THE
BRITISH COLUMBIA REPORTS

BEING

REPORTS OF CASES

DETERMINED IN THE

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

WITH

A TABLE OF THE CASES ARGUED
A TABLE OF THE CASES CITED
AND
A DIGEST OF THE PRINCIPAL MATTERS

REPORTED UNDER THE AUTHORITY OF

THE LAW SOCIETY OF BRITISH COLUMBIA

BY

E. C. SENKLER, K. C.

VOLUME XXIII.

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

ATTORNEYS-GENERAL:

THE HON. WILLIAM JOHN BOWSER, K.C.
THE HON. MALCOLM ARCHIBALD MACDONALD, K.C.

MEMORANDUM

On the 1st of May, 1917, David MacEwan Eberts, one of His Majesty's counsel learned in the law, was appointed a Justice of the Court of Appeal in the room and stead of the Honourable Paulus Æmilius Irving, deceased.

TABLE OF CASES REPORTED

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SUPREME COURT RULES, 1906

Provincial Secretary's Office,
27th March, 1917.

HIS HONOUR the Lieutenant-Governor in Council, under the provisions of the "Supreme Court Act" directs that the said Rules be amended by adding to Rule 4 of Order LXVII., the following words:

"Provided that in any action for the foreclosure of any equitable estate, right, title, or interest in real or personal property, or for the specific performance of any contract, and whether a claim for judgment upon any covenant be joined in such action or not, it shall not be necessary to so serve any such document by filing, unless the Court or a Judge shall otherwise order, but any such document shall be deemed to have been served at the time when such document or a copy thereof, as the case may be, shall have been delivered to, or left or filed with the proper officer, as elsewhere required by these Rules, and the Taxing Officer shall disallow any costs occasioned by the service of any such document by filing."

By Command.

J. D. MACLEAN,
Provincial Secretary.

RULE OF COURT

NOTICE is hereby given that, under the powers conferred by section 72 of the "Supreme Court Act," chapter 58 R.S., 1911, His Honour the Lieutenant-Governor in Council has been pleased to direct that the Rule of Court with respect to the Powers of Local Judges of the Supreme Court made the 16th day of June, 1906, be amended by adding thereto as follows:

"3. The Judge of every County Court in all actions brought in his County shall be and he is hereby empowered to hear all motions for judgment made under Order 27, Rules 11 and 12, and Order 32, Rule 6 of the Rules of the Supreme Court, 1906, and to make all such orders in Court or in Chambers, and to do all such things and to exercise all such jurisdiction as a Judge of the Supreme Court of British Columbia sitting in Court or at Chambers, can make, do, and exercise upon motions under the said rules."

By Command.

J. D. MACLEAN,
Provincial Secretary.

Provincial Secretary's Office,
27th March, 1917.

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

ALEXANDER AND SMITH v. YORKSHIRE GUARANTEE AND SECURITIES CORPORATION, LIMITED.

GREGORY, J.

1915

Aug. 12.

COURT OF APPEAL

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ALEXANDER v. YORKSHIRE GUARANTEE AND SECURITIES CORPORATION

Deed—Agreement for sale of land—Under seal—Parties—Action on agreement against person not a party to agreement—Counterclaim.

A., by agreement under seal, agreed to purchase lands from Y. A. and S. subsequently agreed verbally to share equally in the purchase, and they made two payments on account of the purchase price. They then discontinued payment and brought action to recover back the moneys paid. Y. counterclaimed for the balance of the purchase price. The action was dismissed and judgment entered against both A. and S. for the balance due under the agreement.

Held, on appeal (MARTIN, J.A. dissenting), that as S. was not a party to the agreement, which was under seal, he could not be sued upon it.

APPEAL from the decision of GREGORY, J. in an action tried by him at Vancouver on the 20th, 21st and 25th of May, 1915, for the recovery of moneys paid under an agreement for sale of land. The facts are that on the 25th of January, 1912, A. J. Paterson & Co., of Vancouver, entered into an agreement with the plaintiff Alexander for the sale of certain lots in Van- Statement

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couver for $60,000, payable in instalments as provided for in the agreement for sale. In May, 1912, A. J. Paterson & Co. sold the property, subject to the said agreement, to the defendant Company. Fifteen thousand dollars had been paid to J. A. Paterson & Co. on account of the purchase price, but owing to difficulty in registering the agreement of the 25th of January, 1912, it was by mutual consent concelled in April, 1913, and a new agreement covering the same lands was prepared and signed to take its place, but not delivered, there being a verbal arrangement between the parties that it was not to be delivered until $10,000 had been paid on account of the purchase price. A further verbal arrangement was made at the same time between Alexander and the defendant Company, that the plaintiff Smith should become equally interested with Alexander in the agreement for sale. The sum of $8,877.20 was paid on account of the purchase price by two payments in May and June, 1913. No further payments were made, and the April, 1913, agreement was never delivered. In December, 1914, the plaintiffs notified the defendant Company that they declined to proceed with said agreement and demanded a refund of the $8,877.20, which the defendant Company refused to pay. The plaintiffs then brought action for the recovery of the $8,877.20 so paid by them, and the defendant Company counterclaimed for the balance of the purchase price under the agreement for sale. The learned trial judge dismissed the action and gave judgment against both plaintiffs on the counterclaim. The plaintiff Smith appealed, mainly on the ground that he was not a party to the agreement for sale.

Statement

Burns, for plaintiffs.
Bodwell, K.C., and *C. F. Campbell,* for defendants.

12th August, 1915.

GREGORY, J.

GREGORY, J.: This case presents some difficulties, but on the whole I have no difficulty in coming to a conclusion as to what should be done in the matter. As it is the plaintiffs' action, the burden of proof is, of course, on them, and I do not think they have established it. I cannot accept Mr. Alexander's statement as to what took place. I cannot say that I was dis-

satisfied with his manner in the box particularly, but the probabilities seem to me to be against his statement being true, and it is impossible for me to believe that his statement is true when I consider the correspondence that passed between the parties during the progress of the negotiations. His statement seems to me to be absolutely inconsistent with the language used time and again in different letters. I refer particularly, for example, to the letter of the 8th of August, 1913, and also to the suggestion made by him that the Yorkshire Guarantee should rent the premises which, according to his own story, he had absolutely no interest in until the $10,000 was paid. It is clear that both the plaintiffs and defendant understood that Mr. Alexander's agreement should not be registered. That may or may not be so. I am inclined to think it is not so; but they thought it should not be registered, and Mr. Alexander was anxious to get a new agreement that he could register, and he proceeded to do it in the way, I think, that has been suggested by the defendant, and he got an agreement. The original agreement was marked cancelled, and a new agreement entered into. Those words are full and explicit, and have a very clear meaning standing by themselves. The fact that he did not himself receive a copy of the new agreement is surprising, but I have no reason to doubt Mr. Houlgate's statement that he could have had the agreement any time he asked for it, and that he really did not know that he had not the agreement until these proceedings, I think it was, were launched. Unless the agreement was retained with the knowledge of both parties with the object of preventing it becoming effective, then it must be considered, I think, as delivered, notwithstanding the fact that it remained in the actual physical custody of the Yorkshire Company. Now, if there was a delivery, there could be no doubt that the parties to it intended that it should be effective, and the plaintiffs undertook to pay the moneys called for by that agreement. In addition, attention must be drawn to the fact that the language of the receipt which Alexander received when he made his first payment of $3,812. That receipt shews clearly itself that there was no idea, it seems to me, that $10,000 was to be paid, and condi-

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tional upon its being paid he was to have an agreement. Mr. Alexander talks all along of $10,000, but when we come to some of the papers and documents there is no such sum as $10,000 along. It is an entirely different sum.

As to the counterclaim, I do not feel so clear with reference to the claim against Mr. Smith. Mr. Smith authorized Mr. Alexander, apparently, to enter into negotiations, and if he could make arrangements which were satisfactory to him, then he was willing to take a half interest. He entered into negotiations and went back and made a report to him, so Mr. Smith tells us; but in cross-examination he does state that it is (he does not use the word) conditional upon the $10,000 being paid that this second agreement, as we call it, should come into force. It is impossible to contradict that, but at the same time it does not seem to be consistent with the correspondence that passed between the plaintiffs and defendant, some of which was written, or signed at least, by Mr. Smith himself. Neither Alexander nor Smith, when given the opportunity of telling without any assistance just what took place at the meeting between Mr. Houlgate and Mr. Alexander there, as reported to Smith by Alexander of it actually taking place, make any reference, such as one would expect, to the fact of this $10,000 being a condition, which if not paid, the whole thing was to become null and void or was not to come into force at all. It is only when the words are almost put into their mouth that either one of them makes such a statement. It seems to me, on the whole, I must accept the suggestion that Mr. Smith knew about it, that the agreement that he knew of was the agreement which I saw was entered into between Alexander and the Yorkshire, and that he, as well as Mr. Alexander, is liable for the repayment of the money, I think on the agreement itself, that is, the new agreement, and if not on that, I think upon the verbal agreement as evidenced by that agreement. If that agreement has not been delivered, a question has arisen as to the defendant's right to claim under this. I have no hesitation in allowing the amendment to be made in accordance with the evidence as offered at the trial, and of course that would include the right of the plaintiff to amend and set up the Statute of Frauds.

GREGORY, J.

Mr. Houlgate's evidence is not entirely satisfactory to me, and it is difficult for me to understand the language of the telegram with reference to the sending back again of the draft with the documents attached, but it is not nearly so inconsistent with the situation as I find it would be to take all the correspondence and accept the plaintiffs' story; therefore the plaintiffs' action will be dismissed. The defendant will have judgment on the counterclaim against both parties. If I have overlooked anything, there will be liberty to apply.

The appeal was argued at Victoria on the 6th of January, 1916, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Armour, for appellant: This is an appeal by the plaintiff Smith only. He was not a party either to the original agreement for sale or to the subsequent one upon which $8,877.20 was paid, so that he cannot be held liable for the balance of the purchase price of the property: see *Armstrong* v. *Anderson et al.* (1877), 4 U.C.Q.B. 113; *Beckham* v. *Drake* (1841), 9 M. & W. 79; *In re International Contract Co.* (1871), 6 Chy. App. 525; *Evans* v. *Bennett* (1808), 1 Camp. 300 at p. 303; *In re Empress Engineering Company* (1880), 16 Ch. D. 125; *Tweddle* v. *Atkinson* (1861), 1 B. & S. 393; *M'Ardle* v. *The Irish Iodine Co.* (1864), 15 Ir. C.L.R. 146. Argument

Bodwell, K.C., for respondent: We were obliged to bring an action against Smith. There was a partnership arranged and Alexander had authority to act for Smith: see *Filby* v. *Hounsell* (1896), 2 Ch. 737; *Marchant* v. *Morton, Down & Co.* (1901), 2 K.B. 829; Fry on Specific Performance, 5th Ed., 238. Smith cannot come into Court and ask for the return of money paid on his behalf under an agreement and then on the counterclaim deny that there was any liability on his part because he was not a party to the agreement.

Armour, in reply.

Cur. adv. vult.

4th April, 1916.

MACDONALD, C.J.A.: The appeal is by the plaintiff Smith from the judgment against him on the counterclaim. An MACDONALD, C.J.A.

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agreement under seal was entered into between the defendant and the plaintiff Alexander for the sale and purchase of land. In connection with the purchase Alexander and Smith paid several thousand dollars and then discontinued payment. There seems to have been an understanding between the two plaintiffs that the land was purchased for both of them, but the agreement was taken in the name of Alexander alone.

Their action to recover back the moneys paid was dismissed, but the learned judge gave judgment against both plaintiffs on the defendant's counterclaim for the balance of the purchase price. Alexander has not appealed, but Smith has appealed on the ground that as he was not a party to the purchase agreement, which is under seal, he could not be sued upon it, and I think that that contention is right. The general rule is that when the contract is under seal the deed must be declared upon, notwithstanding that the nature of the contract be such that without the existence of the deed an action of debt could have been maintained: *Atty* v. *Parish* (1804), 1 Bos. & P. (N.R.) 104; 127 E.R. 397, referred to in note to *Evans* v. *Bennett* (1808), 1 Camp. 303.

MACDONALD, C.J.A.

In *Beckham* v. *Drake* (1841), 9 M. & W. 79, Lord Abinger, C.B., at p. 91, clearly lays it down that a contract in writing by an agent, signed by himself, will bind his principal, and that the law makes no distinction except between contracts which are and contracts which are not under seal. A contract under seal can bind none but those who signed and sealed it. All other contracts, whether in writing or not, are treated as parol contracts: *In re International Contract Co.* (1871), 6 Chy. App. 525, is exactly in point, and is entirely in the appellant's favour.

I would, therefore, allow the appeal.

IRVING, J.A.

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

MARTIN, J.A.

MARTIN, J.A.: After reading all the correspondence, as requested, as well as the portions of evidence cited, I am of opinion that this appeal should be dismissed. I think the learned judge below has taken the proper view of the facts, chief of which is that Alexander was acting as Smith's agent

as well as for himself, which makes Smith an undisclosed principal. Once that is established, the cases cited by Mr. *Bodwell* remove any legal difficulty.

GALLIHER, J.A.: I think, under the circumstances as disclosed in this case, Mr. *Armour's* contention that Smith cannot be sued in respect of the contract by deed to which he is not a party, is sound.

The appeal should be allowed.

MCPHILLIPS, J.A.: I am of the same opinion as the Chief Justice. No agreement other than the agreement under the seal of Alexander was established, and the law is clear that no person not a party to a deed is capable of suing or being sued; this is the case even though the deed in its terms sets forth that the deed is made on behalf of someone not a party thereto, or that the covenants are made with him. Lord Ellenborough, C.J. in *Storer* v. *Gordon* (1814), 3 M. & S. 308 at p. 322; 15 R.R. 499 at p. 503 said:

"As to the release, the objection is this, that where there is such a deed as is technically called a deed *inter partes*, that is, a deed importing to be between the persons who are named in it, as executing the same, and not as some deeds are, general to 'all people,' the immediate operation of the deed is to be confined to those persons who are parties to it; no stranger to it can take under it except by way of remainder, nor can any stranger sue upon any of the covenants it contains."

Smith was no party to the agreement under seal executed by Alexander, and he could not sue upon it either at law or in equity. In *Ex parte Piercy. In re Piercy* (1873), 9 Chy. App. 33, Lord Selborne, L.C. at p. 40 said:

"Mr. Piercy is no party to the deed, and in no manner or form whatever entered into any contract upon that occasion—he is as free as if no such agreement had ever been made, and it is not with him but between the companies *inter se* that this arrangement is made."

It is to be observed that GREGORY, J. arrived at his judgment upon the counterclaim with some hesitancy, and, with great respect, I am of the opinion that it is not sustainable. I would allow the appeal.

Appeal allowed.

Solicitors for appellant: *Burns & Walkem.*
Solicitors for respondents: *Campbell & Singer.*

MORRISON, J.

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Dec. 6.

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TAI SING CO. v. CHIM CAM

TAI SING COMPANY v. CHIM CAM *ET AL.*

Principal and agent—Power of attorney—Power to borrow—Partnership—Partner's power to borrow—Scope of partnership business.

Notice of appeal—Amendment of and grounds of—Rule 865.

