plaintiff's appeal and directed the sheriff to allow the execution debtor his exemption in accordance with the Homestead Act, which included the whole crop, as its value was less than the exemption allowed. The defendant Pendray, in defiance of the order, took away a portion of the crop. The sheriff contended that no notice had been given by the plaintiff claiming exemption under the provisions of section 18 of the Homestead Act, and that the notice actually given by the plaintiff was one claiming title and possession, and not exemption. The defendant Pendray also claimed that selection of exemption was made in May, when the first seizure was made, and the plaintiff was, therefore, not entitled to any further exemption.

Statement

The appeal was argued at Victoria on the 10th and 11th of January, 1916, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

W. J. Taylor, K.C., for appellant: Household goods were first seized in May under two writs of *fi. fa.,* when the full exemption was allowed. It was under one of these writs that the crops were seized in August following. He was not again entitled to exemption: see *Sehl* v. *Humphreys* (1886), 1 B.C. (Pt. 2), 257. The exemption must be claimed in any case: see *Roy* v. *Fortin* (1915), 22 B.C. 282. It is a privilege that must be claimed: *Hernaman* v. *Bowker* (1856), 11 Ex. 760; *Doe* v. *Thorn* (1813), 1 M. & S. 425; *Hoe's Case* (1600), 3 Co. Rep. 181. The proper course was to order the sheriff to withdraw, but in this case it was done too late. Exemption must be claimed before sale, when he should insist that the sale must not take place: see *Rideal* v. *Fort* (1856), 11 Ex. 847. There is no evidence to shew he was at the sale and protested.

Argument

D. S. Tait, for respondent: The plaintiff knew of the sale on the 4th of August. Claim for exemption was made on the 5th, when notice of application to the County Court judge was served on the sheriff, and the sheriff sold on the 6th. The

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exemption is a privilege, and once claimed is absolute. Section 136 of the County Courts Act is subject to the provisions of the Homestead Act, and sections 4 and 10 of the Execution Act are to the same effect. If the sheriff sells what the writ does not give him the right to sell, the sale is void. The exemption was claimed and notice of appeal served the day before the sale. The value of the crop was less than the exemption, so none of the crop should have been sold: see *Lancashire Wagon Co.* v. *Fitzhugh* (1861), 6 H. & N. 502; *Tancred* v. *Allgood* (1859), 4 H. & N. 438; Halsbury's Laws of England, Vol. 14, p. 57, par. 113; *Wickham* v. *The New Brunswick and Canada Railway Co.* (1865), L.R. 1 P.C. 65; *Crawshaw* v. *Harrison* (1894), 1 Q.B. 79; *Edge* v. *Kavanagh* (1888), 24 L.R. Ir. 1. A sale under the circumstances in this case is void *ab initio.*

Argument

Taylor, in reply: The chief point is that exemption was not insisted on: see *Manning's Case* (1609), 4 Co. Rep. 329 at p. 335; *McCracken* v. *Adler* (1887), 4 S.E. 138.

Cur. adv. vult.

4th April, 1916.

MACDONALD, C.J.A.: I am of the opinion that the sheriff had no right to sell the oats in question. They were clearly of a value of less than $500, and when rightly claimed, as I think they were, by the plaintiff, the execution debtor, as an exemption under the Homestead Act, the sheriff was bound to release them. There is, to my mind, a clear distinction between this case and such cases as *Doe* v. *Thorn* (1813), 1 M. & S. 425. Where there is legal authority to sell, the fact that the judgment upon which the *fi. fa.* issued is afterwards set aside will not, it appears, affect the purchaser's title. And the same is true where the sheriff, having lawful authority to sell, disregards some legal formality. On the other hand, it appears to be equally clear that where the sheriff sells the goods of a stranger, the sale is void, and the owner can treat the purchaser who has taken possession of them as a trespasser, and either recover the goods, or damages for their conversion.

MACDONALD, C.J.A.

In *Turner* v. *Felgate* (1656), Raym. (Ld.) 73, damages for the conversion were awarded against the purchaser.

In *Farrant* v. *Thompson* (1822), 5 B. & Ald. 826, the Court held that no property in the goods passed to the vendee, and that an action of trover would lie for their recovery, Abbott, C.J. at p. 828 saying:

"The sheriff wrongfully took the goods of the plaintiff, instead of those of the tenant; he could acquire no title by his wrongful act, and could therefore convey no title to the defendant."

The principles to be applied to the case at bar are the same as those applied in that case. The *fi. fa.* gave the sheriff no right to take the goods in question. His selling of them was unlawful, not merely irregular, and the sheriff could confer no title upon the purchaser.

MACDONALD, C.J.A.

I would dismiss the appeal.

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

IRVING, J.A.

MARTIN, J.A.: The neat question before us is what, if any, right or interest does a purchaser at a sheriff's sale acquire to or in goods which are exempt from sale under the Homestead Act, and which have been claimed as exempt, pursuant to the statutory option given to the judgment debtor by section 17. No question of selection under section 18 arises here, because the goods (a crop of grain) seized were of less value than $500. It is submitted that in such case the immediate duty of the sheriff, after notice of the exercise of said option and claim, is to withdraw from possession, and that if he nevertheless thereafter proceeds to sell the exempted goods it is an illegal and void act, and no interest of any kind passes to the purchaser. In my opinion, this is the correct view of the matter. A sale in such circumstances is not an irregular exercise of lawful powers, but an unlawful act in defiance of a statutory prohibition not to sell at all in such circumstances. It is just as though the statute in terms forbade the selling of the debtor's bed, and yet it was put up for sale. That is the distinction between this case and such cases as *Hoe's Case* (1600), 3 Co. Rep. 181; *Manning's Case* (1609), 4 Co. Rep. 329; and *Doe* v. *Thorn* (1813), 1 M. & S. 425, in which last it was said "the term (of a lease) was legally sold, for the sheriff had authority to levy the money and the property passed by the sale." Here the sheriff did not have authority to levy upon these goods after exemption claimed, nor

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had he "lawful authority to sell" them, as in *Manning's Case, supra,* at p. 335. The present is a very strong case because it is not one where the "precise interest," whatever it may be, of the debtor in the goods passes (as to which see Halsbury's Laws of England, Vol. 14, p. 57, and cases cited) to the purchaser by the sale (which is not in market overt), but one wherein the statute says no interest of the debtor in the goods shall be sold or pass at all. The purchaser in this case was, we are told, unaware of the fact of the exemption, but even though he was thus unwittingly participating in an unlawful proceeding, he does not for that reason acquire any better title to the goods. Here there was no interest that could be sold or bought, and so the purchaser acquired nothing. The reasoning in the case of *McCracken* v. *Adler* (1887), 4 S.E. 138, relating to exemption of lands, which I referred to during the argument, and *Mobley* v. *Griffin* (1889), 10 S.E. 142, wherein it is approved, supports this view.

MARTIN, J.A. The purchaser was referred to as an "innocent" one, but, from my point of view, that does not affect the situation, and I do not think the term is appropriate to these proceedings, because the statute is notice to all of the right to exemption, and it puts a purchaser upon his inquiry as to the exercise of that right. The observations in the cases above cited on this aspect of the matter apply in principle to goods as much as to lands.

Then, it was urged that the plaintiff had waived or lost his right to object to the sale, but I am unable to accept this view of the facts before us.

It follows that the appeal should be dismissed.

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

MCPHILLIPS, J.A. MCPHILLIPS, J.A.: This is a hopeless appeal. There was a flagrant denial of the right of exemption, and the conduct of the sheriff cannot be approved. It may be that the sheriff was acting upon legal advice—I trust he had that excuse. The sheriff, in my opinion, must discharge his duty in the way of the absolute recognition of the right of exemption under the Homestead Act (R.S.B.C. 1911, Cap. 100, Secs. 17 and 18) when the exemption is claimed thereunder, and here it admit-

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tedly was. It is further the duty of the sheriff to acquaint the judgment debtor with the right of exemption and admit of it being claimed. An officer exercising the high office of sheriff should proceed regularly, not illegally, and obey the statute law and directions of the Court implicitly. It is matter for regret that the purchaser at the sheriff's sale should be the sufferer in this case, but it is impossible to hold that any title was obtained through void proceedings—void *ab initio*. The appeal, in my opinion, should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Eberts & Taylor.*
Solicitors for respondent: *Tait & Brandon.*

TAIT v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

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TAIT v. B.C. ELECTRIC RY. CO.

Negligence — Street railways — Collision with motor-car — Contributory negligence — Rule of road contravened.

Driving a motor-car contrary to a rule of the road under a municipal traffic by-law, and proceeding out from behind a street-car in a diagonal course, thereby hiding from view a street-car approaching from an opposite direction, constitutes contributory negligence which will preclude recovery for injuries sustained in consequence of a collision with a street-car.

British Columbia Electric Railway Company v. *Loach* (1915), 113 L.T.N.S. 946 discussed.

Statement

APPEAL from the decision of MCINNES, Co. J. of the 29th of June, 1915, dismissing an action for damages for injuries sustained by the plaintiff's motor-car colliding with a street-car of the defendant Company. On the 26th of March, 1915, at about 8.30 p.m., the plaintiff, a jitney driver, while taking a

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load of passengers to the Arena Rink in Vancouver, was going along Robson Street, in a westerly direction, about 30 feet behind a street-car going in the same direction. On reaching Hornby Street he turned, with the intention of going north on that street, and on reaching the car-track to his right he was struck by a street-car going east and travelling at the rate of about 35 miles an hour. In turning towards Hornby Street (north) the plaintiff did not go around the middle of the two streets, as required by the city traffic by-laws, but cut short in attempting to make the crossing. The learned trial judge found the plaintiff guilty of contributory negligence and dismissed the action. The plaintiff appealed.

The appeal was argued at Vancouver on the 17th of November, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

R. M. Macdonald, for appellant: The plaintiff was found guilty of contributory negligence. In turning north from Robson into Hornby Street he did not go around the middle of the two streets. There is a rule to that effect which he should have complied with, but it has no bearing on the accident, so should not be given effect to. If the street-car had not exceeded the speed limit the accident would not have happened: see *British Columbia Electric Railway Company* v. *Loach* (1915), 23 D.L.R. 4. The excessive speed was the primary cause of the accident.

McPhillips, K.C., for respondent, referred to *Canadian Pacific Railway* v. *Frechette* (1915), A.C. 871, and *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1155.

Macdonald, in reply.

Cur. adv. vult.

4th April, 1916.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal. In my opinion, the plaintiff was clearly guilty of contributory negligence, which brought about the injury complained of.

IRVING, J.A.

IRVING, J.A., concurred in dismissing the appeal.

MARTIN, J.A.: Unless the decision of their Lordships of the Privy Council in *British Columbia Electric Railway Company* v. *Loach* (1915), 113 L.T.N.S. 946, is to be taken as deciding that a continuation of excessive speed up to the time of the accident constitutes ultimate negligence, this appeal ought to be dismissed. I do not think that case goes that far. If the gap between original and ultimate negligence is to be thus bridged by the continuity of excessive speed till impact, then there is no room for contributory negligence, and the plaintiff could with impunity be as negligent as the humour took him.

MARTIN, J.A.

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

GALLIHER, J.A.

MCPHILLIPS, J.A.: This is an appeal in a negligence action tried by MCINNES, Co. J. without a jury, the learned judge having dismissed the action, holding that the appellant was guilty of negligence, not having complied with the rule of the road, *i.e.*, Traffic By-laws of the City of Vancouver, By-law No. 963, section 22, subsections (4) and (11). The appellant failed to obtain a finding of fact from the learned trial judge that the respondent had been in any respect negligent, or that the respondent could have, by the exercise of reasonable care and diligence, avoided the accident. The evidence, being carefully weighed, does not establish any negligence upon the part of the respondent, or want of care or diligence, therefore the case resolves itself into the simple one of the negligence being that of the appellant. It is plain that the chauffeur who was driving the motor-car of the appellant—damage to which is claimed owing to a collision therewith—not only contravened the rule of the road, but recklessly drove out and from behind the street-car proceeding westerly in front of him, hiding from view the street-car which was approaching from the opposite direction, and in a diagonal course brought the motor-car in front of the street-car proceeding easterly upon Robson Street. The negligent action of the chauffeur brought about that which under the circumstances was inevitable—accident—and the appellant's chauffeur was the author of the injury to the motor-car that ensued.

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The following cases may be usefully referred to in view of the facts of the present case, and well demonstrate the law applicable to those special facts: *Radley* v. *London and North Western Railway Co.* (1876), 1 App. Cas. 754, 759; *Cayzer* v. *Carron Company* (1884), 9 App. Cas. 873; *H.M.S. Sans Pareil* (1900), P. 267, *per* Vaughan Williams, L.J. at p. 287; *The Ovingdean Grange* (1902), P. 208; *Reynolds* v. *Tilling* (1903), 19 T.L.R. 539; *Butterly* v. *Mayor, &c., of Drogheda* (1907), 2 I.R. 134; *The "Bernina"* (1888), 13 App. Cas. 15; *British Columbia Electric Railway Company* v. *Loach* (1915), 85 L.J., P.C. 23.

I am of the opinion that the learned trial judge was right in dismissing the action, and the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Bird, Macdonald & Ross.*
Solicitors for respondent: *McPhillips & Wood.*

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MELDRUM v. DISTRICT OF SOUTH VANCOUVER

MELDRUM v. CORPORATION OF THE DISTRICT OF SOUTH VANCOUVER: BLACK AND WILCOX, INTERVENANTS.

Municipal law — Acquisition of land by corporation — Powers under Municipal Act—Repeal and substitution of section of Act requiring assent of electors—Effect on another section—Refusal by implication —B.C. Stats. 1914, Cap. 52, Sec. 54, Subsecs. (27), (155) and (160) —B.C. Stats. 1915, Cap. 46, Secs. 4 and 5.

With reference to the purchase and acquisition of real property, the provisions of section 5, B.C. Stats. 1915, Cap. 46, amending the Municipal Act, B.C. Stats. 1914, Cap. 52, as to the necessity of the assent of the electors, are incompatible with the powers conferred by subsection (155) of section 54 of the 1914 Act, and, therefore, to this extent the latter must be deemed to have been repealed by implication.

A municipal by-law passed for the purpose of purchasing certain properties for street widening and the erection of a fire hall, which has not received the assent of the electors as required by the Municipal Act as amended in 1915, even if operative under the Act as to one of the purposes but incapable of segregation from the general scheme, it fails as a whole, and should be quashed.

APPEAL by the intervenants from the order of MURPHY, J. of the 11th of August, 1915, quashing a by-law of the Corporation of South Vancouver to authorize the purchase of lands for the widening of a portion of 35th Avenue and for a fire hall. The by-law in question was passed on the 15th of July, 1915. At the instance of one C. W. Meldrum, a ratepayer, a rule *nisi* was granted on the 4th of August, 1915, ordering the Municipal Council of said Corporation to shew cause why the said by-law should not be quashed on the ground that the by-law is for the purchase of lands for a price exceeding $2,000, and the council had no power to pass the said by-law without first obtaining the assent of the electors thereto, as provided in the Municipal Act. The order absolute was granted on the 11th of August, from which this appeal was taken. Subsections (27) and (155) of section 54 of Cap. 52, B.C. Stats. 1914, both deal with the power of a municipality to pass by-laws for the purchase and acquisition of real property. Subsection (27) was repealed and substituted by section 4 of Cap. 46, B.C. Stats. 1915, which provides that the assent of the electors must first be obtained before such by-law be passed, but no amendment was passed as to the powers conferred by subsection (155), and the question at issue was whether owing to the restriction placed on subsection (27) it must be deemed that subsection (155) is by implication repealed to the same extent, and that the assent of the electors is therefore necessary before such a by-law can be passed. Subsection (160), which deals specifically with the acquiring of land for a fire hall, had also to be dealt with in deciding whether that portion of the by-law which dealt with the acquisition of property for the fire hall could be segregated from the whole.