A power of attorney authorizing the attorney to "draw, accept, make, sign, indorse, negotiate, pledge, retire, pay or satisfy any bills of exchange, promissory notes, cheques, drafts, orders for payment on delivery of money, securities, goods, warehouse receipts, etc., confers no general power to borrow money.

Jacobs v. *Morris* (1902), 1 Ch. 816 followed.

The power to borrow money in the capacity of partner cannot be validly exercised where the transaction appears to be foreign to the firm's business.

A new ground of appeal may, on application, be added to the notice of appeal where the new ground turns upon facts shewn at the trial; but if it appears during the argument that the amendment should not have been made, it will be struck out (MACDONALD, C.J.A. and MARTIN, J.A. dissenting).

APPEAL from the decision of MORRISON, J. of the 28th of September, 1915, in an action on a promissory note for $1,200, signed by Kwong Wing Chong and Chin Mon on the 22nd of March, 1913, payable on demand at the Northern Crown Bank, Vancouver, which was presented for payment on the 1st of December, 1913, and dishonoured, or in the alternative for goods sold and delivered by the plaintiffs to the defendants. The

Statement

defendant Chim Cam, a Chinese silk merchant, originally carried on business in Nelson, B.C., under the firm name of Kwong Wing Chong, and later, with a number of others, one of them being Chin Mon, started a partnership business in Vancouver under the firm name of Kwong Wing Chong, Importing Company. Chim Cam resided in Nelson, and the Vancouver business was managed by Chin Mon. Chim Cam, being a man of substance, left a power of attorney with the Royal Bank in Vancouver, appointing Chim Mon his attorney in fact to "draw, accept, make, sign, indorse, negotiate, pledge, retire, pay or satisfy any bills of exchange, promissory notes, cheques, drafts, orders for payment or delivery of money, securities, goods,

warehouse receipts, etc., etc." The power of attorney was made on the bank's special form and deposited with the bank and signed "Kwong Wing Chong." On the 22nd of March, 1913, Chim Mon borrowed from the plaintiffs $1,200, for which he gave a promissory note to which he signed the names "Kwong Wing Chong" and "Chin Mon." When the promissory note was delivered the plaintiff was unaware of the existence of the power of attorney from Chim Cam to Chin Mon. The learned trial judge dismissed the action, holding that the power of attorney was intended only for loans and other business transacted at the bank. The plaintiff appealed.

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Dickie, for plaintiff.
Stockton, for defendants.

28th September, 1915.

MORRISON, J.: Kwong Wing Chong seems to be a trade name of the defendant Chim Cam, who has been in the silk goods business for many years in Nelson, B.C., but lately had been with several others, amongst them one Chin Mon, in a partnership business in Vancouver, dealing in the same line of goods. This partnership was known as Kwong Wing Chong Importing Company, which name was duly registered, and was managed by Chin Mon. Chim Cam took no active part in the Vancouver business. On the 22nd of March, 1913, Chin Mon, who was the active member of this partnership, borrowed from the plaintiff the sum of $1,200, and gave them a promissory note, to which he signed the name of Kwong Wing Chong. He shortly afterwards departed for China, leaving the defendant Chim Cam, who was entirely ignorant of this transaction, to deal with it. Hence this action. The defendant, whose credit was good, had left a power of attorney with his bankers in Vancouver, the Royal Bank of Canada, made on a bank's special form and deposited it with the bank. The plaintiff, who, at the time the money was loaned to Chin Mon, was not aware of the existence of this, or any power of attorney, now invoke it against the defendant. I think the power of attorney was intended only for loans and other business transactions at the bank in question. I fancy that no bank, or other business concern, would for a moment advance money to the Kwong Wing Chong

MORRISON, J.

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Importing Company on the credit of Kwong Wing Chong without the name of Kwong Wing Chong being properly utilized. This authority the Royal Bank alone possessed. Had Chin Mon applied to their bankers for a loan such as he secured from the plaintiff, I am of the opinion that he would have had some difficulty in obtaining it.

From the method adopted in raising the money advanced, I am led to the conclusion that the plaintiff either knew that the money was not for the purposes of the business of the Importing Company, or were unconcerned as to its ultimate use, so long as they secured the defendant to the bill.

I find that Kwong Wing Chong and Kwong Wing Chong Importing Company are distinct trading entities, and were so known to the plaintiff; that Chin Mon had no authority to pledge the name of Kwong Wing Chong as he did. There is a heavy onus on the plaintiff in such a case as this, where they seek, at their peril, to prove agency of this sort. I think that they have not discharged that onus, and I dismiss the action, with costs.

MORRISON, J.

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

Martin, K.C., for appellant, applied to amend the notice of appeal. The facts shew that Chin Mon was a partner in the firm of Kwong Wing Chong, and, as such partner, had power to sign the note in question. He therefore asked to be allowed to amend the notice of appeal accordingly.

Argument

S. S. Taylor, K.C., for respondent, *contra*: To allege that Chin Mon was a partner in the firm is absolutely a new issue that was not in the pleadings, and was not argued in the Court below. Partnership must be pleaded in order to contend that Chin Mon had, by implication, authority to sign the note.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the application for the amendment should be refused, on the ground that it would raise a new question of fact not raised in the pleadings. The pleadings, as I read them, shew that the plaintiff sues "Chim Cam, carrying on business under the name and style of firm of Kwong Wing Chong, and the said Kwong Wing Chong." Now that is tanta-

mount to saying that Kwong Wing Chong is a trade name for Chim Cam; in other words, that these two names may be read interchangeably, and that there is no other person interested as a partner in that firm. The note in question was signed "Kwong Wing Chong." The defence raised is that Chin Mon had no authority to sign the name of Kwong Wing Chong. When the action came on for trial it was sought to shew that Chin Mon had such authority, as agent, under a power of attorney. The plaintiff now seeks to strengthen his position by contending that Chin Mon was a partner in Kwong Wing Chong, and as such had authority to sign. It appears that there is a partnership registered in Vancouver styled Kwong Wing Chong Importing Company, in which Chim Cam and Chin Mon are partners. But that firm is not a party to this action. If Chin Mon signed the promissory note as the note of that firm it may bind that firm, but not the trade name Kwong Wing Chong, before the Court. To add the partnership now would necessitate a new trial, as new facts might be put in issue. Therefore, I think, it is not proper to amend the notice of appeal, which would be tantamount to conceding that an amendment should be made to the statement of claim.

IRVING, J.A.: This is simply an application, as I understand it, to add to the notice of appeal a new ground of appeal, and the new ground turns upon facts shewn at the trial. For that reason I think we ought to accede to the application. It may be shewn during the course of the argument that the amendment should not be allowed, that it would amount to hardship on the respondent, and in that case we should have to strike it out or impose terms.

IRVING, J.A.

MARTIN, J.A.: We are informed that this is an application to amend the notice of appeal, whereas in truth and in substance it is an application to amend the statement of claim. The allegation now sought to be set up should have been pleaded. Not having pleaded it, and applying now to amend the notice of appeal it is simply the imposition of a new burden on the defendant, which is a very serious matter indeed, especially since we have the statement of counsel, which is confirmed by the learned judge, who says:

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"Kwong Wing Chong seems to be a trade name of the defendant Chim Cam, who has been in the silk goods business for many years in Nelson, B.C., but lately had been with several others, amongst them one Chin Mon, in a partnership business in Vancouver, dealing in the same line of goods."

There is nothing in the statement of defence which is at all inconsistent with that position, yet we are now asked to amend the statement of claim which would mean a fundamentally new cause of action, which might be disastrous to the defendant, if allowed. We are only entitled to allow such a thing to be done "on such terms," as rule 685 says, "as may be just." Surely we cannot say that such an amendment made now to the statement of claim would be just.

GALLIHER, J.A.: I would allow the application. It seems to me, if the statement by Mr. *Martin* that the defendants' own evidence proved that Chin Mon was a partner in the firm of Kwong Wing Chong is correct, they could not very well contradict that evidence from the mouth of their own witness, by bringing books or anything else, and they could not be prejudiced in that respect. I agree with my brother IRVING that this application is something we should accede to, at the present time, but when the matter is gone into more fully it may be shewn that the defendants are prejudiced, and if that is done, we might modify this position.

GALLIHER, J.A.

MCPHILLIPS, J.A.: In my opinion, which I have expressed in other cases in regard to these applications to amend notices of appeal, I think very often they are quite unnecessary. Possibly in this case it may be found it is necessary. However, as the application is made I accede to it, but in acceding to it I would point out this—that in my opinion the style of cause is only intended to bring the parties before the Court. Even in the pleadings we do not expect to find evidence, although pleaders find it very difficult, apparently, to draw statements of claim and statements of defence without disclosing evidence. When the case comes to trial the evidence is adduced, and if something then is evolved which is claimed to be outside the ambit of the pleadings, it is then a matter for the necessary amendment to be made. In this case, on looking at the pleadings, I cannot see that the point which is now being raised is

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beyond the ambit of the pleadings as I read them. Clearly, defendants' counsel was of opinion that the plaintiff would set up just such a case as this proposed amendment to the notice of appeal does set up. He states in paragraph 6 that he proposes to shew that Chin Mon had no authority to bind this other man. If it turns out from the evidence that Kwong Wing Chong is not composed only of Chim Cam, or that Kwong Wing Chong is a partnership; if that evidence was brought out, and if the defendants were not taken in any by surprise, and Chin Mon was alleged to be of the firm of Kwong Wing Chong, I should expect to see evidence adduced to shew that Chin Mon was not a member of the firm. I should expect to see, during the course of this appeal, that evidence was adduced to that effect, and if it was not, it seems to me the defendants were responsible and cannot now complain.

Application granted,
Macdonald, C.J.A., and Martin, J.A., dissenting.

Martin, on the merits: The trial judge was wrong in saying the power of attorney was confined to the business of the bank. The document must be lodged somewhere, and the fact of its being filed in the bank has nothing to do with the question: see *Bryant, Powis, & Bryant* v. *La Banque du Peuple* (1893), A.C. 170.

Taylor: They sue in the alternative for goods sold and delivered when no goods were even sold or delivered by the plaintiff. The money obtained on the note had no connection with the Vancouver firm whatever. The note was dated the 22nd of March, but was not signed until June. The power of attorney must be strictly construed: see Bowstead on Agency, 5th Ed., 73-6. The power of attorney referred to the bank seven times, and is exclusively confined to business with the bank.

Argument

Martin, in reply.

Cur adv. vult.

4th April, 1916.

MACDONALD, C.J.A.

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

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MARTIN, J.A.: This is a somewhat complicated matter, and

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the first question arises on the power of attorney to Chin Mon, *viz.*: is it wide enough to include the transactions of the partnership with the general public, within the limits specified, as well as those with the Royal Bank of Canada? After careful consideration of its terms I feel bound, with every respect, to differ from the learned judge below, in his construction of it, that it should be restricted to business with said Bank. I can only read the earlier portion of it as general in its application: the fact that the plaintiffs were unaware of its existence does not affect the authority it confers.

But this does not end the matter, because a further question respecting the authority of Chin Mon arises on the face of the power of attorney as to whether or no the transaction is within its scope. I am of the opinion it is not. It authorizes Chin Mon to "draw, accept, make, sign, indorse, negotiate, pledge, retire, pay or satisfy any bills of exchange, promissory notes, cheques, drafts, orders for payment or delivery of money, securities, goods, warehouse receipts," etc., etc., but there is no suggestion of any authority to borrow money, which this transaction was, as the plaintiff Leong Wong (Tai Sing) admits, the note sued on not having been given for three months after it is dated, or after the money was borrowed. The case comes within the principles set out in *Jacobs* v. *Morris* (1902), 1 Ch. 816. Moreover, regarded either as a transaction by an agent under said power, or as a partner, it cannot stand, because after a perusal of all the evidence, and in particular that of the plaintiff, it is quite apparent that this was a private speculation or venture of Chin Mon's, wholly apart from his relationship with any principal or partner, and entirely foreign to the firm's business. Chin Mon, through the solicitation of the plaintiff, personally entered as a member (*i.e.*, partner) into two Chinese mutual associations of twelve members, including the plaintiff, each contributing $100 to each association, and getting benefits in turn each month in some undisclosed way. The money was borrowed from the plaintiff for this purpose only, and it would be just as plausible to endeavour to fix the defendant with liability for Chin Mon's actions in running a fan tan game or keeping an opium joint. The whole suspicious and significant

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circumstances, including the subsequent giving of the note, its *ante*-dating, the claim that it was for goods, the concealment of the actual loan, and Chin Mon's abscondment, shew conclusively that it was a scheme to defraud the defendants, and though fraud is not set up as a defence, yet the truth of the transaction is important as negativing the allegation of Chin Mon's authority from any point of view.

The appeal should be dismissed.

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

MCPHILLIPS, J.A.: I agree in dismissing this appeal.

Appeal dismissed.

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Solicitors for appellant: *Dickie & De Beck.*

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

FERRERA v. NATIONAL SURETY COMPANY.

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Principal and surety—Building contract—Non-disclosure of alterations—Discharge of surety.

Permission by the architect in charge, with the assent of the owner, to the construction of the walls of a building with an improper proportion of cement mixed therein, as called for by the specifications, amounts to a change or alteration in the plans, non-disclosure of which to the surety, as required by the terms of the bond, is sufficient to release the latter from liability (GALLIHER and MCPHILLIPS, JJ.A. dissenting).

APPEAL from the decision of MURPHY, J. in an action tried by him at Vancouver on the 8th, 9th and 10th of June, 1915, for $19,023.85 upon a bond entered into between the plaintiff and the defendant Company. On the 9th of July, 1912, the plaintiff entered into a contract with Messrs. Davis & Saunders, building contractors, to provide materials and perform

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all work in connection with the erection of a six-story apartment building in the City of Vancouver according to certain specifications, the contract price being $80,000. On the 16th of August, 1912, the defendant Company entered into a contract with the plaintiff to become surety in the sum of $25,000 for the due completion of the building in question. About the 1st of February, after completing the larger portion of the building, the contractors made default, and the defendant Company, under its agreement with the plaintiff, assumed the contract, but later, owing to a dispute over the plumbing installation, stopped work and denied all liability under its contract. The plaintiff then took over the work and completed the building according to contract. The plaintiff later brought this action, claiming that the cost of the building, without extras, was $99,023.85. It appeared from the evidence that while the contractors were in control the architect notified the contractors that they were not using a sufficient percentage of cement mortar in the construction of the walls, and on calling the plaintiff's attention to it his answer was that "he (the architect) should not be too hard on them." The architect did not force them to live up to the specifications as to this, and some time later, after further stories had been put up, the architect found that the whole building was out of plumb about nine inches. This defect was fully remedied by the contractors before they stopped work, but there was no evidence of what extra cost was occasioned by it. When the defendant Company undertook to complete the work upon the contractors' default they were not advised by the plaintiff or the architect of the lack of the proper proportion of cement used by the contractors, or the fact that the building had been out of plumb. The defendant Company claimed that it was relieved from liability under the surety contract owing to the failure of the plaintiff to notify them of the changes and alterations that took place in the work as provided in the building contract. The learned trial judge held that the fact of the contractors not using a sufficient proportion of cement, which resulted in the building going out of plumb, was a change in the specifications, of which the defendant Company should have been notified

under its contract, and dismissed the action. The plaintiff appealed.

J. H. Senkler, K.C., and *Spinks,* for plaintiff.
R. M. Macdonald, and *Bird,* for defendant.

16th June, 1915.