Statement

The appeal was argued at Vancouver on the 10th of November, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

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Cassidy, K.C., for appellants: The Corporation practically allowed the judgment to go by default, and we then intervened. The ground for setting it aside is that they did not receive the consent of the electors. Subsections 27 (*a*) and (155) apply in this case, but section 4 of Cap. 46, 1915, amends (27); it does not change (155). Subsection (155) has the words "taking or entering upon," whereas subsection (27) (*a*) has "purchasing, acquiring," etc. The sections overlap: see *Dobbs* v. *Grand Junction Waterworks Company* (1882), 9 Q.B.D. 151 at p. 158. There cannot be a repeal by implication: see Halsbury's Laws of England, Vol. 27, p. 197.

Argument

O'Brian, for respondent (plaintiff), referred to section 157, B.C. Stats. 1914, Cap. 52, repealed by section 24 of Cap. 46, 1915. Subsection (155) deals with lands taken by expropriation "subject to restrictions in this Act contained." The effect of the 1915 amendment to subsection (27) is destroyed by subsection (155), if it is not repealed by implication. Previously to the 1915 amendment the assent of electors was not necessary, but it is now.

Cassidy, in reply.

Cur. adv. vult.

4th April, 1916.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal.

IRVING, J.A.

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

MARTIN, J.A.

MARTIN, J.A.: After a careful study of the various groups of sections in the Acts in question, I have come to the conclusion that we should not be justified in disturbing the judgment given below. The question is not an easy one to solve, and generally speaking, repeal by implication is not favoured, but so far as the purchase and acquisition of real property are concerned I am of opinion that the provisions of section 5 of 1915, Cap. 46, as to the necessity of the assent of the electors are wholly incompatible with the unfettered powers under by-laws conferred by the old subsection (155), and therefore the latter must be deemed to have been repealed, to this extent at least, by implication. And I am inclined to think that it would also be impliedly repealed on another ground, *viz.*: that the two

standing together would lead to wholly absurd consequences: see the authorities collected in Craies's Statute Law, 2nd Ed., 328-9, 334-5; Halsbury's Laws of England, Vol. 27, p. 197.

GALLIHER, J.A.: This is an appeal from an order of MURPHY, J. quashing a by-law of the Municipality of South Vancouver, passed for the purpose of purchasing certain properties therein set out for street widening and the erection of a fire hall. The by-law was quashed on the ground that it had not before passing received the assent of the electors. The application to quash was made by Charles William Meldrum, a ratepayer of the Corporation, and interested in the by-law. Alexander Pines Black and Myron Calvert Wilcox on behalf of themselves and all other vendors to the Corporation, came in as intervenants.

The validity of the by-law depends upon the effect to be given to certain sections of the Municipal Act, B.C. Stats. 1914, Cap. 52. The sections to which we have been referred are subsections (27), (155) and (160). It was contended that the Act of 1915, Cap. 46 (see section 4, and section 5 under heading "Assent of Electors"), repeals by implication subsection (155) of Cap. 52 of 1914, but even if it does not, in my view that does not affect the case. Subsection (27), in so far as it is necessary to consider same, and subsections (155) and (160), and section 4 of Cap. 46 of 1915 are hereunder set out:

GALLIHER, J.A.

"(27.) For negotiating, purchasing, acquiring, taking on lease, or accepting the abandonment of and the control of lands, rights, easements, and privileges from the Government of the Dominion, or the Provincial Government, or any corporation or person for and to the use of the municipality:

"(155) For accepting, purchasing, or taking or entering upon, holding, and using any real property in any way necessary or convenient for corporate purposes, and so that the Council may direct the taking or entering upon immediately after the passing of any such by-law, subject to the restrictions in this Act contained:

"(160) For purchasing, acquiring, holding, managing, and maintaining real property for the purpose of a fire hall or halls within the municipal limits.

"4. '(27.) (*a.*) For purchasing, acquiring, leasing, or accepting lands, rights, easements, or privileges from the Dominion or Provincial Government or from any person for and to the use of the municipality.'"

Subsection (160), which, it will be noted, deals with one

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specific subject, *viz.*: fire halls, is invoked in respect of appellants' second objection, *viz.*: that the by-law is good as to the fire hall clause, which I will deal with last.

Now as to subsections (27) and (155), the wording in both is general, and though somewhat different, both deal with the acquisition of real property for municipal purposes generally, but (27) is restricted in that the assent of the electors is necessary before passing the by-law: see paragraph (*f*), subsection (30), Cap. 52, 1914. Subsection (155) is silent as to restrictions. We have then in the Act two sections dealing generally with the purchase of lands for the purposes of the corporation, one under which it is necessary to obtain the assent of the electors, and the other in which it is not. In such a case, in my opinion, the section which imposes a restriction must prevail over that which is silent as to restriction to the extent of requiring the assent of the electors.

It is not set out and one does not set out in a by-law the section under which they are proceeding: the proceeding is under the powers given by the Act, so that even if (155) is unrepealed by the amendment of 1915, upon which I express no opinion, the Municipality are not relieved from complying with the provisions of (27).

GALLIHER, J.A.

On the second branch of the appeal, subsection (160) is a special and not a general section—in that sense a special Act—and, in my opinion, would prevail over a general enactment such as (27): see *per* Lord Hatherly in *Garnett* v. *Bradley* (1878), 3 App. Cas. 944 at p. 950; but this being a by-law for one general scheme, though combining two purposes, unless one of these purposes, *viz.*: the fire hall scheme, can be segregated from and given effect to, independently of the street widening scheme, the by-law must fail as a whole.

On examining the by-law it is found that it provides for an expenditure of not more than $8,000. It also provides for the purchase of lots 21, 22 and 23. Upon the rear of these lots the fire hall is to be erected, the front of the lots forming a part of the street widening scheme. The street widening scheme being defeated, the result would be, if the fire hall scheme was sustained, that we have a fire hall on the rear of

these lots, access to which could only be obtained by crossing private property—something never contemplated by the by-law. Moreover, it cannot be said that under such conditions the balance of the property could be secured within the limit fixed in the by-law. The by-law must stand or fall as a whole and, in my opinion, the appeal should be dismissed.

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

Appeal dismissed.

Solicitor for appellants: *Lambert Bond.*
Solicitor for respondent: *C. MacL. O'Brian.*

MILLS v. SMITH SHANNON LUMBER COMPANY.

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Woodman's lien—Action for wages against person to whom logs are supplied under contract—Woodman's Lien for Wages Act, R.S.B.C. 1911, Cap. 243, Secs. 37 and 38.

Sections 37 and 38 of the Woodman's Lien for Wages Act only apply to contracts which contemplate the employment of labour after the date of the contract.

APPEAL from the decision of McINNES, Co. J. of the 9th of November, 1915. The plaintiff was a logger and was employed by the Pacific Slope Lumber Company as hook tender, between the 20th of June and the 10th of December, 1914. Said Company was engaged in preparing and hauling logs of cedar from limits surrounding Hauskin Lake into the lake, and from there hauling them over a divide into Turnbull Cove on the coast. On the 24th of October, 1914, the defendant Company entered into a contract with the Pacific Slope Lumber Company to purchase 1,500,000 feet of logs that were at that

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time in the water at Turnbull Cove and Hauskin Lake at a fixed price per thousand boomed up in Turnbull Cove ready for towing. The Pacific Slope Lumber Company, whose duty it was to deliver the logs in the lake at Turnbull Cove, went into liquidation on the 21st of November, 1914, when the plaintiff and other loggers who were not paid their wages filed woodman's liens. The defendant Company had by this time towed away a certain portion of the logs from Turnbull Cove under the contract. As to what remained a further agreement was then entered into between the defendant Company and the liquidator of the Pacific Slope Lumber Company with the consent of the lienholders, whereby the defendant Company was to sell the logs at the price arranged under the original contract and account to the liquidator. The defendant Company sold the logs as agreed, but withheld $2,000, which it claimed it had already paid the Pacific Slope Lumber Company under the original contract to purchase. The plaintiff then brought this action under and by virtue of sections 37 and 38 of the Woodman's Lien for Wages Act, claiming that the defendant Company did not require the vendor of the logs in question to produce and furnish to them any pay-roll or sheet of the wages owing to workmen engaged in work contemplated under the contract. From the plaintiff's own evidence it appeared that after the date of the contract he was engaged in preparing logs and hauling them to the lake, and was never employed in hauling logs from the lake to Turnbull Cove. The learned trial judge dismissed the action. The plaintiff appealed.

The appeal was argued at Victoria on the 5th of January, 1916, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

J. A. MacInnes, for appellant: The plaintiff was in the employ of the Pacific Slope Lumber Company, who entered into a contract with the defendant Company for the sale of one and a half million feet of lumber, part of which was in Turnbull Cove and part in Hauskin Lake. The defendant Company did not obtain from the Pacific Slope Lumber Company the production of a pay-roll or sheet of the wages and

amount due workmen, as required by section 37 of the Woodman's Lien for Wages Act. We submit the first part of the section applies to all labour in connection with the production of the logs purchased: see *Young* v. *West Kootenay Shingle Co.* (1905), 11 B.C. 171. Of the amount claimed, $174.50 was earned after the above contract was entered into.

J. H. Senkler, K.C., for respondent: We submit that section 37 of the Act only applies to labour in obtaining, supplying and furnishing logs after the contract is entered into. The larger portion of the wages claimed by the plaintiff was earned prior to the date of the contract. The contract included only the logs that were in Hauskin Lake and Turnbull Cove on the date of the contract, and the only labour in connection with the logs was taking them over the divide from the lake to Turnbull Cove. By the plaintiff's own admission the only work he did, after the contract was entered into, was cutting and bringing logs from the woods into the lake. He was not engaged on the divide between the lake and Turnbull Cove at all, and therefore has no status for invoking the statute.

Argument

MacInnes, in reply.

Cur. adv. vult.

4th April, 1916.

MACDONALD, C.J.A.: The plaintiff was a woodman employed by the Pacific Slope Lumber Company, Limited, in the manufacture of logs. The said employers, after the logs were manufactured, sold them to the defendant Company. The wages of the plaintiff and other woodmen being unpaid, they commenced proceedings under the Woodmen's Lien for Wages Act, whereupon an agreement was arrived at whereby, in consideration of the undertaking of the defendants to pay the contract price of the logs to the liquidator of the said Pacific Slope Lumber Company, Limited, the lien proceedings were stayed. A month later another agreement was entered into, apparently in substitution for the first one, between the defendant Company and the said liquidator, and assented to by the solicitors for the woodman, whereby the ownership of the logs was acknowledged to be in the liquidator and whereby the defendant Company, as agent for the liquidator and the woodman, agreed

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to sell the logs and account to the liquidator for the proceeds, as set out in the letter evidencing the agreement. The defendant Company sold the logs as agreed, but withheld the sum of $2,200, being the amount which they claimed to have paid to the said Pacific Slope Lumber Company under the original agreement of purchase. The plaintiff then brought this action not to enforce his claim of lien, nor to enforce his rights under the said agency agreement, nor for damages for breach of that agreement, but under and by virtue of sections 37 and 38 of the said Woodman's Lien for Wages Act. Section 37 provides that every person entering into an agreement with another for supplying or obtaining logs by which it is necessary to employ workmen, shall, before making any payment, require the production of the employer's pay-roll. And section 38 provides that where the preceding section has not been complied with, a workman shall have a right of action for his wages against the person for whom the logs were supplied under the contract. In a proper case these sections would enable the workman to sue the purchaser in a personal action as if he were the employer and debtor, but, in my opinion, the sections apply only to contracts which contemplate the employment of labour after the date of the contract. The contract in question here was for the purchase of logs already manufactured and ready to be taken possession of by the purchaser, except that some were to be removed from Hauskin Lake to Turnbull Cove, which would involve some work and labour.

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And this brings me to the second submission made by plaintiff's counsel, namely, that in any event the plaintiff is entitled to recover his wages for the time he was employed after the date of the contract. His difficulty, however, as I see it, is that he was not employed in removing the logs from the lake to the cove as his own evidence, I think, shews, or if he was, it does not appear whether his labour in that connection was in respect of logs moved subsequently to the date of the contract. He was working in the woods for some time after the date of the contract, but it does not appear whether the work he did was in any way connected with the logs in question.

It may be that the plaintiff is entitled to relief in another

form of action, but I think he cannot succeed in this. His notice of appeal raises only the issue of his rights under said sections 37 and 38, and I confine my consideration of the appeal to the grounds raised in the notice.

I think the appeal fails.

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

MARTIN, J.A.: In the water at Turnbull Cove and Hauskin Lake the Pacific Slope Lumber Company had one and a half million feet of logs, which it agreed to sell to the Smith Shannon Lumber Company. Now, if the matter rested here, and it only remained for the purchaser to pay for and take away the logs, there could be no claim of any workman or labourer under section 38, because that section only relates to persons making "payment under such contract," which is the contract provided for in section 37, and that contract relates only to the future operation "of furnishing, supplying or obtaining logs or timber by which it is necessary to engage and employ workmen and labourers," and does not purport to include work already done.

At the same time, however, the contract may make it requisite and "necessary" that additional work and labour should be performed on logs or timber already obtained, such as that they should be boomed at a certain place, or brought to or delivered thereat, which would be, I think, included in the not very exact but wide expression "furnishing, supplying, or obtaining," because they could not be "obtained" by the purchaser unless under the contract: moreover, "delivery" is mentioned in the latter part of the section as the time up to which the pay-roll should be made. Therefore under this contract the defendant might be liable for any additional work there might have been done in getting any shortage of logs from Hauskin Lake to Turnbull Cove necessary to make up the number contracted for, and also for booming them all in Turnbull Cove ready for towing. Unfortunately, however, neither in the plaint nor in the evidence is there any specific segregation of work upon this shortage or booming which would enable judgment to be entered therefor, owing apparently to a misconception on the

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part of counsel of the effect of the statute, so the plaintiff's claim becomes a matter of mere speculation.

The only thing to be done, therefore, is to dismiss the appeal.

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

MCPHILLIPS, J.A.: I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Affleck & MacInnes.*

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

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DORRELL v. CAMPBELL

DORRELL v. CAMPBELL *ET AL.*

Practice—Mechanics' liens—Action on—Parties—Adding assignee of contractor's interest—County Court Rules, Order II., r. 12.

The assignee of the balance of the contract price owing by the owner to the principal contractor, has a sufficient interest to be added a party defendant in a mechanic's lien action.

Per MACDONALD, C.J.A.: The power of adding parties in a mechanic's lien action should be sparingly exercised.

Statement

APPEAL by the Canadian General Fire Extinguisher Company, Limited, from the order of GRANT, Co. J. of the 11th of June, 1915, adding the Bank of Toronto as a party defendant in five consolidated lien actions. The defendants Messrs. Campbell & Wilkie, building contractors, entered into a contract with the City of Vancouver for the construction of a building for public purposes. The plaintiffs had obtained sub-contracts from the defendants Campbell & Wilkie for various parts of the work, and on the completion of the same in each case liens were filed for the balance due and owing on their contracts. They subsequently commenced actions on the liens. The first

lien was filed on the 11th of March and action commenced on the 31st of March, 1915. An order was made on the 28th of May, 1915, consolidating the actions. The defendant City of Vancouver admitted in its dispute note that there was still due Campbell & Wilkie $6,252.69 on the contract, and this sum was paid into Court by the City to abide the result of the actions. On the 11th of June, 1915, the Bank of Toronto applied to be added as a party defendant as assignee under an assignment bearing date the 14th of August, 1914, from Campbell & Wilkie to the Bank, of all moneys due and owing to the said contractors by the City under said contract.