MURPHY, J.: I find the defendant did agree to take over and complete the building at the conference held on the 5th of February, and that they appointed Perkins their agent to carry out this agreement. If there were no other issue in the case I think the plaintiff would be entitled to judgment for the amount the building cost over the contract price, less the $1,000 cost of solid, instead of open, partitions, after deducting from such contract price the reductions affected by the changes from marble to plaster and from wire glass and metal frames to sheet glass and wooden frames. But, in my view, the contract to finish the building was made to the knowledge of both plaintiff and defendant on the assumption by the defendant that it was liable on the bond. One of its objects at the conference of the 5th of February was, to the knowlege of the plaintiff and Perkins, in my opinion, to ascertain from plaintiff and Perkins all the facts of the situation so that it might decide, first, the question of their liability on the bond, and secondly, how such liability was to be met. The plaintiff and Perkins did lay many facts before defendant, but omitted, I think, not fraudulently, but probably because they thought them of no importance, certain other facts which, had they been known to defendant, might have caused them to take an entirely different view of their liability. In other words, I think it was understood by all parties that defendant entered into the contract to complete because, on the facts as it knows them, it believed it was liable on the bond. If there were facts unknown to it, but known to the plaintiff, and innocently suppressed, which would constitute a good defence to liability on the bond, then I think the assumption of liability, on which the contract, to the knowledge of all parties, was founded, falls to the ground, and the contract falls with it. In my opinion there were such facts. It was discovered by the architect, whilst the contractors were

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on the job, that the cement mortar called for by the specifications was not being used. As I recollect the evidence, the date of this discovery was not clearly given, but apparently it was in the early stages of construction. As the evidence shews, this was a most serious matter. The architect proposed to enforce the specifications, but Ferrera, the owner, interfered and directed the architect to allow the contractors to proceed with the use of ordinary mortar. The result was what the architect had foreseen. When the building was up several stories, the whole structure—not one wall, but the whole building—slid nine inches out of plumb. No evidence was given as to the result and cost incurred in correcting this, but the event itself shews the seriousness of the change in the specifications. The bond, amongst other provisions, makes it a condition precedent to liability thereunder that all changes or alterations in the specifications should be forthwith communicated to the defendant. The defendant was at no time informed of the change permitted in reference to the mortar, and only discovered it after action brought. On this state of facts I think it was under no liability on this bond when it made the contract found above to have been made by it, and I hold, for reasons already set out, that it is not liable on the contract.

MURPHY, J.

I find it was not justified in repudiating the contract when it did on the grounds it then acted upon, but that, in my opinion, does not preclude it from setting up the defence, which I hold must succeed, after obtaining knowledge of facts which it did not know at the time of the repudiation.

The action is dismissed.

The appeal was argued at Vancouver on the 24th and 25th of November, 1915, before IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Stuart Livingston, for appellant: The bond sets out there must be no change in the contract or specifications, and there was no change. There was a defect in the cement mortar that afterwards had to be remedied, but this does not affect the bond: Hudson's Building Contracts, 4th Ed., Vol. 1, pp. 447-8. Changes cannot be made in the contract without written

Argument

authority: see Halsbury's Laws of England, Vol. 15, p. 539, pars. 1014-5; *Wright* v. *Western Canada Accident and Guarantee Ins. Co.* (1914), 20 B.C. 321.

R. M. Macdonald, for respondent: On the general question of liability see Halsbury's Laws of England, Vol. 15, p. 546, par. 1025, and p. 549, par. 1032. The terms of the contract were included in the bond. The mortar or cement used was defective, and the result was the building went out of plumb. It is conceded it was defective work and it had to be remedied: *Holme* v. *Brunskill* (1878), 3 Q.B.D. 495. On the meaning of "default" see Stroud's Judicial Dictionary, Vol. 1, p. 488; *In re Woods and Lewis's Contract* (1898), 67 L.J., Ch. 475; *In re Young and Harston's Contract* (1885), 31 Ch. D. 168; *In re Bayley-Worthington's and Cohen's Contract* (1909), 78 L.J., Ch. 351 at p. 355; *The King* v. *Herron and Montgomery* (1903), 2 I.R. 474 at p. 481.

Argument

Livingston, in reply.

Cur. adv. vult.

4th April, 1916.

IRVING, J.A.: Appeal dismissed.

IRVING, J.A.

MARTIN, J.A.: This appeal should, I think, be dismissed for, substantially, the reasons given by the learned judge below.

MARTIN, J.A.

GALLIHER, J.A.: During the trial reference was made to a decision of this Court in which it is stated that the Court has held that no sub-contractor is entitled to a lien, even where a lump sum is given for the contract, unless they serve the material notice required under the statute, and that the Court had modified its decision later. I presume the case first referred to is *Rat Portage Lumber Co.* v. *Watson and Rogers* (1912), 17 B.C. 489. In that case, what was decided by the Court was that in case of a sub-contractor who supplies material only, the notice is necessary. Mr. *A. H. MacNeill* argued for the appellants that the appellants having contracted to deliver certain material, there was no delivery until all the material was in fact delivered. The Court held that delivery meant actual physical delivery on the ground, and that no lien could attach to material actually and physically delivered prior to

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ten days before the giving of the notice. What is held in the later cases—*Irvin* v. *Victoria Home Construction and Investment Co.* (1913), 18 B.C. 318; *Fitzgerald* v. *Williamson*, *ib.* 322; and *Coughlan & Sons* v. *John Carver & Co.* (1914), 20 B.C. 497—is that a sub-contractor doing work and supplying the materials is not required to give the notice necessary in the case of a material man simply. I refer to the above to make it clear that there is no inconsistency in the Court's judgments, and to point out the danger of relying on newspaper reports of cases.

In the case at bar, then, sub-contractors who supplied material and worked it into the building were not required to give notices, and those who supplied material simply were.

The learned trial judge bases his decision on the ground that at the interview between Ferrera, Perkins, the architect, and the representatives of the defendant when the work was taken over by the defendant, certain material facts were not brought to defendant's attention which might have influenced it in deciding as to its liability on the bond, and whether it would assume the work and complete it, and that the failure to do this voided the contract. Whether it did or not depends entirely upon whether acts committed prior to, or facts not disclosed at that meeting, had at that time rendered the bond voidable. If not, two courses were open to the obligors: they could either assume and carry out the contract (which they did), or refuse to do so, when Ferrera could himself complete it and charge anything over and above the contract price up against defendant.

GALLIHER, J.A.

The learned trial judge instanced the permitting of the contractors, by Ferrera, to use mortar with an improper proportion of cement mixed therein as a change or alteration in the plans sufficient to release the obligors. Clauses 2 and 5 of the bond are referred to:

"2. The obligee shall, at the times and in the manner specified in said contract, perform all the covenants, matters, and things required to be by the obligee performed; and if the obligee default in the performance of any matter or thing in this instrument, or in said contract agreed or required to be performed by the obligee, the Company shall thereupon be relieved from all liability hereunder."

"5. If any changes or alterations by the principal and obligee be made in the plans or specifications for the work mentioned in said contract, the

obligee shall immediately so notify the Company of such changes or alterations giving a description thereof and stating the amount of money involved by such changes or alterations. Provided, however, that when the cost of said changes or alterations shall in the aggregate amount to a sum equal to ten per cent. of the penal sum of this bond, no further changes or alterations shall be agreed upon by the principal and obligee until the consent of the Company shall first be obtained thereto."

The question is, have the dealings between the obligee and the principal been such as to release the obligor? I must say I do not consider the acquiescence of Ferrera in permitting a less quantity of cement to be used in the mortar a change or alteration within the meaning of clause 5, and unless the results which followed can be said to be the cause of the contractor falling down in his contract, then that was not such an act as would void the bond. There is no evidence that such was the case. The contractors remedied the defect before the work was taken over, and we should not assume, in the absence of evidence, that their doing so brought about the disability which caused the architect to dismiss them from the work.

Other acts were urged upon us, such as that Ferrera gave his own personal note to certain sub-contractors, in effect guaranteeing that their claims for material and for work and material supplied would be paid; in other words, if the contractor fell down they could, as to these amounts, look to Ferrera personally. This seems to me a system of financing which, so far from impeding construction, was calculated to assist it, and be to the advantage of the contractor, who was guaranteed by the defendant, and in its interest as well. In any event, any such sums paid by Ferrera, if they were paid for claims where notices should have been, and were not given, cannot be charged against defendant.

There should be a reference to the registrar to take the accounts.

MCPHILLIPS, J.A.: This appeal is from the decision of MURPHY, J., who held that the respondent the Surety Company was discharged from liability because of the fact that disclosure was not made to the respondent that the cement mortar called for by the specifications was not being used. Apart from this one ground of defence which was given effect to by the learned

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trial judge, judgment would have gone for the appellant. The bond sued upon was one for the due performance of a building contract. The contractors having made default under the contract, the respondent stepped in to complete the same.

Later, a disagreement took place between the respondent and the appellant relative to the Pacific Plumbing and Heating Company, culminating in a denial upon the part of the respondent of all liability in connection with the contract. In the result of things the appellant was compelled to complete the building at his own cost, claiming, in the statement of claim, $19,023.85, this amount being the claimed increase of cost to the appellant over and above the contract price of $80,000, but I understood during the argument that a sum considerably less was really claimed, *viz.*: $10,400. The letter denying liability read as follows: [His Lordship read the letter and continued].

It would not appear that in the specifications any proportions were given for the cement work. The following is an excerpt therefrom: "The brick work to include all of the exterior walls, etc., and all to be laid up in cement mortar." It would seem that some question arose about the cement mortar used, and the architect Perkins (the architect the respondent continued in charge of the work) called the contractors' attention to this, and the appellant spoke to the architect, and the agents for the respondent appeared disinclined to hear any reports. [His Lordship quoted the evidence upon this point in the cross-examination of Perkins, and continued].

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It would further appear that the inspector appointed by the respondent on the 25th of March, 1913, was made aware of the cement mortar that had been used, and it was not until the 22nd of April, 1913, that the respondent wrote denying liability and then not on account of the cement mortar, but for an entirely different reason; the cement mortar defence was one raised for the first time after the action was brought. The ground taken for the repudiation of the contract was not a justifiable ground, as found by the learned trial judge. We find him saying: "I find that they" (the respondent Surety Co.) "were not justified in repudiating the contract when they did on the grounds they then acted upon." If it was that the

cement mortar which caused the walls to go out of plumb, this was remedied by the contractors, and the walls put in proper place and in good condition, and Williams, an engineer, called by the defence, said, speaking of the building: "It is of good construction—the building—good walls, very heavy walls." At the time the building was taken over from the contractors the building was nearly finished. Plastering was then going on, and the jacking up or straightening up of the walls had been done early in the construction of the building. With the greatest respect to the learned trial judge, I cannot agree that there was any change or alteration in the specifications with regard to the cement mortar. It was a matter for the architect, and to be determined by him, and there is really no evidence of any change or alteration having been made; further, any alteration could only be by written order of the architect. In so far as there was any question raised as to the cement mortar used and its alleged effect—causing the walls to go out of plumb—notice went to the respondent, and, in any case, the conduct of R. V. Winch & Co., the agents of the respondent, constituted waiver of the requirement of notice.

Upon the whole case, in my opinion, it must be held that no change or alteration in the specifications was made. But should I be wrong in this, then there was sufficient notice to the agents of the respondent, and to the inspector as well, or waiver thereof. Further, the action of the respondent in acknowledging liability, as it did, and undertaking to see to the due completion of the building and the performance of the contract, in view of all the surrounding facts, and the knowledge it had, or ought to have had, in the circumstances, does not now admit of it being heard in denial of liability.

MCPHILLIPS, J.A.

I would allow the appeal, and there should be an assessment of the amount due by the respondent to the appellant.

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

Solicitors for appellant: *Livingston & O'Dell.*
Solicitors for respondent: *Bird, Macdonald & Ross.*

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DRINKLE v. REGAL SHOE COMPANY, LIMITED, ENDACOTT, AND RAE.

Principal and surety—Continuing guaranty—Change of relationship—Chattel mortgage—Discharge.

DRINKLE v. REGAL SHOE CO.

D. guaranteed payment for goods advanced by R. to E., a retail merchant, up to $4,000. R. continued to supply E. with goods, and upon the debt amounting to $7,000 (in consideration of a further advance of goods worth $6,000) he took a chattel mortgage on E.'s stock in trade and an assignment of the lease on his business premises. R. then took control of the business, E. remaining on as local manager at a salary. Later R., with E.'s consent, sold the whole stock in trade in bulk and applied the proceeds on E.'s debt. D. knew nothing of the transactions between R. and E. An action by R. against D. as surety was dismissed.

Held, on appeal (MARTIN and MCPHILLIPS, JJ.A. dissenting), that the relationship between E. and R. as creditor and principal debtor having been radically changed without notice to D., the guaranty ceased to be effective.

Statement

APPEAL from that part of the judgment of MACDONALD, J., of the 30th of September, 1914, reported in 20 B.C. 314, dismissing said defendant's counterclaim in an action brought by the plaintiff to set aside as fraudulent and void a chattel mortgage given by the defendant Endacott to the Regal Shoe Company, Limited, on his stock in trade, and to set aside the sale of said stock in trade under the chattel mortgage. The defendant Company counterclaimed to recover from the plaintiff under a guarantee to pay for goods to the value of $4,000 supplied by the defendant Company to Endacott. The facts are that prior to September, 1911, Drinkle had loaned Endacott $2,000 to assist him in his boot and shoe business in Vancouver. In order to further assist Endacott, Drinkle gave a written guarantee, on the 4th of September, 1911, to the Regal Shoe Company, Limited, of Toronto, Ontario, and licensed to do business in British Columbia, to pay for goods advanced to Endacott to the extent of $4,000. On the 24th of April, 1912, Endacott was indebted to the defendant Company for more than $7,000, and in consideration of a further delivery of goods

worth $6,000, he executed a chattel mortgage for $13,000 in favour of the defendant Company of all his goods and chattels, merchandise, and stock in trade, to secure his indebtedness, and at the same time assigned to the Company the lease of his business premises. After the chattel mortgage had been given the defendant Company went into practical control of the business, Endacott only remaining on as local manager at a weekly salary, without the right to purchase goods from other wholesale establishments. In November, 1913, the defendant Company, under the terms of the chattel mortgage, and with the consent of Endacott, sold the whole stock in trade to the defendant Rae, and applied the proceeds on Endacott's debt. Drinkle knew nothing of the transactions between Endacott and the defendant Company until after the sale to Rae. The learned trial judge dismissed both the action and the counterclaim. The defendant Company appealed from the judgment on the counterclaim.

Statement

The appeal was argued at Vancouver on the 1st and 2nd of December, 1915, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

M. A. Macdonald, for appellant: The contest is between the creditor and the surety. Endacott received Drinkle's guarantee in September, 1911, and the mortgage was given on the whole stock to the Regal Shoe Company in April, 1912. They also obtained an assignment of the lease Endacott had on the premises. They sold under the mortgage in 1913, and after the sale there was still $3,000 owing. The dealing between the creditor and debtor, we say, was manifestly to the advantage of the surety, in which case the surety is not discharged: see *Wright* v. *Western Canada Accident and Guarantee Ins. Co.* (1914), 20 B.C. 321. Drinkle was not advised of the chattel mortgage when it was made, but on learning of it later he did not repudiate it: *Taylor* v. *Bank of New South Wales* (1886), 11 App. Cas. 596.