Statement

The appeal was argued at Vancouver on the 10th of December, 1915, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

E. A. Lucas, for appellant Company: The order should not have been made as the assignee of the moneys due from the contractors is not a proper party on the issue. In any case the order is bad, as it was made three days before the trial, and no provision was made for the service of process on the Bank. There is no privity between the Bank and the lienholders: see *Coughlan* v. *National Construction Co.* (1909), 14 B.C. 339.

R. M. Macdonald, for respondent Bank: The practice in mechanics' lien proceedings is authority enough to see that no injustice is done to any one affected by the judgment: see section 31 of the Mechanics' Lien Act, and Order II., r. 12 of the County Court Rules. In *Coughlan* v. *National Construction Co.* (1909), 14 B.C. 339, there was no money in Court. On the question of adding parties see *Montgomery* v. *Foy, Morgan & Co.* (1895), 2 Q.B. 321. The Bank has an interest in defeating the liens as they are entitled to the money in Court subject to the liens: see *Edison & Swan United Electric Light Company* v. *Holland* (1889), 41 Ch. D. 28 at pp. 33-4; *Strathy* v. *Stephens* (1913), 29 O.L.R. 383 at p. 390; *Kino* v. *Rudkin* (1877), 6 Ch. D. 160. The contractors were proper parties before the Court and the Bank being an assignee of the contractors, the assignee has a right to appear and protect its interest.

Argument

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Lucas, in reply: The Bank is not directly interested in the issue between the original parties to the action, and should therefore not be added: see *Moser* v. *Marsden* (1892), 1 Ch. 487. The claim of lien must be determined before the assignee can invoke the Court.

Cur. adv. vult.

4th April, 1916.

MACDONALD, C.J.A.: This is an appeal from an order of GRANT, Co. J. adding the Bank of Toronto a party defendant in a mechanic's lien action. The ground of the Bank's application to be added as party defendant was that it held an assignment of the balance of the contract price owing by the owner to the principal contractor. If the lien claimants establish their liens, the owner will have the right to pay them off out of the said moneys and thus relieve his property. The Bank is, therefore, interested in defeating the liens, and as the owner has paid the said balance of the contract price into Court, which is a sum sufficient to meet all lienholders' claims in this action, and has admitted ownership of the property against which the liens are claimed, the Bank desired to contest that ownership and thus defeat the liens. In these circumstances I cannot say that the learned judge was clearly wrong in adding the Bank as a party defendant. Rule 12 of Order II., of the County Court Rules, appears to me to be wide enough to permit him to do this. Such power, however, I think should be very sparingly exercised in mechanics' lien actions. The Act furnishes what I think was intended to be a speedy and inexpensive procedure for realizing liens. Incidentally, a personal judgment may be given where there is privity of contract, but the primary object of the procedure is not to be lost sight of and, except where the property of the party seeking to be added is affected, an order adding him should not be made: see *Moser* v. *Marsden* (1892), 1 Ch. 487. This, I think, is a much stronger case in favour of adding the party than that was, because if the lienholders should succeed, that which otherwise would be the moneys of the Bank would be lost to it. In other words, the title to the money assigned to the Bank indirectly is at stake.

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In these circumstances I would not interfere. The appeal should be dismissed.

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MARTIN, J.A.: This is an appeal from the order of GRANT, Co. J. adding the Bank of Toronto as a defendant because it is the assignee, before action, of Campbell & Wilkie of all moneys due on the contract in question. It is urged that the Bank being directly interested as assignee in the result of the claim for a mechanic's lien is entitled to dispute the existence of any lien, and that section 16 has no application to such a case, and I do not think it has.

In support of the contention that an assignee is of right entitled to be added as a defendant in order to protect himself, *Montgomery* v. *Foy, Morgan & Co.* (1895), 2 Q.B. 321 (in which *Moser* v. *Marsden* (1892), 1 Ch. 487, was cited) is relied on, which is a case wherein the shippers of a cargo were added as third parties in order to enable them to counterclaim against the shipowners for freight, and though it is not on all fours with the case at bar, and Kay, L.J. was careful to guard against its extension, yet the general principle stated by Smith, L.J., p. 328, seems applicable:

"It is not disputed that the amount of freight due under the bill of lading is so much; but the shippers say that under the same contract they are entitled to damages for injury to cargo, and therefore they ought only to pay the difference, if any, over and above the amount of the damages to which they are entitled. I think we should be frittering away the effect of the rule if we held that the cargo owners were not interested in the settlement of the questions involved so as to disentitle them to be added as defendants."

MARTIN, J.A.

I have, also, found an Ontario case, *Kitching* v. *Hicks et al.* (1883), 9 Pr. 518, which though a decision of the Master in Chambers, nevertheless is indistinguishable from the present, and in it, after reviewing several apt authorities, certain creditors were added on the ground that, in common with the assignee, they had a substantial interest in the subject-matter, which they were entitled to more fully protect by being added as parties.

I think, in view of these authorities, that the learned judge below was justified in the exercise of his discretion, and that the appeal should be dismissed.

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GALLIHER and MCPHILLIPS, JJ.A. agreed in dismissing the appeal.

Appeal dismissed.

Solicitors for appellant: *Bourne & McDonald.*

Solicitors for respondent Bank of Toronto: *Bird, Macdonald & Ross.*

Solicitor for respondent City of Vancouver: *J. B. Noble.*

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VANCOUVER CITY YOUNG MEN'S CHRISTIAN ASSOCIATION v. RANKIN.
VANCOUVER CITY YOUNG MEN'S CHRISTIAN ASSOCIATION v. WOOD.

VANCOUVER Y.M.C.A. v. RANKIN

Contract—Subscription to charitable organization—Erection of building—Time fixed for payment—Sufficiency of consideration.

A subscription promised towards the expense of erecting and equipping a building for the Young Men's Christian Association, in reliance of which liabilities are incurred and other subscriptions obtained, forms a sufficient consideration for a contract and is enforceable even before the completion of the building.

Sargent v. *Nicholson* (1915), 26 Man. L.R. 52 followed.

APPEAL from the decision of MCINNES, Co. J., of the 14th of June, 1915. The facts being the same in the two actions, the appeals were argued together. On the 9th of November, 1910, the defendant Rankin entered into an agreement with the plaintiff Association in the words and figures following, that is to say:

Statement

"For the purpose of erecting and equipping three buildings for the Vancouver City Young Men's Christian Association, and in consideration of the subscriptions of others, I promise to pay to the said Association Five Hundred Dollars, payable as follows: One-fifth December 1st, 1910, one-fifth May 1st, 1911, one-fifth November 1st, 1911, one-fifth May 1st, 1912, one-fifth November 1st, 1912.

"Or will pay in full on ——"

Rankin paid $100 on account of the sum so promised, but refused to pay the remaining $400.

On the 10th of November, 1910, the defendant Wood entered into precisely the same agreement with the plaintiff Association, except that the sum he promised to pay was $100. He paid nothing on account of said sum, and refused to pay the same. Actions brought by the plaintiff Association for the enforcement of the agreements were tried together and dismissed. The plaintiff Association appealed.

Statement

The appeals were argued on the 12th and 13th of November, 1915, before MACDONALD, C.J.A., IRVING, GALLIHER and MCPHILLIPS, JJ.A.

D. A. McDonald, for appellant: The subscription list signed by the defendants had in all 2,200 subscribers. [He referred to *Berkeley Street Church* v. *Stevens* (1875), 37 U.C.Q.B. 9 at p. 24; *Thomas* v. *Grace* (1865), 15 U.C.C.P. 462 at p. 468; *In re Hudson* (1885), 54 L.J., Ch. 811; Halsbury's Laws of England, Vol. 15, p. 430, par. 855; *In re Soames* (1897), 13 T.L.R. 439; Cyc., Vol. 9, pp. 330-2; and *Hammond* v. *Small* (1858), 16 U.C.Q.B. 371.]

C. W. Craig (*George Grant,* with him), for respondents: This is a contract not enforceable at law for want of consideration. We assumed no liability by the mere signing of the document: see *Dunlop Pneumatic Tyre Company, Limited* v. *Selfridge and Company, Limited* (1915), A.C. 847. The liability must be determined on the state of affairs when the document was signed. They entered into no obligation to erect a building. *In re Hudson* (1885), 54 L.J., Ch. 811, is in our favour. In *Baker et al.* v. *Vanluven* (1864), 14 U.C.C.P. 214; and *Skidmore* v. *Bradford* (1869), L.R. 8 Eq. 134, there was an executed consideration which distinguishes them. There is no evidence to shew that they need this money to discharge any liabilities they have incurred. No English decisions have been cited against us.

Argument

McDonald, in reply, referred to Maclaren on Bills, Notes and Cheques, 5th Ed., 452 (Sec. 176 of Act); *Parsons* v. *Jones* (1858), 16 U.C.Q.B. 274 at p. 276; Chitty on Con-

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tracts, 6th Ed., 34; *Carlill* v. *Carbolic Smoke Ball Company* (1892), 2 Q.B. 484.

Cur. adv. vult.

3rd April, 1916.

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MACDONALD, C.J.A.: The legal question involved in this appeal was recently considered by the Manitoba Court of Appeal in the case of *Sargent* v. *Nicholson* (1915), 9 W.W.R. 883, and, holding the same view of the law as that expressed in the opinion of Cameron, J.A. (concurred in by the other members of that Court), I think no useful purpose would be served by going over the same ground in this case.

Considerable argument was directed to the respondents' contention that as the buildings had not been completed, the action is not maintainable. Reliance was placed on the language of Richards, C.J., in *Berkeley Street Church* v. *Stevens* (1875), 37 U.C.Q.B. 9 at p. 24, that—

"When the work is completed, as in this case, if he do not pay he may be sued for the money so promised."

The fact that there the building had been completed, while here it has not, is one of the distinctions raised between the two cases, but I would point out that there is another distinction which nullifies the one just mentioned, that is to say, that the contract in question here fixes the due dates of the sums promised. In the case just mentioned the time for payment not being specified, it might perhaps, in the circumstances, have been thought that the moneys were not to be payable in advance, but only when the work had been completed. I am far from saying that, apart from this fixing of the dates, the promised contributions could not have been recovered by action before the completion of the buildings; but it is enough to say that the dates having been fixed by the parties, and default having been made in payment, a right of action accrued. *Berkeley Street Church* v. *Stevens, supra,* is authority for the proposition that the promise to contribute to the building funds was revocable only up to the time it was acted upon by the trustees by the incurring of obligations on the faith of it. Thereupon it became a contract in fact, and not the mere offer of a gift.

MACDONALD, C.J.A.

While the facts concerning the obligations entered into by

the appellants were not fully brought out at the trial, I think it sufficiently appears that the appellants, acting on the faith of the promised donations, entered into very heavy obligations. They appear to have let contracts which resulted in the erection of buildings which, while not yet complete, are in an advanced state of construction. The buildings appear to have been erected on the appellant's land, and what present or future obligations have been incurred in respect of taxes and rates is not disclosed, but it is manifest that the appellant cannot now be placed in *statu quo*.

In re Hudson (1885), 54 L.J., Ch. 811, was greatly relied on by respondents' counsel, but the circumstances of that case, I think, differ very greatly from those of the case at bar. There the donations were to be distributed in reduction of church indebtedness; if discontinued the trustees of the fund would have less to distribute; they would have smaller gifts to make to the different bodies intended to be assisted. That, at all events, was the view of the learned judge. Here the parties must have clearly understood that once the undertaking was entered upon it would involve responsibilities which could not be displaced until the buildings were completed, that is to say, it would be absurd to suppose that either the appellant or respondents entertained the view that the buildings should be commenced and abandoned at any time the funds should fail by reason of subscribers not meeting their engagements.

MACDONALD, C.J.A.

I would allow the appeal.

IRVING, J.A.: I concur in allowing the appeal.

IRVING, J.A.

GALLIHER, J.A.: Since this case was argued, the Court of Appeal for Manitoba has decided in a similar case (with one exception) that the subscriber is liable: see *Sargent* v. *Nicholson* (1915), 9 W.W.R. 883. I agree with the reasons for judgment of Cameron, J.A., who delivered the judgment of that Court. The exception to which I referred above is this: I would infer from reading that case that the building had been completed, while in the case at bar it is left in an unfinished state requiring large sums of money to complete it. There is no suggestion that the total subscriptions, if paid, would

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not have been sufficient to complete the structure undertaken by the appellant. The total subscriptions were $520,000, of which $230,000 has been paid up, and the contract price for the building was $350,000. Over and above the contract price there would be extras and the installing of fixtures and furniture necessary for a building of this description, but the difference between the contract price and the total subscriptions leaves a handsome margin for this.

Once the consideration for the contract is established—and under the authorities I think there can be no question as to that—it resolves itself into the one narrow point: Can the subscribers be called upon to pay up while the building is incomplete and at a standstill for lack of funds? The money is subscribed for the very purpose of creating a fund out of which from time to time payments are to be made as the building progresses. Now, if any subscriber, or combination of subscribers, by refusing payment of the sums subscribed, bring about a condition by which it is rendered impossible to proceed to completion, though the work has been undertaken and large sums expended thereon, they are, by their own act, destroying the very purpose for which they subscribed, in other words, taking advantage of their own wrong to escape their liability.

GALLIHER, J.A.

In *Thomas* v. *Grace* (1865), 15 U.C.C.P. 462 at p. 468, Richards, C.J. has this to say:

> "Plaintiff, of course, could be called upon to shew a proper expenditure of the money that he had received for a certain purpose; but it is no answer, if he has a right to receive the money, to say that he has not begun to expend it for the purpose for which it was paid to him. Besides we must import into agreements like this that which was present to the minds of all at the time it was entered into. It was not contemplated nor made a condition precedent that the church and rectory should be built before the money subscribed was paid. The very money subscribed was undoubtedly to be employed for paying for the building, and would be required for that purpose, and, in the usual course of things, from time to time to pay for the building as it progressed."

Should this statement of the law be considered too wide, we have before us, in the case at bar, the fact of a contract let and an obligation incurred.

I would allow the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would allow the appeal for the same

reasons as given by me in *Vancouver City Young Men's Christian Association* v. *Wood.*

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VANCOUVER CITY YOUNG MEN'S CHRISTIAN ASSOCIATION v. WOOD.

MACDONALD, C.J.A.: This case is identical with *Vancouver City Young Men's Christian Association* v. *Rankin,* and the result will be the same.

MACDONALD, C.J.A.

IRVING, J.A.: I agree.

IRVING, J.A.

GALLIHER, J.A.: It follows from the decision just handed down in *Vancouver City Young Men's Christian Association* v. *Rankin* that this appeal also should be allowed.

GALLIHER, J.A.

MCPHILLIPS, J.A.: This is an appeal from the judgment of MCINNES, Co. J., dismissing the action. We are without the assistance of written reasons from the learned judge, but it can be assumed that the judgment proceeded upon the ground that there was no enforceable contract. It cannot be gainsaid that the subject-matter of the action is very close to the line, and the first glance at the contract sued upon, and the attendant facts, would seem to impel the conclusion that no legal obligation exists. The appellant is an incorporated association, and, within its corporate powers, embarked upon the construction of a large building upon Georgia Street, in the City of Vancouver, which, when completed, will be an ornament to the city, and designed, no doubt, to well supply the purposes for which it is intended. Before entering upon the work of construction subscriptions were obtained from some two thousand or more citizens of the City of Vancouver to defray the cost of the erection of not only one, but three buildings. The form that the agreement took in the case of the respondent, as well as all others, follows: [already set out in statement].

MCPHILLIPS, J.A.