Argument

E. B. Ross, for respondent: Drinkle guaranteed up to $4,000 only. The Shoe Company had a right to advance more, but on doing so, and their taking a chattel mortgage on the whole stock for $13,000, the surety's position is prejudicially affected.

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There must be a material alteration between the debtor and the creditor to relieve the surety, and if it is found that there is a material alteration in their business relations, the Court will not go into the question as to whether the alteration is to the benefit of the surety or not. It is not in the course of ordinary business to obtain a chattel mortgage. There was a variance in the manner in which the business was conducted after the surety guaranteed the credit. He could not be held under the guarantee when the control of the business wholly changed from Endacott to the Regal Shoe Company. The sale under the mortgage was conducted so carelessly that they did not know what the proceeds of the sale actually were, and the sale was at about 65 cents on the dollar. On the question of a material change in the position of creditor and debtor see Halsbury's Laws of England, Vol. 15, p. 546, par. 1025. On the question of guaranteeing an account, see Halsbury's Laws of England, Vol. 2, p. 450, par. 919, and Vol. 15, p. 475, par. 907; *Ellis* v. *Emmanuel* (1876), 1 Ex. D. 157; *Bristol, &c., Land Co.* v. *Taylor* (1893), 24 Ont. 286; *Commissioner of Stamps* v. *Hope* (1891), A.C. 476. Drinkle was entitled to a *pro rata* interest in the sale of the goods: see *Hood* v. *Coleman Planing Mill Co.* (1900), 27 A.R. 203.

Argument

Macdonald, in reply: As to the debtors and creditors' transactions being to the surety's benefit, see *Polak* v. *Everett* (1876), 1 Q.B.D. 669.

Cur. adv. vult.

4th April, 1916.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal. When the guarantee was given Endacott was entering into business as a retail shoe merchant. Assuming that the guarantee was intended to be a continuing one, it could not, I think, continue without the consent of the guarantor after the relationship between the Regal Shoe Company and Endacott had, without notice to the guarantor, become radically changed.

In the early part of the year 1912 the Company took a chattel mortgage on Endacott's stock and an assignment of his lease, and practically took charge of his business.

I think that Drinkle cannot be held to have guaranteed the

payment of goods supplied by the Shoe Company to Endacott thereafter, and as payments on account were not appropriated to particular items by the parties, and as all items existing at the date of such change were satisfied by subsequent payments, by application of the legal rule of appropriation, the prior liability to Drinkle was extinguished.

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

MARTIN, J.A.: This guarantee is one of a very sweeping and unusual kind, and having regard to the circumstances in which it was given, a liberal construction must be placed upon it. There are many cases on the point that where there is a variation in the contract the surety is discharged, but here, in the ordinary sense, there are no terms to vary, the surety simply saying: "I will guarantee Harry T. Endacott's account up to $4,000." The learned judge below, rightly I think, viewed this as a continuing guarantee of such a nature that at any time during the currency of the account the creditor could call upon the surety to pay said account up to the amount guaranteed. In other words this means, as Endacott puts it, that Drinkle was to "back him financially" during the course of carrying on the business in question, which negotiations were on foot to open up when the guarantee was given on the 4th of September, 1911, the business actually opening two months thereafter. In the course of establishing this business it must have been contemplated that a considerable expenditure would be necessary (the first purchase of goods alone being $7,000), and that difficulties foreseen and unforeseen would be encountered which would have to be overcome or the ordinary legal consequences would follow. The learned judge below held that the surety was discharged because he had a right to conclude that

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"the business in which he thus sought to assist his friend would be carried on in the ordinary way, [and] while he might expect that the bulk of the goods, to be sold by the defendant Endacott, would be the product of the defendant Company, still, he could assume that the purchases would not be confined to this Company alone."

The case the learned judge relies on, *Rees* v. *Berrington* (1795), 2 Ves. 540, is, when examined, seen to be one on a bond, and of limited application, and it is unfortunate that his

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attention was not directed to a case of more general business application, *viz.*: *Stewart & McDonald* v. *Young* (1894), 38 Sol. Jo. 385, wherein this exact point of restricted purchase was taken on a guarantee of not nearly so sweeping a nature as this, and overruled, and, moreover, Wills, J. said he "could find nothing in the guarantee to shew that the parties were confined to ordinary business transactions."

That really covers in principle the whole of this case, for all that followed was simply the culmination of business obstacles, difficulties, and losses, and none of the steps that the defendant Company took can be said to be contrary to what should fairly and reasonably have been done by business men to protect themselves in the circumstances; there was, to my mind, nothing unusual about them; no waste or improper dealing, which would be a ground for discharge (*Ward* v. *National Bank of New Zealand* (1883), 8 App. Cas. 755 at p. 766). On the contrary, the learned judge has found "good faith," and the correspondence shews not only a fair disposition but a friendly tolerance and encouragement to the debtor. In short, none of the consequences which resulted could reasonably be said not to have been in contemplation, and so it cannot be said that there was an alteration of the original contract.

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I have not, be it noted, dealt with the matter on the assumption that this business was in reality an agency, though that term is used by all parties in referring to it. Whatever it was, however, it was of such a nature as to necessarily and properly bring Endacott in particularly close business relations with, and subject him very largely to the inevitable business influence of, the defendant Company.

With respect to the other objections taken, which were not passed on below, I am of opinion that they cannot, on the facts, be sustained, calling attention, with respect to the alleged merger, to the observations of their Lordships of the Privy Council in *Commissioner of Stamps* v. *Hope* (1891), A.C. 476 at pp. 483-4.

The appeal, therefore, should be allowed.

GALLIHER, J.A.

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

McPHILLIPS, J.A.: This is an appeal from the judgment of MACDONALD, J., dismissing the counterclaim of the defendant the Regal Shoe Company, Limited. The counterclaim was upon what was alleged to be a continuing guarantee to the extent of $4,000 contained in a cable from Drinkle to the Regal Shoe Company, Limited, dated the 4th of September, 1911, as follows:

"I will guarantee Harry E. Endacott account up to four thousand dollars."

Endacott embarked in the boot and shoe business in the City of Vancouver, not, as I read the evidence, in the ordinary course of business as a retail boot and shoe merchant, but really carrying on an agency, in the main, for the sale of the goods the product or manufacture of the Company. This is well authenticated by reference to the letter of Drinkle to the Company, written from London, England, under date the 7th of January, 1913. An excerpt from that letter reads as follows:

"Yesterday I received from my office in Saskatoon, Canada, your letter dated December 3rd, enclosing a carbon copy of one dated July 11th, 1912. I have never received any of the letters referred to, nor have I had any reason to believe you were at all dissatisfied with the position of your Vancouver agency.

"I quite realize from what you say something definite must be done and some material assistance given to Mr. Endacott in order to be allowed to continue the agency, although I must say that at the time I gave the guarantee I did not expect to be called upon for anything more, believing what you really wanted was security for your account and not the actual money mentioned in the guarantee."

Proceeding, then, from the premise that the guarantee had relation to Endacott carrying on the business as an agency, the terms of that agency and the business arrangements in connection therewith would naturally be under the direction of the principal, and that would be the Company. This clearly differentiates the present case from one where a guarantee is given in reference to the carrying on of a business in a mercantile way and in the ordinary course of business, and in accordance with custom and usage. It would naturally follow that Endacott would proceed and carry on the business in the way directed, and the taking of security from him, and the method of carrying on the banking, etc., would be in compliance with instructions conveyed to him by the Company.

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The business, it would appear, did not prosper, and the Company became very restrictive as to the way in which the business should be carried on, but yet, quite within its rightful authority. There is nothing to shew that anything which was done wrecked the business; the truth was that the business was being carried on under adverse conditions locally existent, not blameable upon the Company. In the end a sale was effected of the stock in trade, under a chattel mortgage given by Endacott to the Company, and in the main action—in which Drinkle attempted to prove that the chattel mortgage was fraudulent and void—we find the learned trial judge saying (20 B.C. 314 at pp. 315-6):

> "I find that such security was taken in good faith to secure the indebtedness from the defendant Endacott to the defendant Company, and there was no evidence to support the allegation that the subsequent taking possession of the stock in trade was fraudulent upon the part of the defendant Company. It was acting within its rights, and endeavouring to realize a portion of the large amount owing for goods supplied. Neither the plaintiff [Drinkle] nor any other creditor of the defendant Endacott was then in a position to interfere with the sale of the goods by the mortgagee [the defendant Company]."

Nothing is apparent upon the evidence to shew that Drinkle ever concerned himself about the method of carrying on the business, and everything points to this: that Drinkle obligated himself to pay a sum not exceeding $4,000 by way of a continuing guarantee. Upon this point see the language of the learned trial judge at p. 316, and the concluding portion of his judgment at pp. 319-20.

MCPHILLIPS, J.A.

Now the question is, has the learned trial judge rightly applied the law to the existent facts? In my opinion, and with the greatest respect, he has not rightly done so. There is no evidence whatever to shew what were the terms and conditions of the agency or business which was to be embarked in by Endacott with the Company. Whatever they were they were not apparently inquired into by Drinkle, and he was satisfied to let that be a matter between Endacott and the Company, he entering into, and apparently content to enter into, a continuing guarantee with an entire absence of terms and conditions.

I cannot see that in all that was done there was any interference with the rights of the surety (Drinkle).

No question arises in the present case, which often does arise, of giving time to the debtor without the assent of the surety.

The stock in trade was apparently brought to sale and there is no suggestion that a proper price was not received therefor, and in this connection I would refer to the language of Blackburn, J. in *Polak* v. *Everett* (1876), 45 L.J., Q.B. 369 at p. 373:

"Two or three distinctions have been drawn with reference to this rule as to the discharge of the surety which may be mentioned. For instance, there is the distinction drawn in *Wulff* v. *Jay* (1872), 41 L.J., Q.B. 322, that where the creditor by his laches or neglect diminishes or destroys a security which the surety would have had, he is bound to account to the surety for the value of that security, and to give him credit for the money he might, ought and should have made, as well as for what he actually did make. But in this case, though he is bound to account to the surety, yet the surety is not discharged because the rights and position of the surety with reference to the principal debtor are not varied."

The case of *Taylor* v. *Bank of New South Wales* (1886), 55 L.J., P.C. 47, would appear to be very much in point, especially the language of Lord Watson in the last paragraph appearing at p. 50.

It was held in *Stewart, Moir, and Muir* v. *Brown* (1871), 9 Macph. 763, *per* Sir James Moncreiff, Lord Justice-Clerk, at p. 766, that "the principal debtor and creditor [are] free to arrange the details of their transactions as they think fit, provided these are not at variance with the ordinary custom of merchants." The present case cannot be looked at, though, as one where the ordinary custom of merchants should be adhered to.

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To indicate the latitude permitted, it was held in *Stewart & McDonald* v. *Young* (1894), 38 Sol. Jo. 385, that the surety was not discharged by a subsequent agreement between the vendors and the trader, that the latter should purchase all the goods required from them or pay a fixed commission on all other goods purchased, where the guarantee was limited in amount for the due payment of goods to be supplied to the trader.

The intention of the parties seems quite plain. The guarantee was a continuing guarantee, and was to answer any existent liability of Endacott to the Company, upon a taking of

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accounts, to a limited amount, namely, $4,000, and the Company was entitled to rely upon it as being a guarantee of that nature and amount. All the surrounding facts make this plain, and no question of the dealings between the creditor and debtor in the carrying on of the agency or business arises. The custom of merchants is not the test, and the conduct of the business was undoubtedly left entirely to the Company and Endacott.

The surety (Drinkle) here undertook to enter into what might be termed an open continuing guarantee without any stated terms, and upon the whole case, in my opinion, the liability undertaken was to be answerable for any balance due by Endacott to the Company not exceeding $4,000, which constituted a legal debt and, as I understand it, it is not contested, but admitted, that $4,000 and more is due to the Company by Endacott. It follows that, in my opinion, the appeal should be allowed and judgment go for that amount upon the counterclaim.

MCPHILLIPS, J.A.

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

Solicitors for appellant: *Russell, Macdonald & Hancox.*
Solicitor for respondent: *E. B. Ross.*

SHORE & GRANT v. WILSON BROS.

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SHORE & GRANT v. WILSON BROS.

Interpleader—Landlord and tenant—Distress—Sale of goods—Purchase by landlord—Change of possession—Distress Act, R.S.B.C. 1911, Cap. 65; B.C. Stats. 1915, Cap. 18, Sec. 2.

The plaintiffs caused certain goods to be distrained for rent in arrear of a premises used by the tenant in carrying on business as a tobacconist. The bailiff offered the goods for sale at an upset price of the amount of rent in arrear. There were no bidders except the plaintiffs, to whom the goods were knocked down at the upset price. The goods were then transferred to the plaintiffs' own premises, where they were subsequently seized by the sheriff under an execution against the tenant. The plaintiffs claimed ownership and an interpleader issue was directed.

Held, on appeal, affirming the decision of LAMPMAN, Co. J., that the claimant could not, as landlord, claim as purchaser at the bailiff's sale.

APPEAL by plaintiffs from the decision of LAMPMAN, Co. J. on an interpleader issue tried at Victoria on the 1st of March, 1916. The facts are sufficiently set out in the judgment of the trial judge. Statement

F. C. Elliott, for plaintiffs (claimants).

C. E. Wilson, for defendants (execution creditors).

9th March, 1916.

LAMPMAN, Co. J.: Jesse Evans was a tenant of premises owned by the plaintiffs, and on the 1st of February he was in arrear for eight months' rent—$200—and as he had no money with which to pay the rent, or any other debt, he saw his landlords, the plaintiffs, and told them he wanted to give up the premises, in which he carried on a small business as a retail tobacconist. Plaintiff then, on the same day, put a bailiff in for the $200 rent, and by an arrangement Evans continued in possession and carried on the business, the plaintiffs advancing him $10 with which to buy stock. LAMPMAN, CO. J.

The bailiff served Evans with a notice of the distraint, the notice containing the statement that unless he paid the rent

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within five days the "goods will be appraised and sold according to law." The bailiff, on the 4th of February, posted at the end of a shelf in the store the following notice:

"AUCTION SALE

"The stock and fixtures in and upon these premises will be offered for sale by public auction on the 9th of February, 1916, at the hour of 3 o'clock.

"A. E. Mitchell,
"City Bailiff."

This notice is typewritten on a half sheet of typewriting paper, in caps. type, and the written part is five inches long and two inches wide.

On the 9th of February, I assume at 3 o'clock in the afternoon—I did not notice until after the conclusion of the argument that the notice did not state the time of the sale as being in the forenoon or afternoon—the bailiff offered the goods (consisting of stock and some fixtures) for sale at $200, and the landlords bought. The landlords then rented the premises to one Hartley, who took possession and employed Evans to work for him. After the auction sale Evans assisted the landlord in removing the stock from the cigar store to another room in the same building; the tenant's fixtures were left as they were.

Wilson Bros. sued Evans on the 5th of February, the summons was served on the 7th, judgment was entered on the 15th, and the sheriff seized the goods on the 16th of February. Shore & Grant claimed ownership, and the matter now comes before me in an interpleader issue. No appraisement was made as required by section 7 of the Distress Act as amended in 1915 (Cap. 18).

LAMPMAN, CO. J.