The case for the appellant established the execution of the agreement by the respondent, and no evidence whatever was led to shew that the respondent at any time revoked the offer

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made, or repudiated his promise in any way, in fact, the evidence is that he would pay the money agreed to be paid were he in a position to do so. Reliance, though, is wholly placed upon the contention that there is no legal or enforceable contract, *i.e.*, that it is without consideration. The facts as adduced at the trial shew that, following subscriptions totalling $520,000, approximately $230,000 was paid up. When a considerable sum of money was in hand—in January, 1913—a contract was let for the first building—the building before referred to—for the sum of $350,000, and the building is roofed in and the structural work may be said to be completed. What remains to be done is the interior and ornamental work, no doubt still requiring a very considerable amount of work and outlay of moneys. The work upon the building is now suspended owing to lack of funds, that is, owing to non-payment of subscriptions, the appellant is without funds to complete the building. The evidence does not disclose the fact, but it was stated at the bar, upon the argument, that to the extent that the building has been constructed, all moneys therefor have been paid to the contractors, and no further liability exists upon the appellant to the builders. The building in its present condition is useless for the purposes intended—for that matter, useless for any purposes. When all the surrounding facts are looked at, the agreement as executed by respondent studied, and, in particular, the words "and in consideration of the subscription of others" given due weight, it seems to me that consideration for the promise upon the part of the respondent is in law well established. It would be highly inequitable that others should subscribe and in good faith pay up their subscriptions and that the respondent should escape liability. The countervailing equity impels and constrains the imposition of liability upon the respondent. There can be no question that, if not in express terms, there was an implied request from the respondent to the appellant to proceed in the construction of the buildings, and the contract for one of them was entered into and obligations incurred. The respondent, upon that state of facts alone, became, and was, obligated in law to pay the amount agreed to be paid by him in the furtherance of the adventure or under-

taking which he, in common with others, was instrumental in launching. It is argued that because of the fact that today no further liability remains upon the contract with the builders, that therefore it follows that the liability, looked at as one of indemnification only, no longer exists. This is—with deference—idle contention in my opinion. The legal liability commenced with the execution of the agreement when it was followed by the subscriptions and payments thereon of others, coupled also with the appellant embarking upon that which was contemplated and requested to be done. What was contemplated was a completed undertaking, and the duty of the appellant is to carry out that undertaking in its entirety, or to the extent that the funds capable of being got in will extend.

Sargent v. *Nicholson* (1915), 9 W.W.R. 883, is a case very much in point. Chief Justice Cameron refers to a number of authorities and at p. 888 says:

"The weight of opinion seems to be, as I read the authorities, that in case of a subscription such as this before us, when in consequence and on the faith of it, advances have been made and liabilities incurred, before revocation, then the promise becomes binding on the subscriber. Other views have been taken of the nature of the underlying consideration in such cases, but, in my judgment, the one I have stated seems to commend itself most strongly."

And see *per* Haggart, J.A. at pp. 888-9.

The agreement sued upon is equally forceful to that under consideration in the Manitoba case—in fact, in like terms.

I would allow the appeal.

Appeals allowed.

Solicitor for appellant: *Bourne & McDonald.*

Solicitor for respondent Rankin: *A. W. V. Innes.*

Solicitor for respondent Wood: *Cowan, Ritchie & Grant.*

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1916

April 4.

CHAMPION & WHITE v. WORLD BUILDING, LIMITED

CHAMPION & WHITE v. WORLD BUILDING LIMITED, *ET AL.*

Mechanic's lien—Time of taking effect—Priority over mortgages for increase in value—Mechanics' Lien Act, R.S.B.C. 1911, Cap. 154, Sec. 9.

For the purpose of arriving at the sum to which the holder of a mechanic's lien should have priority over a prior mortgage under section 9 of the Mechanics' Lien Act, the value of the property before the lien attached is to be taken for the purpose of fixing the upset price as against the increase in value of the mortgaged premises by reason of the work and improvements, which must, however, be limited only to the extent to which the specific contract enhances the selling value, and not for work or improvements by others under independent contracts. In case no greater sum than the upset price is obtained at the sale the lienholder has no priority, and his only recourse is against the equity of redemption.

APPEAL from an order of GRANT, Co. J. of the 30th of June, 1915, declaring the priority of two mortgages on the premises in question over the plaintiffs' lien, fixing the value of the premises and improvements prior to the work upon which the plaintiffs' lien was obtained at $410,000, and ordering a sale of the premises at an upset price of that sum. In February, 1914, the plaintiffs obtained judgment on the lien for $6,000. The facts relevant to the issue are that in the early part of 1910 John Coughlan & Sons prepared for the defendant Company plans and specifications for a structural steel-frame building, known as the World Building, in Vancouver. At the time two mortgages were on the premises for $82,625. The contract for the steel work was let to the Coughlans for $119,000 and the work was completed in September, 1911, with certain extras, $42,285 of the contract price not having been paid. The plaintiffs' contract for the marble and tile work was entered into on the 9th of December, 1910, but they did not commence work until the 15th of July, 1912. On the 18th of December, 1911, the defendant Company mortgaged the premises to J. J. Toomey for $300,000, the two former mort-

Statement

gages were discharged, and the Toomey mortgage was registered on the 29th of December, 1911. On the 27th of December, 1911, the World Building Limited, Toomey and the Coughlans entered into an arrangement for the purpose of enabling the World Building Limited, to complete the building, and in pursuance thereof, on the same day, a second mortgage was made by the World Building Limited, to the Coughlans for $110,000, of which $40,000 was the balance due on the Coughlan steel contract. Toomey and the Coughlans were to advance sums from time to time as required towards the completion of the building. On the 14th of May, 1912, Toomey had paid on account of his mortgage $244,784.84, and between the 30th of May and the 24th of June, 1912, the Coughlans advanced $17,950, making in all $302,734.84 that had been advanced on account of the two mortgages, the mortgages being for a total of $410,000. The only evidence on valuations was that of A. M. Pound, a broker and real-estate dealer, who estimated the value of the land on the 4th of December, 1911, at $185,000 and the improvements at $225,000. It was held by the trial judge that as the plaintiffs' work was not commenced until some months after the mortgages to Toomey and the Coughlans had been given, the plaintiffs' lien was prior to the mortgages as against the increase in the value of the mortgaged premises by reason of the plaintiffs' works and improvements under their contract and no more, and that unless the selling value of the property had been increased by reason of such works and improvements the lien had no priority over the mortgages. He fixed the value of the premises and improvements at $410,000 on the 4th of December, 1911, and made an order for the sale of the premises at an upset price of $410,000. The plaintiffs appealed.

Statement

The appeal was argued at Vancouver on the 8th and 9th of November, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

R. M. Macdonald, for appellants: We obtained judgment on our lien for $6,000 (20 B.C. 156). The Coughlan mortgage was for $110,000, of which $40,000 was for work performed and material supplied under their contract. A mortgage under

Argument

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section 9 of the Act means a mortgage at the time the contract commenced. In this case, my contention is Coughlan & Sons are "owners," and their security is subject to our lien. Section 9 is designed for the purpose of protecting *bona fide* mortgagees, but has no application when given while a building is being erected on property, and is given with knowledge of the right of others to liens: see *High River Trading Co.* v. *Anderson* (1909), 10 W.L.R. 126 at p. 131; *Orr* v. *Robertson* (1915), 34 O.L.R. 147. The Act refers to buildings and improvements put on mortgaged premises. The construction placed on the section by the Court below makes the Act unworkable. The "works and improvements" commenced with the erection of the building, and not from the date of our work. In any event, they are only entitled to priority for the actual amount they have advanced on their mortgages.

A. H. MacNeill, K.C., for mortgagee, Toomey: The argument that a lienholder can come in on the whole property is absurd. He is entitled to a lien only by virtue of his work.

Argument

Mayers, for the Coughlans, second mortgagees: On the question of estoppel, there can be no estoppel when the truth appears on the face of the proceedings: see *Want* v. *Moss and wife* (1894), 70 L.T.N.S. 178. As to the contention that the Coughlans must be treated as "owners" see *Gearing* v. *Robinson* (1900), 27 A.R. 364. Section 9 of the Act carries the key to its construction on its face, the lien applies to the extent of the improvements, and the way of arriving at the amount is defined: see *Broughton* v. *Smallpiece* (1877), 25 Gr. 290; *Bank of Montreal* v. *Haffner* (1884), 10 A.R. 592 at p. 599; *Kennedy* v. *Haddow* (1890), 19 Ont. 240. The lien has priority to the extent of the improvements only: see *Patrick* v. *Walbourne* (1896), 27 Ont. 221 at p. 226; *Douglas* v. *Chamberlain* (1877), 25 Gr. 288; *Richards* v. *Chamberlain* (1878), *ib.* 402; *McVean* v. *Tiffin* (1885), 13 A.R. 1.

Macdonald, in reply: As to my contention that the Coughlans are "owners," the Ontario cases cited do not apply, as the Act differs from ours: see R.S.O. 1897, Cap. 153, Sec. 2, Subsec. 3.

Cur. adv. vult.

4th April, 1916.

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MACDONALD, C.J.A.: The learned County Court judge took evidence of the value of the owner's property before plaintiffs' lien attached, and, for the purpose of arriving at the sum to which the lienholder should have priority over the mortgagee, fixed that value as the upset price and then ordered a sale. If no greater sum than the upset price were obtained at the sale, the lienholder would have no priority. Such a method of arriving at the increased value, where the market value of property has fallen greatly, must, I think, lead to unfortunate results to the lienholder, but it is authorized by the statute, and, therefore, must be upheld by the Courts.

The lienholder, however, does not necessarily lose his security. If the sale should prove abortive, his lien still remains a lien against the owner's equity of redemption. It is only in such circumstances that the amount to which a mortgagee is entitled as against a lienholder who has failed to establish priority for increased value becomes of importance. That question is not involved in this appeal, but as argument was directed to it, I refer to it lest it might be thought I had overlooked it.

The appeal must be dismissed.

MACDONALD, C.J.A.

IRVING, J.A.: I agree.

IRVING, J.A.

MARTIN, J.A.: We are asked, in effect, to hold that where there are, as here, several independent and consecutive contracts, extending, it may be, in the case of a large work, over a period of many years, yet in the operation of section 9 they are all to be taken as relating back to the time the first sod was turned under the first contract. The learned judge below was, I think, right in rejecting that view of the statute, and holding that the lien takes effect "where [the] works or improvements are put upon [the] mortgaged premises" as the statute says, which means when they are done and made, and not that they shall be dependent upon, or determined by, *e.g.*, the contract for excavation, which may have been, and usually is, completed and paid for many months before the decorating contracts are even begun; otherwise the result would be that liens

MARTIN, J.A.

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under later contracts might be thrown back upon and tied to works for which liens never existed. Illustrations were given on both sides shewing how the Act would be made absurd and eventually frankly unworkable by the adoption of either view, but this is not an infrequent result of such legislation. Our duty is to see that the statute is made workable to the extent that is permitted by the language employed.

Argument was submitted on what would be the rights and conditions under a general contract with several subsequent sub-contracts, but I express no opinion on that point, reserving it for the occasion upon which it comes before us for adjudication.

MARTIN, J.A.

I am unable to see any valid ground in support of an estoppel, and in other respects the evidence justifies the judgment.

The appeal should be dismissed.

GALLIHER, J.A.: The appellants' first contention is that the respondents' claim to priority as mortgagees is *res judicata,* and point to the pleadings and the judgment in the trial in the Court below.

Supposing the wording of the judgment was broad enough to support this contention looked at by itself, it could not be allowed to prevail. Looking at the whole proceedings before us it is quite clear that any sale of the lands would be subject to the rights of the mortgagees except in so far as the liens might have priority over the mortgages—in fact, the appellants' own proceedings after judgment were, among others, for the very purpose of settling these priorities.

GALLIHER, J.A.

I entirely concur in the conclusions of the learned trial judge that the words "works and improvements" in section 9 of the Mechanics' Lien Act are, in the circumstances of this case, limited to the works and improvements of the plaintiffs themselves. There was no general contract, but a number of separate contracts. Supposing the contract for the steel structure had been completed and an entirely new contractor, under a distinct and separate contract with the owner, came on to do the plastering, could the latter say that he was entitled to share in the amount to which the selling value of the premises had been increased in

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value by the steel work? That, I take it, would be so if there had been one general contract for the whole work, but as I view it, the rule does not apply where there are separate and distinct contracts with the owner. In such a case it is only to the extent to which the specific contract enhances the selling value of the premises.

I also agree in the method adopted by the learned trial judge in fixing the upset price. It seems to me he has followed out the course laid down in the Act, and the amount advanced by the mortgagees is not a matter for consideration in fixing the upset price.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

Appeal dismissed.

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

Solicitors for respondents Coughlan: *Bodwell, Lawson & Lane.*

Solicitor for respondent Toomey: *A. H. MacNeill.*

REX v. JEAN CAMPBELL.

HUNTER, C.J.B.C.

1916

June 9.

REX v. CAMPBELL

Criminal law—Summary convictions—Warrant of commitment—Sufficiency of—Criminal Code, Secs. 238 (i) and 723, Subsec. 3.

Although a woman cannot be convicted of the offence of vagrancy under section 238 (*i*) of the Criminal Code unless she has failed to give a proper account of herself on being asked to do so, when found wandering at night in the public streets, the absence from the conviction of the allegation that she was asked to do so, is not fatal to its validity where the offence is charged in accordance with section 723, subsection 3 of the Criminal Code.

Re Effie Brady (1913), 21 Can. Cr. Cas. 123 applied.

Statement

APPLICATION for a writ of *habeas corpus* heard by HUNTER, C.J.B.C. at Vancouver on the 9th of June, 1916.

HUNTER, C.J.B.C.

1916

June 9.

REX v. CAMPBELL

Statement

The prisoner in custody under a warrant of commitment issued by the police magistrate at Vancouver, B.C., following her conviction by him "for that at the said City of Vancouver on the 10th day of May, 1916, she was a loose, idle and disorderly person or vagrant, who being a common prostitute or night-walker wandered in the public streets and did not give a satisfactory account of herself." Counsel for prisoner took the preliminary objection that a *habeas corpus* application on the same ground having been dismissed by MORRISON, J., it was not open to the prisoner to bring a second application. The objection was overruled.

Argument

Brydone-Jack, for the application: The warrant of commitment is bad because it did not set out the fact that she was first asked to give a satisfactory account of herself: see *Regina* v. *Levecque* (1870), 30 U.C.Q.B. 509; *Regina* v. *Arscott* (1885), 9 Ont. 541; *Rex* v. *Harris* (1908), 13 Can. Cr. Cas. 393; *Rex* v. *Pepper* (1909), 15 Can. Cr. Cas. 314; *Rex* v. *Regan* (1908), 14 Can. Cr. Cas. 106.

R. L. Maitland, for the Crown, *contra*: The warrant of commitment sets out all the ingredients in the offence. The commitment follows the wording of the Code and is, therefore, within section 723, subsection 3: see *Rex* v. *Leconte* (1906), 11 Can. Cr. Cas. 41; *Re Effie Brady* (1913), 21 Can. Cr. Cas. 123.

Judgment

HUNTER, C.J.B.C.: The warrant of commitment is sufficient under section 723, subsection 3, of the Criminal Code, and the application is dismissed.

Application dismissed.

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada or to the Judicial Committee of the Privy Council:

HERON *et al.* v. LALANDE *et al.* (p. 180).—Reversed by Supreme Court of Canada, 24th June, 1916. See 53 S.C.R. 503; 10 W.W.R. 1241; 31 D.L.R. 151.

J. A. MCILWEE & SONS v. FOLEY BROS., WELCH & STEWART (p. 38).—Affirmed by the Judicial Committee of the Privy Council, 19th January, 1916. See 10 W.W.R. 5.

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