Mr. *Elliott,* for the plaintiffs, contends that only the tenant could sue because of the irregularities in the sale, and that if the title in the goods did not pass at the auction sale, still the plaintiffs are protected because they, in effect, received the goods from Evans in payment of the rent. I do not think either of these contentions can prevail. The sale was bad on two grounds: first, because there was no appraisement, and secondly, because the landlords could not buy: since *Moore* v. *Singer* (1904), 1 K.B. 840, there can be no doubt about this latter ground.

There seems to have been a great economy of effort in carrying out the provisions of the Act, and in giving notice of the sale. Considering the notice, I am not surprised that no one except the parties and four or five others—probably the usual frequenters of the place—attended the sale. If Evans had handed over his stock to plaintiffs in payment of the rent the case would have been different. He did say: "I ceded the stuff to the plaintiffs," but the words were put in his mouth by Mr. *Elliott,* and his acts shew nothing of the kind. All he did was to announce he could not carry on any further, and the fact that he helped to carry some stuff to another room after the sale only indicates that he was continuing to assist about the premises.

I do not think that if Evans cannot impeach the sale it therefore follows that the plaintiffs must succeed in the issue, and I am inclined to think Evans could maintain an action for conversion: see *Plasycoed Collieries Company, Limited* v. *Partridge, Jones & Co., Limited* (1912), 2 K.B. 345.

Judgment will be entered for defendants.

The appeal was argued at Vancouver on the 4th of April, 1916, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

F. C. Elliott, for appellants: At the sale, which took place on the 9th of February, the goods were taken over by the landlords with the tenant's consent on the 12th of February. Wilson Bros. issued their writ on the 5th, and obtained judgment on the 15th of February. Defendants raise the objections (1), that there was no appraisement; and (2), that the landlords cannot buy. On obtaining the tenant's consent the landlords were entitled to take the goods: see judgment of Moss, C.J.A. in *Burnham* v. *Waddell* (1878), 3 A.R. 288 at p. 290; see also *Newlove* v. *Shrewsbury* (1888), 21 Q.B.D. 41. The learned trial judge followed *King* v. *England* (1864), 33 L.J., Q.B. 145; *Moore, Nettlefold & Co.* v. *Singer Manufacturing Company* (1904), 1 K.B. 820; and *Plasycoed Collieries Company, Limited* v. *Partridge, Jones & Co., Limited* (1912), 2 K.B. 345, but the circumstances in those cases are

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quite different. *Woods* v. *Rankin* (1868), 18 U.C.C.P. 44 is in point. When the tenant consents to the sale it is a valid sale. On the question of the landlord taking possession see *Jones* v. *Sawkins* (1847), 5 C.B. 142.

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Mayers, for respondents: The cases already cited shew that when the landlord is both seller and buyer there is no sale, and the property does not pass. The tenant did not consent to the sale, but the rule would apply even if he did.

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Elliott, in reply.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal on the single ground that the evidence in the case is not such that we can say upon it that the learned trial judge was wrong in coming to the conclusion that the sale by the bailiff was an illegal sale because the property was sold to the landlords, who then occupied the dual position of sellers and buyers. I think there was no consent to this, and that, therefore, the judgment cannot be disturbed.

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

MARTIN and GALLIHER, JJ.A. agreed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would dismiss the appeal. I wish to state, though, that in so doing, I hold myself open to take the view that even consent would not support a sale as between landlord and tenant.

I admit that in the case of *Burnham* v. *Waddell* (1878), 3 A.R. 291, and also the case of *Woods* v. *Rankin* (1868), 18 U.C.C.P. 44, in the Courts of Ontario it would seem to be assumed that with consent a bailiff under a sale for distress for rent might sell to the landlord. I have always understood the law that it was against public policy to allow a tenant even to consent to a sale to the landlord, and unless there is a decision which is binding upon this Court, I would be of the view that this was not a valid sale, and that is in conformity with the present English decisions as I understand them.

I am of opinion that there was no sale *inter partes.* If the decisions of the Courts of Ontario are to be followed, *i.e.,* that consent would give validity to a sale to a landlord, of course consent must be established, but the learned trial judge, as I

understand it, has not found upon that question. I do not think that his judgment was founded upon the question of consent. Mr. *Elliott* very ably pointed out that we might arrive at the inference, which inference ought to have impressed itself upon the trial judge, but when I turn to the language of Moss, C.J.A. in the case of *Burnham* v. *Waddell, supra,* at pp. 291-2, I do not think we ought to adopt that submission.

"It would be an inconvenient practice if this Court were to be asked to draw inferences which should have been drawn by the Court of first instance, and upon which that Court would no doubt have pronounced had it been asked to do so."

Therefore, we are in this position, that there is no sale *inter partes,* and the sale (if made at all) was made by the bailiff to the landlords, but with the essential finding of consent (if the Ontario cases are to be followed) not found by the trial judge, the sale cannot be supported. On the other point, and upon the whole case, I think it is against public policy that there should be a sale as between tenant and landlord.

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Appeal dismissed.

Solicitors for appellants: *Courtney & Elliott.*
Solicitor for respondents: *C. E. Wilson.*

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IN RE CANADIAN NORTHERN PACIFIC RY. CO. AND BYNG-HALL

IN RE CANADIAN NORTHERN PACIFIC RAILWAY COMPANY AND BYNG-HALL *ET AL.*

Arbitration—Lands—Expropriation—Lands adjoining owned by same parties—Injurious affection—British Columbia Railway Act, R.S.B.C. 1911, Cap. 194.

The respondents were the owners of a block of land which had been subdivided and advertised for sale in building lots, and a railway company expropriated a strip of land through the block for the purpose of constructing their line. The arbitrators, in addition to the value of the land taken, allowed a certain sum for injurious affection to the remaining portion of the block.

Held, on appeal, that as the lots had no common connection except that they were owned by the same persons, they were not entitled to damages for injurious affection, and even if the block were treated as a whole, there was no evidence of depreciation owing to the strip of land being taken by the railway company.

Holditch v. *Canadian Northern Ontario Railway Company* (1916), 32 T.L.R. 294 followed.

APPEAL from the order of MORRISON, J., of the 4th of April, 1915, dismissing an appeal from the award of the arbitrators appointed to determine the compensation and damages (if any) payable in respect of 2.21 acres of land expropriated by the Railway Company for railway purposes. The land so taken is part of and runs through a block of land described as the south-easterly portion of section 66, Victoria District, about 47 acres, and is owned by Percy Byng-Hall, Thomas Harker, and Lawrence M. Earle, Joseph Nicholson being a mortgagee. It adjoins a lake known as Lost Lake, and is about four and a half miles from the City Hall, Victoria. The owners had subdivided the land into building lots and filed plans in the early part of 1913. The property was then put in the hands of an agent and was advertised for sale in lots. Notice of expropriation was given by the Railway Company in November, 1914. The arbitrators' award was $3,315 for the land and $4,812 for all other compensation and damages in respect of the taking of said lands or otherwise injuriously affecting the

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other lands of the owners. The Railway Company appealed mainly on the ground that compensation should not have been allowed for injurious affection to the owners' other lands or for severance.

The appeal was argued at Vancouver on the 6th of April, 1916, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Mayers, for appellant: The landowners subdivided and filed their plans in 1913, and notice of expropriation was given about two years later. The area of land taken is 2.21 acres. The scope of the Court of Appeal in dealing with awards is settled in *Atlantic and North-West Railway Co.* v. *Wood* (1895), A.C. 257 at p. 263, and *James Bay Railway* v. *Armstrong* (1909), A.C. 624 at p. 631. The land in question is four and one-half miles from the City Hall, Victoria. The principle upon which the value of the land should be arrived at is laid down in *The King* v. *Trudel* (1914), 49 S.C.R. 501 at p. 503, and *Cedars Rapids Manufacturing and Power Company* v. *La Coste* (1914), 30 T.L.R. 293. (1) The price to be paid for it is the value to the owner as it existed at the time of the taking, and not the value to the taker. (2) The value to the owner consists in all advantages which the land possesses present, or future, but it is the present value alone of such advantages that is to be determined: see also *Re Ketcheson and Canadian Northern Ontario R.W. Co.* (1913), 29 O.L.R. 339 at p. 350, and *Re Billings and Canadian Northern Ontario R.W. Co., ib.* 608. The evidence was directed to, and the arbitrators proceeded on the future value of the property, and as to its practical use it is very soft and boggy to a depth of 19 feet. The date of acquiring the land is that of the notice to treat, and the estimate of values should be of that date: see *Saskatchewan Land and Homestead Co.* v. *Calgary and Edmonton Rway. Co.* (1914), 51 S.C.R. 1. The assessment for damages should not have been allowed; in this they proceeded on a wrong principle: see *Holditch* v. *Canadian Northern Ontario Railway Company* (1916), 32 T.L.R. 294; *The William Hamilton Manufacturing Co.* v. *The Victoria Lumber and Manufacturing Company* (1896), 26 S.C.R. 96

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at p. 109. On the question of values see *Dodge* v. *The King* (1906), 38 S.C.R. 149 at p. 162.

Aikman, for respondents: They are really trespassers on the land today: see *Victoria and Saanich Motor Transportation Co.* v. *Wood Motor Co., Ltd.* (1914), 20 B.C. 537. The *Holditch* case does not apply. This was an arbitration by consent, so that the provisions of the Act as to the date when the value of the land is to be taken do not apply. The additional amount allowed was for severance, and this was properly allowed, as it detracts from the value of the land left in taking a portion from the middle of a plot.

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Mayers, in reply, on the question of severance, referred to *Mercer* v. *Liverpool, St. Helen's and South Lancashire Railway* (1903), 1 K.B. 652 at p. 661; (1904), A.C. 461 at p. 465.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal should be allowed in part. In my opinion, as expressed earlier in the case, I do not think we can interfere with the finding of the arbitrators in respect of the value of the land taken. As regards the consequential damages, I am of opinion that, on the evidence, and when I speak of the evidence I refer to the advertisement of the respondents themselves, which is set out in the case, commenting upon the advantages of having transportation furnished by this Railway Company; the situation of the property, its distance from the city, and the area involved, being some 47 acres, subdivided into lots, no consequential damage has been suffered by the respondents. It has been conceded by counsel for the respondents that if the land is to be treated as land used for market gardening there would be no consequential damage. So that, taking it either one way or the other, in my opinion the arbitrators were in error in coming to the conclusion that the damage which they awarded in this regard was suffered. The award, therefore, will be reduced to $1,500 an acre for the land actually taken.

MARTIN, J.A.

MARTIN, J.A.: I agree. I think the *Holditch* case applies. If it does not, the land has to be taken as a whole and, considering the land as a whole, in my opinion it has been appreciated instead of depreciated. I have no doubt there was juris-

diction in the arbitrators to entertain this point of damages. I agree with what my brother McPHILLIPS has said, that the time of acquisition, of acquiring title, means the notice to treat.

GALLIHER, J.A.: I would dismiss the appeal as to the value of the land and allow the appeal as to damages.

McPHILLIPS, J.A.: I am of like view, and consider that we should not interfere with the arbitrators' decision with regard to the value of the land. With regard to the damages to other land, I consider that they went wrong in law. The controlling decision is the case of *Holditch* v. *Canadian Northern Ontario Railway Company* (1916), 32 T.L.R. 294, where their Lordships of the Privy Council express themselves in the most precise terms, stating that the decision of the Supreme Court of Canada is in accordance with the true interpretation of the law, and the principle is clear enough, and it has been carried out in the past, that you must take some land, or sever some other pieces of land which stand there, in a severed condition. Unfortunately the respondents, if it is unfortunate—I would rather assume that they knew their own business, and that it was to their best advantage—provided the right of way upon the plan and subdivision, and having provided it the railway came along and adopted it. If the right of way had encroached in the slightest way on any of the adjoining lots there would have been liability. But there is no encroachment, and therefore the *Holditch* case, it seems to me, is wholly in point.

Appeal allowed, in part.

Solicitors for appellant: *Bodwell & Lawson.*

Solicitor for respondents Byng-Hall, Harker and Earle: *J. A. Aikman.*

Solicitor for respondent Nicholson: *C. Dubois Mason.*

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IN RE DOMINION TRUST COMPANY AND CRITCHLEY

IN RE DOMINION TRUST COMPANY AND CRITCHLEY *ET AL.*

Company law—Winding-up—Duties of liquidator—Order for adjudication on certain claims—Stay of proceedings on other claims—Power of Court—Winding-up Act, R.S.C. 1906, Cap. 144, Secs. 33, 72 and 73.

The Court has no jurisdiction to interfere with the statutory duties of a liquidator under section 73 of the Winding-up Act by making an order staying all proceedings until the final adjudication of certain selected claims, even where the intention is merely to minimize costs and expedite proceedings.

Per MARTIN, J.A.: A liquidator is not an officer of the Court in the same full sense as its regular officers are, such as the registrar, etc.

APPEAL by the Dominion Trust Company (in liquidation) from an order of MURPHY, J., of the 3rd of December, 1915, whereby he ordered that the claims of three certain depositors be entered for adjudication, and that such adjudication be set down for hearing before himself on a day to be fixed; also that until the final disposition of the adjudication upon the cases selected all proceedings upon other claims by depositors against the Company be stayed. The applicants (respondents), who are four creditors of the Company in liquidation, had moved and obtained an order on the 23rd of September, 1915, directing the liquidator of the Company to file a list of the depositors having claims against the Company which are disputed by him with the registrar, and that the liquidator, with counsel for the depositors, make selection of the names of persons whose claims are to be entered for adjudication, and that such adjudication be set down for hearing. The liquidator filed the list as ordered, but did nothing further in the way of selecting claims for adjudication or setting them down for hearing. The applicants then applied for and obtained the order appealed from.

Statement

The appeal was argued at Victoria on the 4th of January, 1916, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Martin, K.C., for appellant: The depositors are not credi-

tors of the Company under the Act. We object to the stay of proceedings in all other cases until certain claims are disposed of. There is no jurisdiction for this. No one can impose their advocacy on an individual, not even the Crown: *Wood* v. *Curry* (1908), 12 O.W.R. 345. The liquidator must perform such duties as the Act imposes, and the Court cannot interfere.

Armour, for respondents: The liquidator is an officer of the Court. The contention that they deposited in a Company that had no power to take deposits is not tenable. They have the right to recover their proportion of moneys deposited, and must be ranked as creditors.

Argument

Martin, in reply.

Cur. adv. vult.

17th April, 1916.

MACDONALD, C.J.A.: Section 33 of the Winding-up Act declares that the liquidator "shall perform such duties in reference to winding up the business of the Company as are imposed by the Court or by this Act." Section 72 authorizes the Court to fix a date on or before which creditors shall send in their claims to the liquidator. When claims have been sent in it is the duty of the liquidator to decide which claims, if any, he will require the claimant to prove before the Court. Rule 21 of the Winding-up Rules directs him to leave at the registrar's office a list of the claims, shewing those of which he does and those of which he does not require proof. Section 73 provides that the liquidator may give notice to creditors to prove their claims before the Court on a day to be specified in the notice.

MACDONALD, C.J.A.

The respondents are four creditors of the Company in liquidation who appear to have foreseen that proof of their claims would be required by the liquidator. They, therefore, moved and obtained an order of the Court directing the liquidator to leave the list above mentioned with the registrar, but the order went further, and also directed the liquidator to co-operate with the respondents' solicitors in selecting a limited number of disputed claims to be brought before the Court for adjudication. The liquidator filed the list as directed, but neglected to participate in such selection. The respondents thereupon again moved the Court, and obtained an order that the claims of the

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respondents be entered for adjudication on a day to be thereafter fixed. The claims of two other creditors were included at the request of the appellant's counsel, but apparently without prejudice, as leave to the liquidator to appeal was included in the same order. It was further ordered that until final disposition of these claims all proceedings in respect of the other claims on the list should be stayed.

I can find no warrant for such an order in the Act or Rules, nor have we been referred to any other authority for it. There are certain things which may be done by the liquidator only with the approval of the Court. They are specifically set out in the Act. There are others which the liquidator is authorized to do, and it is manifest to me that in respect to these the Court cannot control him so long as he keeps within the authority given him. It is idle to speak of the inherent jurisdiction of the Court over its officer where the officer acts in pursuance of authority given to him by statute. The statute says the liquidator may give notice to claimants requiring them to prove their claims in Court. The order complained of in effect says that the liquidator shall not give such notice. Under the statute, what the liquidator has to do is plain enough. He has to decide the questions left to his discretion alone. If he should decide that a claim ought to be proved before the Court, he must bring the claimants before the Court in the manner provided by section 73. This section has to do with judicial proceedings in which a liquidator brings the question of the right of the creditor to rank on the estate into Court for adjudication.

MACDONALD, C.J.A.

The respondents, and, as intimated by counsel, a large body of others in the same situation, think that a saving in costs to all parties concerned would be effected if certain questions of law affecting all creditors of that class should be decided without bringing more than a limited number of them before the Court. I have every sympathy with that desire, but the responsibility in this instance rests with the liquidator. The statute has placed it there. He ought not to incur unnecessary expense, and while his counsel intimated in his argument before us that he intended to give notice to all the creditors concerned, requiring them to attend and prove their claims, yet it may be that after

what has been said he will adopt the course which the learned judge in the Court below apparently thought a very proper one.

Mr. *Martin* seemed to think that it was in the interest of the estate to bar every creditor who was either unwilling or unable, through lack of means, to verify his claim. I do not agree with that notion of the liquidator's duty. I think his duty is more correctly stated by the Lord Justices in *Gooch's Case* (1872), 7 Chy. App. 207 at p. 211. They said:

"In truth, it is of the utmost importance that the liquidator should, as the officer of the Court, maintain an even and impartial hand between all the individuals whose interests are involved in the winding-up. He should have no leaning for or against any individual whatever."

It is not the liquidator's duty to get rid of a single creditor whose claim is just, and if the justice of his claim depends upon the decision of legal questions equally pertinent to the claims of a large body of creditors, and can be decided in an adjudication upon six of such claims at a saving of expense, it is the liquidator's duty to assist, and not to retard the accomplishment of this end. If the Court below had power to make the order appealed from I should unhesitatingly sustain it, but, in my opinion, it had not the authority to make it.

MACDONALD, C.J.A.

It may be noted that the English winding-up rule, No. 102, differs from section 73 by providing that the liquidator, "unless otherwise ordered by the Court," may from time to time fix the date for proof of claims.

The appeal should, therefore, be allowed.

IRVING, J.A. concurred.

IRVING, J.A.

MARTIN, J.A.: Section 73 imposes the duty upon the liquidator of giving a notice to all the creditors, or those so claiming to be, of the company, "requiring such creditors to attend before the Court on a day to be named in such notice and prove their claims to the satisfaction of the Court," in default of which their claims "shall be disallowed."

MARTIN, J.A.

The order complained of assumes the power to arrest the hand of the liquidator in the performance of this clear statutory duty by directing that all proceedings taken by him to obtain that end shall be stayed till the final adjudication of the claims of certain creditors selected out of several thousand

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claims against the Company. In my opinion, it is clear that there is no power to make such an order; nowhere in the statute is any authority given to a judge to override the directions of the statute by the exercise of his discretion or otherwise, nor is there any inherent power to do so, so that of itself ends the matter.

But apart from this, what is done by the order is to seek to make test cases in certain classes of creditors, but this has none of the advantages, such as finality, of a test decision, and there can be no consolidation of the claims because thousands of these creditors are unrepresented and no one is authorized to speak for or bind them, yet they may in effect ultimately claim the benefit of any favourable decision on these selected cases while escaping any responsibility for the costs thereof if unfavourable, or being barred thereby. And in the meantime the much to be desired object of the liquidator to carry out the provision of the statute by clearing up the list of claimants as quickly as possible, and weeding out bogus creditors, or those who have no desire to litigate, is frustrated.

The further suggestion is made, however, that the action of the liquidator amounts to an abuse of the process of the Court which ought to be restrained by the exercise of its inherent jurisdiction. Though the liquidator, like a trustee in bankruptcy, may in general terms be said to be an officer of the Court—*In re Silver Valley Mines* (1882), 21 Ch. D. 381; and *Ex parte Simmonds* (1885), 16 Q.B.D. 308—yet Sir George Jessel, M.R., in the first-mentioned case at p. 386, more precisely describes him as "a paid agent of the Court," and Cotton, L.J. says, p. 392, that "he is a person appointed by the Court to do a certain class of things." It is obvious that at best he is not an officer of the Court in the same full sense as its regular officers are, such as the registrar, etc. For this reason any question of abuse of the process of the Court by the liquidator could only arise to a very limited extent, and I am unable to see how the inherent jurisdiction of the Court to prevent such an abuse can be invoked in a case like this, where he is merely doing what the statute directs that he alone shall do. On the contrary, to prevent him from discharging this definite

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statutory duty by staying his hand would, in my opinion, be an abuse by the Court itself of its inherent jurisdiction. No case has been cited to us, nor, I think, can be found, approaching the great length thus contended for.

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

MCPHILLIPS, J.A.: I am of opinion that the order made, with great respect to the learned judge, was made without jurisdiction. I have no doubt it was made, as the facts shew, with the desire to minimize costs and expedite the proceedings. Had there been the jurisdiction to make the order, and it was the exercise of a discretion capable of being exercised, I would have been in entire agreement with the order made.

The appeal, in my opinion, should be allowed.

Appeal allowed, Galliher, J.A. dissenting.

Solicitors for appellants: *Cowan, Ritchie & Grant.*

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

SKELDING *ET AL.* v. LEVIN.

Practice—County Court—Judgment of nonsuit—Right to bring another action—County Courts Act, R.S.B.C. 1911, Cap. 53, Sec. 110.

A judgment of nonsuit under section 110 of the County Courts Act is not a bar to another action by the plaintiff on the same subject-matter. *Poyser* v. *Minors* (1881), 7 Q.B.D. 329 followed.

ACTION tried by HOWAY, Co. J. in the County Court at New Westminster on the 23rd of May, 1916, for wages and for damages for wrongful dismissal. The plaintiff alleged that under a verbal contract made on the 19th of April with the defendant he was employed for one year at $25 for the first month, and $40 for each of the following months. The defence was (1)

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that the contract was made on a Sunday, and, therefore, void. (2) That it was not in writing and, therefore, void under the Statute of Frauds. (3) That the same cause of action was previously tried in Vancouver before GRANT, Co. J., in which the plaintiff was nonsuited, and the matter was, therefore, *res judicata*.

Bayfield, for plaintiffs.

Rubinowitz, for defendant.

29th May, 1916.

HOWAY, Co. J.: An action between these parties, involving the major part of the plaint now sued on, was tried before GRANT, Co. J. in Vancouver in February last. The result of that trial was a judgment of nonsuit. The plaint in this action was launched a few days later. On the trial before me I received, subject to objection, the evidence of the learned trial judge that he had tried and dismissed the action. On consideration, I must hold the objection well taken and the evidence not admissible. The formal record must govern, and I cannot go behind the existing judgment: *Dews* v. *Ryley* (1851), 25 L.J., C.P. 264; *Huddleston* v. *Furness Railway Company* (1899), 15 T.L.R. 238; *Wallace* v. *Ward* (1903), 9 B.C. 450.

Much argument has been addressed to me as to the right of the plaintiffs to take these proceedings, and stress has been laid upon voluntary and involuntary nonsuit and the distinctions between them. I must, however, take it that the judgment of nonsuit was given in accordance with section 110 of the County Courts Act, which is identical in language with section 89 of 9 & 10 Vict., c. 95. And, as stated in *Poyser* v. *Minors* (1881), 7 Q.B.D. 329 at p. 332:

Judgment

> "Nonsuit under these sections would undoubtedly have left the plaintiff at liberty to bring another action."

See, too, *Guilbault* v. *Brothier* (1904), 10 B.C. 449. A different rule exists in the Supreme Court. Many of the cases cited by the defendant are inapplicable because of this difference.

Upon the facts there is a straight contradiction. The demeanour of the defendant and his wife in the box did not impress me favourably. There is an inherent improbability in their version of the circumstances surrounding the termination

of the plaintiffs' hiring. The independent testimony is opposed to the defendant's version of the terms of hiring. The alleged conversation in the presence of the defendant's little daughter is, in my opinion, purely imaginary, and never occurred in fact. The glibness of this witness too greatly resembles a recitation. Upon this flimsy foundation defendant seeks to build up a superstructure of conspiracy. It is to be observed that the plaintiffs were not (as is the proper practice: see Phipson on Evidence, 5th Ed., 460) cross-examined thereupon even in an over-lengthy and time-wasting cross-examination.

I find as a fact that the defendant Levin employed the plaintiffs to work for him as specified for a space of one year at $25 for the first month and $40 for each subsequent month; that this contract, though discussed for some time, was entered into at New Westminster on the 19th of April, 1915; that the plaintiffs worked under the said contract from the said 19th of April to the 8th of May, 1915; that the plaintiffs were on the latter date wrongfully discharged and are entitled to damages therefor. The evidence shews that the plaintiffs made frequent efforts to obtain work, but failed. I also find that the plaintiffs spent $10 for food for defendant's family. There will be judgment for one month's wages, $25; for reasonable damages, which I fix at $120, being three months' wages at $40 per month, and for damages paid, $10, making in all $155.

Judgment

The plaintiffs will have the costs.

Judgment for plaintiffs.

CLEMENT, J.

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May 12.

WALKER v. JOHNSTON.

Pledge—Option to repurchase—Time of essence—Right of pledgee to fix time of redemption irrespective of any agreement.

WALKER v. JOHNSTON

There being no agreement at the inception of a transaction that time should be of the essence, a pledgee cannot of his own accord, without judicial decree, make it so as against a right to redeem.

ACTION tried by CLEMENT, J. at Vancouver on the 5th of May, 1916, for an accounting and an order that upon payment of the amount found due by the plaintiff to the defendant, the defendant deliver up to the plaintiff a certain motor-truck, and for damages. The plaintiff alleged that in October, 1915, he arranged with one Williams, assignee of the Canadian Builders Supply Company, Limited, to purchase a three-ton Packard motor-truck, and being unable to pay the balance of the purchase price ($900) he arranged with the defendant that he (the defendant) should advance the money necessary to purchase the truck, and gave him a power of attorney, constituting the defendant his attorney to act for him in the purchase of the truck. The defendant was to remain in possession of the truck until such time as the plaintiff should pay him the moneys advanced, and he was to rent the truck in the meantime and apply the earnings in reduction of the plaintiff's indebtedness. Johnston then saw Williams, paid him the $900, but instead of using the power of attorney from Walker, he obtained a bill of sale of the car from Williams as assignee of the Canadian Buildings Supply Company, Limited, in his own name, without the knowledge or consent of Walker. About the middle of the following month the defendant advised the plaintiff by letter that unless he made some arrangement to protect his equity in the truck, it would be disposed of for the defendant's benefit. An arrangement was then made extending the time for payment until the 24th of February following. The defendant sold the car in March without accounting for the proceeds of the sale. The plaintiff alleged he was at all times willing to

Statement

pay the money advanced by the defendant, less the rentals he had received. The defendant alleged that he purchased the truck for his own benefit and that in any event, as the value was over $50 and no note or memorandum in writing of the alleged agreement was given, he was entitled to the benefit of section 11 of the Sale of Goods Act. He further set up, alternatively, that as the plaintiff did not pay the amount due on the 24th of February, he was, under the terms of the agreement, entitled to dispose of the truck.

Statement

McCrossan, for plaintiff.
C. W. Craig, for defendant.

12th May, 1916.

CLEMENT, J.: I have read over the evidence and exhibits carefully, and have come to a clear conclusion in my own mind that the paper title which the defendant procured from Williams and the possession (such as it was) which he had of the car in question was as mortgagee-pledgee, as security for his advances. As to his paper title: it takes on validity only through the plaintiff's consent and authority as conferred by the power of attorney, for Williams was not entitled to sell without the advertisement and notice to plaintiff required by our statute law. In short, the defendant redeemed the car for the plaintiff and held it subject to plaintiff's right to receive it from the defendant upon payment of the amount advanced and reasonable charges. Etymologically, to "redeem" is to "buy back," and plaintiff's right to buy back was nothing less, in my opinion, than a right to redeem. On this phase I have been much assisted by the case of *Beckett* v. *Tower Assets Company* (1890-1), 60 L.J., Q.B. 56, 493; (1891), 1 Q.B. 638, which in many features is much like the present case.

Judgment

In reference to the possession I have said "such as it was." As a result of discussions with Tucker, a composite vehicle, consisting of the car in question and a platform body upon which the defendant had no shadow of a claim to ownership, was placed in Tucker's possession, with instructions to earn what moneys he could by hiring out this vehicle. Notwithstanding all which defendant claims to hold as his own, and subject to no accounting, the amount earned. If defendant is to be taken as

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being in possession of the platform body, he holds that part of the vehicle as a pure pledgee. The right of redemption which exists, if that be the true position, in reference to this platform body would suggest, to say the least, that there was a still subsisting right to redeem, and not a mere option to buy, the car in question. I accept the evidence of the plaintiff and Bothel as to what was said when defendant refused to allow the vehicle to be hired out for snow-clearing. In short, I do not think the plaintiff has lost his right to redeem. There was no agreement at the inception of the transaction that time should be of the essence, and the defendant, as I apprehend the law, cannot of his own accord (without judicial decree) make it so as against a right to redeem, whatever might be his position in that regard if plaintiff had a mere option to buy. It seems an undue strain to treat the position as an option to purchase, when the price to be paid had no relation to the value of the car, but solely to the amount the defendant had advanced. Plaintiff's right was not to buy, but to buy back; in other words, to redeem. On the question of time being of the essence, see *Kilmer* v. *British Columbia Orchard Lands, Lim.* (1913), A.C. 319, as explained in *Steedman* v. *Drinkle* (1915), 85 L.J., P.C. 79 at p. 81.

I have been in doubt as to the propriety of allowing the defendant, in taking the accounts, more than the legal rate of interest upon his advances. The plaintiff is seeking an equitable remedy, however, and moreover, in his own statement of account, credits defendant with interest at 12 per cent. I direct, therefore, that interest at that rate be allowed.

Judgment

There will be a reference, therefore, to take the accounts, and a period of 21 days from the date of the registrar's report allowed to plaintiff to redeem. The plaintiff is entitled to his costs up to and inclusive of this judgment, to be set off against defendant's claim, both because defendant denied the right to redeem, and because he improperly refused to credit plaintiff with the receipts from Tucker. The costs of the reference, if one prove necessary, will be added to the defendant's claim. The registrar will tax costs and will report ultimate balance due defendant as of a date 21 days after the date of his report. In default of redemption within that period, the plaintiff will

stand foreclosed of all interest in the car in question, not including the platform body. The account to be taken will not touch the earlier transaction as to the passenger body. That stands unaffected by this judgment. Defendant to have the carriage of the reference.

Judgment accordingly.

[EXCHEQUER COURT OF CANADA—IN PRIZE.]

THE OREGON.

Prize Court—Petition by marshal to unlade, survey and sell cargo of seized ship before writ issued—Perishable or damaged cargo—Inherent jurisdiction to preserve cargo.

The Prize Court has jurisdiction, both statutory and inherent, to take all necessary steps to preserve property in its custody, and, therefore, an order will be made that the cargo of a seized ship should be unladen, inventoried and warehoused to protect it from damage by damp and heat. This jurisdiction begins from the "moment of seizure," and may be exercised before the issue of a writ.

Prize Court, at Victoria, B.C., before the Honourable Mr. Justice MARTIN, Local Judge in Prize for British Columbia, 26th June, 1916.

Statement

PETITION presented by the marshal in prize. The ship, a three-masted power schooner, had been seized by H.M.C.S. Rainbow, Walter Hose, Acting Captain, on or about the 23rd of April, 1916, in the Gulf of California, and brought into Esquimalt, B.C., on the 29th of May, 1916, and pursuant to section 16 of the Naval Prize Act, 1864, delivered up to the marshal on the following day. On the 1st of June the affidavit as to ship papers, required by section 17 of said Act and Order IV., had been filed, but no writ had yet been issued.

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June 26.

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Statement

The marshal's affidavit shewed that the cargo, a miscellaneous one of about 245 tons, had been partly damaged by damp and water in the hold, there being about three feet of water therein at the time the marshal took possession, and that the vessel was taking water at the rate of about five inches per day and had to be pumped out daily; that there was a very bad smell with heat coming from the cargo through the one small ventilating hatch, the main hatches having been sealed up, which led to the belief that certain portions of the cargo were sweating, in consequence of which the marshal unsealed the main hatches and inspected the cargo so far as possible and found that certain boxes of sugar in the lower tiers of stowage had been damaged by water, and also many sacks of corn, and probably other goods; that there were about 50 tons of coffee, and a large amount of cigars and cigarettes, leather, dried bananas, etc., etc., which should be removed without delay in order to be preserved from deterioration from damp and heat and sweaty conditions. On this state of facts,

Argument

Harold Robertson, for the marshal, moved for an order that a survey should be made of the ship and that the cargo should be unladen and sold, and, for that purpose, that the ship should be brought to Victoria harbour. Though no proceedings have been begun, yet the Naval Prize Acts and Rules contemplate steps being taken to preserve the cargo at any stage: see sections 16, 17, and 31, of the Naval Prize Act, 1864, and Order IV., rr. 1-6; Order V., r. 4; Order XI., rr. 1, 2, 10, 11, which shew that certain applications may be made to the Court at any time after seizure, upon which this Court has sole jurisdiction: *Le Caux* v. *Eden* (1781), 2 Doug. 594, 613-4; Tiverton's Prize Law, 1. He asked for a direction that the ship be brought to Victoria, where there were better facilities than at Esquimalt for unlading and warehousing.

Luxton, K.C., for the proper officer of the Crown, supported the application, in so far as it asked that the cargo should be unladen, warehoused and inventoried. By the Interpretation Order, r. 2, provisions as to ships extend and apply, *mutatis mutandis,* to goods, and also to freight (if any) due or to grow due.

Crease, K.C., for Bartning, Guerena y Cia, of Mazatlan, Mexico, claimants of 229 packages of cargo, agreed that, if possible, steps should be taken by the Court to preserve the cargo from further damage, but complained of the delay in the institution of proceedings, and asked that in any order that should be made the various goods should be directed to be kept distinct and ear-marked for the protection of the consignees and owners thereof.

Martin Swanson, the master of the ship, being in Court, and the attention of the learned judge being called to that fact, he was asked by his Lordship if he wished to be heard, but said he did not.

Statement

Per curiam: In my opinion, the statute and rules warrant the making of an order at any time to preserve a ship or a cargo which is in the custody of the Court by its marshal, subject to its orders (section 16), and the hand of the Court is not stayed in this, or certain other respects, because the writ has not yet been issued. An order, therefore, is now made that the goods "be unladen, inventoried and warehoused," as mentioned in section 31, the various consignments being kept distinct, but the time has not arrived to consider the question of a sale, which may be better decided upon after the marshal has made his return to the commission which will issue to him for the aforesaid purposes. It is unnecessary to give any directions to the marshal as to where or how the unlading should take place: that is part of his duty to decide.

Judgment

I may add that, quite apart from any statute or rule, this Court has inherent jurisdiction to take all necessary steps to preserve any property which is in its custody, and its jurisdiction begins not merely when the ship is delivered to the marshal, but from the moment of seizure: *The Zamora* (1916), 2 A.C. 77, 99, 108; 85 L.J., P. 89; 32 T.L.R. 436; 2 P. Cas. 1, wherein it is stated that "the primary duty of the Prize Court . . . . is to preserve the *res* for delivery to the persons who ultimately establish their title."

The question of costs will be reserved to be spoken to later.

Order accordingly.

MARTIN, J.P.C. (At Chambers)

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[EXCHEQUER COURT OF CANADA—IN PRIZE.]

THE OREGON (No. 2).

Prize Court—Appearance—Leave to enter after lapse of time—Enemy claimant's affidavit—Condition precedent—Order III.

Where leave is given to enter an appearance after the expiration of eight days after service of the writ, it is not a condition precedent to the granting of the application that an alien enemy should then file an affidavit stating the grounds of his claim.

Prize Court, at Victoria, B.C., in Chambers, before the Honourable Mr. Justice MARTIN, Local Judge in Prize for British Columbia, 22nd August, 1916.

Statement SUMMONS for leave to enter appearance.

Bullock-Webster: I apply, under Order III., rr. 1 and 2, for leave for the master to enter appearances for several of the consignees resident in Mexico who have not already entered appearance, as some others have, within the prescribed eight days. We wish to protect the consignees.

[Reads affidavit of Martin Swanson, master of the Oregon, setting out the facts.]

Argument *Luxton, K.C.*, for the proper officer of the Crown: There is nothing to shew that these applicants are not alien enemy subjects: see Order III., r. 5. This should be shewn affirmatively. One of them is believed to be a German subject, and in the examination of the master of the ship he said he thought so; this man, at least, should file an affidavit stating the grounds of his claim.

Bullock-Webster: I only ask for leave to enter an appearance, and if I get it I am in the same position as if I were within the regular eight days, and I have to conform to the rule and take the risk of my appearance being struck out if I do not.

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Per curiam: Leave will be given to enter an appearance. The effect of this is to put the applicants in the same position as though they were within the eight days, and they must conform to the rules as regards an alien enemy or otherwise, but to obtain this leave the filing of an affidavit under Order III., r. 5, is not a condition precedent, though in the case of one who is an alien enemy it ought to be filed before appearance, and the consequences for not doing so will later be visited upon such defaulting party. It should not now be assumed that the rule will not be complied with at the proper time by the alien enemy, if he is one. The giving of leave is the first step, and the filing of the affidavit is the second.

Order granted.

[EXCHEQUER COURT OF CANADA—IN PRIZE.]

MARTIN, J.P.C. (At Chambers)

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Aug. 15.
Sept. 12.

THE OREGON

THE OREGON (No. 3).

Prize Court—Examination of witnesses and postponement of—Pleadings—Petition—Particulars—Orders VII., VIII.

The examination of witnesses, officers of a seized ship, who are about to leave the jurisdiction will not be postponed until a petition is filed by the Crown.

Pleadings and particulars of the grounds for condemnation will only be ordered in very special cases.

Particulars ordered in the circumstances of the present case, there being no intimation given in the writ of such grounds.

Prize Court, at Victoria, B.C., in Chambers, before the Honourable Mr. Justice MARTIN, Local Judge in Prize for British Columbia, 15th August, 1916.

Statement

SUMMONS for an order that the proper officer of the Crown be directed to file a petition under Order VII., shewing upon

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what grounds the condemnation of the ship and cargo are sought, and that till that is done the pending examination before the registrar of the master and three other witnesses, officers of the ship (*viz.*: the purser, engineer and wireless operator), not being British subjects, on behalf of the Crown, pursuant to order already made, be postponed: the said witnesses after their examination proposed to leave British Columbia.

Bullock-Webster, for owners of the ship and certain cargo owners: We are, so far, in the dark, because we do not know what are the grounds of seizure: impossible for us to meet any case that may be sprung on us later: Tiverton's Prize Law, p. 80; Order VI., r. 7; Order XV., r. 4. In *The Bellas* (1914), Mayers's Admiralty Law, 512, 524, such a petition was filed. Ship brought here at end of May last, but though all this time has elapsed no petition has been filed. We should not be called upon to answer a case against us which may take a large number of various aspects. In all fairness the Crown should now disclose its case. The proposed witnesses are seafaring men, and once they leave the jurisdiction there is practically no way of our getting them again as witnesses—they may be scattered far away on long sea voyages.

Argument

Crease, K.C., for Bartning, Guerana y Cia, of Mazatlan, Mexico, part owners of cargo, followed to same effect, and took similar position. We also are vitally interested to know what the grounds are. It is contrary to justice to be asked to meet a case without knowing what it is. Our case will inevitably be prejudiced, and justice will fail.

Luxton, K.C., for the proper officer of the Crown: The procedure in *The Bellas* case is respectfully submitted to be wrong, but the point never was contested. After the ship is seized the onus is on it to clear itself. Claimants will not be prejudiced by the examination being taken. Under old practice, standing interrogatories were delivered to those who were on the ship: *The Haabet* (1805), 6 C. Rob. 54. But this was changed in 1914: Order XV., r. 3. Proper time must be allowed to the Crown to get up its case. But point concluded by recent case—*The Antares* (1915), 1 P. Cas. 261.

At present I am not in a position to state what the grounds for condemnation are, and could not be instructed before the examination begins in three days, the 18th. Here there will be no injustice done; the examination will disclose our hand, and as it is disclosed the cross-examination will be able to meet the case of the claimants. The witnesses who are about to leave the jurisdiction almost immediately cannot be detained, and if their examination is prevented their testimony may be lost.

Bullock-Webster, in reply: This is a very special case, and I ask for an order for pleadings under Order VII.

Crease, K.C.: I also submit that it is a very special case, for practically all the witnesses who will be examined on our behalf are those who are going away, and we cannot, in the circumstances, satisfactorily set up our case. *The Bellas* case is a direct authority, and this case is a stronger one: see Order VIII., which provides for particulars, and forms 14 and 15. It extends to other documents than pleadings. At least, particulars should be given of the grounds for condemnation against us.

Argument

[Judgment was reserved till later in the same day.]

Per curiam: After careful consideration, and consulting all the authorities available, I have reached the conclusion that the part of the summons which asks that the Crown do file a petition should stand for further consideration, for it may, probably, be disposed of to better advantage after the result of the examination is known. In the circumstances, I would not be justified in delaying the examination which is to take place within three days, and there is no way of detaining these foreign witnesses, who are about to leave the jurisdiction for Mexico. The mere fact that there are no pleadings or particulars for condemnation would not warrant the postponement of the examination, which at this stage very largely, at least, represents the former examination under the old practice of "three or four principal persons belonging to the captured ship" on the standing interrogatories "within all practicable speed after the captured ship is brought into port" under repealed section 19 of the Naval Prize Act, 1864.

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I give leave to the applicant to amend the summons to ask alternatively for the delivery of particulars. Costs reserved pending further consideration after the examination is finished.

The examination of the witnesses was had and later, on the 12th of September, 1916,

Bullock-Webster, representing fifteen different claimants, renewed application made originally on the 15th of August, pursuant to leave reserved, for the filing of a petition by the Crown, or alternatively the delivery of particulars of the grounds for condemnation. Refers to *The Bellas* case, *supra,* and *The Antares, supra,* and distinguishes the latter. There the ship was carrying absolute contraband. The writ itself gave the information, or a great part of it, that I now ask: see the report indicating the grounds why the captors' alleged condemnation should be ordered. All I ask for herein is some information why the Oregon was seized. Since last argument the examination has been finished and extended to 247 pages, which I refer to. Ship seized on the 23rd of April, 1916, and brought into Esquimalt on the 29th of May, but writ only issued on the 27th of July. Crown has had nearly two months to be instructed. There has been undue delay. We still do not know the reason for seizure even though the examination has been had, which disclosed not a scintilla of evidence or any suggestion of improper conduct or communication with enemy ships or subjects. In any event, this is an exceptional case within the President's ruling in *The Antares* case, and by which this Court is not bound, but we should, in that view alone, have as much particulars given here as they got there. But *The Bellas* case should be followed. I cannot tell what witnesses I shall have to bring from a great distance and at great expense to meet an unknown and possible case. Cannot go to trial with any hope of justice as matter now stands.

Argument

Crease, K.C., for Bartning, Guerena y Cia, part owners of the cargo: We take the same position, as our rights depend on the fate of the ship. This is a mixed cargo, with a variety of

claimants, living at different places and carrying on different kinds of business. This case is stronger than *The Bellas*. To try such divergent claims without definite issue or the real points in controversy would lead to great and unwarrantable expense: Tiverton's Prize Law, pp. 55, 64, 80. In any event, particulars should be ordered, and the writ may be amended by inherent jurisdiction. This is an international Court, and causes should be accelerated to prevent hardship and loss: see Particulars, Order VIII.

Luxton, K.C., contra: These four witnesses were examined under Order XV., r. 3, at the instigation of the Crown, the captors, yet that examination is to "obtain all information for the assistance of the Court," and these witnesses are really here also for the defence, and their depositions take the place of the old standing interrogatories: Naval Prize Act, 1864, section 19. Carlos Linga is the sole charterer of the ship, with full control. He was admitted on his own affidavit to have been born in Germany: see *The Zamora* (1916), P. 27 at p. 36. In *The Bellas* case the point never came up: see in Nova Scotia *The Sandefjord* (1915), before Drysdale, J.P.C., a copy of whose judgment, in January, 1915, I have here—not yet reported—which holds that the claimants, and not the Crown, should be ordered to file a petition. It is not the proper practice for the Crown to file a petition to itself, but the claimant: see form 13 (i).

Argument

Bullock-Webster: *The Sandefjord* case is contrary to *The Antares* and Order VII., r. 1, says "a party instituting a cause," which is general and includes the Crown, or failing that, then Order V. applies and claimant institutes the writ. The power to order a party to file a petition is not restricted to claimants; the language fully covers the point. We should not be called upon to file sixteen different petitions of sixteen entirely different claimants.

Crease, K.C.: There is a claim for condemnation in the writ that the ship is a good and lawful prize, seized and taken as prize, and of that allegation particulars can and should be ordered. There are other forms of petition (*e.g.*, Nos. 13 (ii.) and iii.)), in which the captors file a petition, and the note on

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p. 47 of the rules says that the forms are given as examples only and should be adapted to other cases.

Per curiam: In the view which I am about to express it will be unnecessary for me to decide the important point as to whether or not the Crown can be required to file a petition under Order VII., r. 1. In the case of *The Sandefjord,* an unreported decision of Mr. Justice Drysdale in the Prize Court for Nova Scotia, he (according to what purports to be a copy of his judgment), gave a "ruling as to the proper party to begin such pleading" under said Order as follows:

"I think it is the plain intention of the Rules that where a party appears and makes a claim, if pleadings are directed the claimant should begin by filing his petition to which the Crown answers and on the petition and answer the cause goes down to trial in the absence of any further order.

"The party instituting the cause may be ordered to file a petition and in a proper case this could be done but when parties appear and make a claim I think the Rules contemplate a petition or statement of claim of such parties in the form of pleadings to which the Crown pleads by what is technically called under the rules an answer. This will be my direction in this case and after the claim or claims be duly made herein, an order will pass for pleadings."

The exact date of this decision is not before me, but it recites that the summons on which it was given was issued on the 12th of January, 1915. Since that time, however, we have the further benefit of the decision of the President of the English Prize Court on the 8th of March, 1915, in *The Antares,* 1 P. Cas. 261, 270-1, wherein that learned judge refused an application for pleadings or for particulars of the Crown's claim, saying that:

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"I am not going to be a party, except in extremely special cases—there may be some—to the introduction of pleadings, summonses for particulars, etc., into these Prize Court proceedings."

But there is no suggestion that when that sort of case does arise the Crown, which is unquestionably included in the expression "A party instituting a cause" in rule 1 (as it has instituted this cause by issuing a writ under Order II., r. 1) should not be required to file a petition, or give particulars under Order VIII., as the case may be. And it should further be noted that the prior case of *The Bellas,* decided on the 15th of December, 1914, Mayers's Admiralty Law, 512, 524,

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wherein the learned President of this Court, at Ottawa, made an order directing the Crown to file a petition, was not cited to the learned judge who decided *The Sandefjord,* and though such order was not contested, yet nevertheless, that action was taken without objection as to its propriety.

But as intimated above, I am not called upon to express an opinion on this point, and, therefore, shall reserve it for a future occasion, should it arise, because I think this, in any event, is a very special case wherein, at least, the Crown should give particulars of its bare claim in the writ "for the condemnation of them (*i.e.,* ship and cargo) as good and lawful prize seized and taken as prize by our Ship of War Rainbow." Said Order VIII. does not restrict the delivery of particulars to the case of pleadings, and the form of Order No. 14 refers to matters "alleged" in "the pleadings or other documents in which the allegations are contained." I am the more moved to make the direction because I note that in *The Zamora* (1916), P. 27; 2 P. Cas. 1, the writ set out with brief yet sufficient particularity the different grounds of condemnation, as it did also in *The Antares,* a fact which is to be borne in mind in applying the above-quoted remarks of the learned judge therein. As the writ herein stands now I feel that, having regard to all the circumstances of the case, particularly the many different classes of claims, with various claimants in different places, the great distance and difficulty of communication in the present unhappy disturbed state of Mexico, the absence and dispersion of certain witnesses, it would lead to so much expense and delay as to almost be oppressive were all these different claimants required to come into Court with each one necessarily prepared to meet all possible grounds, yet in complete ignorance of any one ground upon which condemnation was sought.

Judgment

Therefore, I direct that particulars be delivered, this to be done on or before the 2nd of October next. Costs to be in the cause.

Order accordingly.

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May 25.

UNION BANK OF CANADA v. WEST SHORE AND NORTHERN LAND COMPANY, LIMITED, KEITH, WHYTE AND HAMMOND.

UNION BANK OF CANADA v. WEST SHORE AND NORTHERN LAND CO.

Promissory note—Alteration in—Assent of maker not obtained—Right of action by holder against maker and indorsers.

A company of which A was president made a promissory note signed by A, as president of the Company, payable to A and B in one month. A and B indorsed the note and presented it to a bank for discount. The bank would not discount unless C's indorsement was obtained. C would not indorse unless payment of the note was changed from one to two months. The bank manager thereupon, without A being present or obtaining his assent, changed the word "one" to "two" on the note. C then indorsed and B and C initialled the change. The bank discounted the note, and on its maturity brought action against A, B, and C for payment.

Held, that the alteration was a material one that vitiated the note, as the change was not assented to by the maker, and the holder could not recover in an action against the maker or indorsers.

APPEAL from the decision of MORRISON, J. in an action tried at Vancouver on the 15th of October, 1915, upon two promissory notes. The facts are that on the 20th of June, 1914, The West Shore and Northern Land Company, Limited, of which the defendant, J. C. Keith, was president, made a note payable in two months to the order of J. C. Keith and Albert Whyte for $2,000. The note was signed by the president and secretary of the Company, indorsed by J. C. Keith and Albert Whyte, and discounted by the Union Bank of Canada at its Vancouver branch. Upon its expiry (*i.e.*, the 24th of August) a new note was drawn in the same way for the amount due, payable in one month, and indorsed by Keith and Whyte. When presented to the Bank for renewal of the June note, the manager would not accept it without further indorsement. After discussion in the Bank manager's office it was decided that it would be accepted if they obtained George J. Hammond's name. Hammond agreed to indorse if they made the note payable in two months instead of one. The Bank manager then changed the word "one" to "two," and the

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change was initialled by Whyte and Hammond. Keith was not present when the change was made, being confined to his house through an illness from which he shortly afterwards died, and although it was the intention to do so, he was never asked to initial the change in the note. Upon the August note coming due the Bank sued on said note, or in the alternative, on the June note. The learned trial judge dismissed the action as to the August note, but gave judgment for the plaintiff on the June note against those defendants who were parties thereto. The defendant Anne Jane Keith, executrix of the estate of J. C. Keith, appealed, and the plaintiff Bank cross-appealed on the ground that the defendants should have been held liable on the August note.

McPhillips, K.C., for plaintiff.
M. A. Macdonald, for defendant Company and Whyte.
A. M. Whiteside for defendant Anne Jane Keith.
Cassidy, K.C., and *O'Brian,* for defendant Hammond.

12th February, 1916.

MORRISON, J.: The defendant Company, the late J. C. Keith, and the defendant Whyte, had been for some time renewing and discounting a certain promissory note for $2,000 with the plaintiff Bank, the time being one month. On the 20th of June, 1914, a renewal was effected for one month, the defendant Company making the note as before, which, as on previous occasions, was again indorsed by Keith and Whyte. This note fell due and a renewal was drawn up, signed and indorsed as before, Keith's signature, as president of the Company, appearing on the face of the note, and he, as well as Whyte, again indorsed. Keith at that particular time was at home and very ill. Mr. Rowley then was local manager of the plaintiff Bank, but over him was Mr. Vibert, the superintendent. Mr. Rowley was apparently satisfied to follow the usual course respecting the renewals, but upon reference to Mr. Vibert a difficulty arose, he not being willing to take the renewal without another indorser and the defendant Hammond was named, who, upon being approached, refused to indorse a note for one month but agreed to do so if the time were extended to two months, which was accordingly done. The change was

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then and there made, pursuant to what I find was an independent collateral agreement between Hammond and the Bank. Then arose the question of getting Keith to initial the alteration. Whyte declined to trouble him so soon after having already got his signature. It appeared that no one cared to do so, particularly at that juncture. The note, in this condition, was left with the Bank, which in due course took the usual protective steps upon non-payment. Before the due date Keith died, without knowing anything of the alteration above referred to. Hammond did not hear anything more about the matter until proceedings were begun, or, at least, did not know that the Bank was seriously trying to hold him liable. Now the Bank is seeking to hold all the defendants liable on this note of August, 1914, altered as aforesaid. Hammond, in effect, states that he had practically no interest in the subject-matter of the note, and indorsed as an accommodation on the specific understanding that if Keith and the Company were to make a note for two months he would indorse. He expected Keith would initial the alteration. I accept Hammond's evidence as to how he came to put his name on the note. I am satisfied that were Keith to be left out he would not have considered the matter at all. That being my view, there will be judgment for him, with costs, and he is eliminated from this suit. Keith was ignorant of this material alteration, and as far as this particular incident is concerned there will be judgment for the defendant executrix, with costs. As to Whyte, he was vitally interested, and acquiesced in all that was done. He acted *bona fide* and sympathetically, and I do not think he is in any way trying to evade, by any formal defence, any just claim the Bank may have against him. The plaintiffs claim alternatively on the note of June, and I think they are entitled to succeed. The attempt to effect another renewal of this note failed—it came to naught.

MORRISON, J.

There will be judgment for the plaintiff on the note of June, 1914, as claimed in the alternative, with costs.

The appeal was argued at Vancouver on the 23rd and 25th of May, 1916, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

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Whiteside, K.C., for appellant: If you are surety on a note and it is altered without your being notified and obtaining your assent, you are relieved from responsibility: see section 145 of the Bills of Exchange Act, R.S.C. 1906, Cap. 119; *Suffell* v. *Bank of England* (1882), 9 Q.B.D. 555. There is no evidence that Hammond expected Keith to be on the note, and the learned trial judge's finding of fact as to this should be disregarded.

O'Brian, for respondent Hammond: The renewal note was no note at all, as all parties must agree to the alteration. Hammond signed the note on the understanding that Keith would be on it. Keith was not a party to the change and was therefore not a party to the note as changed; this, therefore, relieves Hammond.

McPhillips, K.C., for respondent Bank: The question is whether the second note is a completed renewal of the first: see *Wyton* v. *Hille* (1915), 25 Man. L.R. 772. There was no suggestion of fraud—simply an unauthorized alteration. It is a question of fact as to whether Hammond signed on the understanding that Keith was to be kept on, and the trial judge has so found.

Argument

Whiteside, in reply: The duty of the Court of Appeal as to such finding is defined in *Coghlan* v. *Cumberland* (1898), 1 Ch. 704.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the alteration was a material one and vitiated the note. In that view of the case, the judgment below should be sustained and the appeal dismissed.

MARTIN, J.A.

MARTIN, J.A.: I have already expressed my views to a similar effect.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree.

Appeal dismissed.

Solicitor for appellant: *A. M. Whiteside.*
Solicitor for respondent Bank: *L. G. McPhillips.*
Solicitor for respondent Hammond: *C. MacL. O'Brian.*

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May 22.

BROWN v. BANK OF MONTREAL

BROWN v. THE BANK OF MONTREAL.

Debtor and creditor—Preference—Assignment of book debts—Pressure—Creditors' Trust Deeds Act, R.S.B.C. 1911, Cap. 13, Secs. 52 and 53—Fraudulent Preferences Act, R.S.B.C. 1911, Cap. 94, Sec. 3.

If *bona fide* pressure is exercised by the transferee upon the debtors, and there is no fraud, the transfer should be upheld even if the inference is that the debtor was at the time insolvent and the transferee knew of his financial condition.

APPEAL from the decision of CLEMENT, J. in an action tried at Vancouver on the 7th of February, 1916, to have it declared that a certain assignment of book debts made by The Glover, Rice Hardware Co., Limited, to the Bank of Montreal is fraudulent and void as against the plaintiff as assignee for the benefit of the creditors of the said Company, to have the assignment set aside, and for an account taken of all moneys received by the Bank in respect thereof. The Glover, Rice Hardware Co., Limited, was incorporated in February, 1912, with a paid-up capital of $20,000, and carried on business in Vernon, B.C. The capital stock of the Company was owned by J. W. Glover, W. H. Rice, and their wives, Glover being the first president and general manager. Rice was a director up to March, 1914, when he sold his stock and resigned as a director. On September the 22nd, 1914, Glover died. On the 6th of October following, at a meeting of the directors, a share of the Company was issued to Rice, who was, by resolution, made president and general manager of the Company, which position he filled until the Company went into liquidation on the 15th of February, 1915. Shortly after commencing business the Company borrowed $3,000 from the Bank of Montreal, when both Glover and Rice personally guaranteed the Company's account. In 1912 the Company made a small profit, but in 1913 there was a loss of $4,000, and in 1914 a further loss of $6,000. The indebtedness to the Bank gradually increased, and in October, 1914, it was slightly over

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\$6,000, at which time the assets of the Company were about \$29,000 and the liabilities \$19,000. The manager of the Bank twice asked Glover, shortly before his death, for an assignment of the Company's book debts to secure the indebtedness to the Bank, but owing to his illness he was not further pressed in the matter. Upon Rice assuming control the Bank's manager then asked Rice for this security, and on the 31st of October, 1914, Rice assigned to the Bank the book debts of the Company. From the commencement of its business the Company obtained the very large portion of its goods from McLennan, McFeely & Co., Limited, of Vancouver, who were its principal debtors, and after the Company's assignment for the benefit of its creditors McLennan, McFeely & Co. obtained an order, under section 53 of the Creditors' Trust Deeds Act, giving them the right to bring action to set aside the assignment of the book debts to the Bank as being fraudulent and void as against the Company's creditors. The learned trial judge gave judgment for the plaintiff. Defendant appealed.

Statement

Armour, for plaintiff.
Wilson, K.C., and *Whealler,* for defendant.

7th March, 1916.

CLEMENT, J.: After a careful perusal of the evidence, I find myself forced to the conclusion that the assignment to the defendant Bank was in clear fraud of the creditors. It was designed by both parties to it to help out Rice and the Glover Estate at the expense of the general body of creditors. Rice had gone in upon Glover's death at the suggestion of the Bank's local manager, not to carry on, but to wind up, the Company's business, and to wind it up in such fashion as to lessen as far as possible the burden of the liability of Rice as guarantor to the Bank of the Company's indebtedness to the Bank. This would be a perfectly honest and legitimate motive, but when the local manager and Rice put through the assignment of the Company's book debts their action was neither honest nor legitimate. The Bank did not really want the assignment. There is no suggestion that the guarantors were not men of ample

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means. Under these circumstances the act of Rice in signing the assignment to save his own skin cannot be too strongly condemned, and I must confess that I cannot see any excuse for the Bank's local manager becoming a party to such a palpable act of injustice to the Company's trade creditors. Rice's lack of authority may not be a matter of which the plaintiff's assignee can take advantage on this record as a distinct ground for declaring the assignment invalid; but it is an element of fraud, and the dishonesty must surely have been plain to the Bank's local manager.

There will be judgment for the plaintiff, with costs.

The appeal was argued at Vancouver on the 19th of May, 1916, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Argument

Wilson, K.C., for appellant: This action was commenced by direction of an order obtained by McLennan, McFeely & Co., under section 53 of the Creditors' Trust Deeds Act. The assignment they seek to set aside was made to the Bank on the 6th of November, 1914. On the 15th of February, 1915, The Glover, Rice Hardware Co., Limited, assigned for the benefit of its creditors. An assignment of book debts stands on the same footing as an assignment of chattels: see *Koop* v. *Smith* (1915), 51 S.C.R. 554; *Codville* v. *Fraser* (1902), 14 Man. L.R. 12. There was pressure by the Bank for further security, the Bank knowing the financial condition of the Company: see *Whitney* v. *Toby et al.* (1884), 6 Ont. 54; *McRoberts* v. *Steinoff* (1886), 11 Ont. 369; *Stephens* v. *McArthur* (1891), 19 S.C.R. 446 at p. 453. At the time of the assignment of the book debts to the Bank the assets were about $29,000 and the liabilities about $19,000. It should be inferred they were solvent unless there is evidence to the contrary: see *Ex parte Stubbins. In re Wilkinson* (1881), 17 Ch. D. 58. If the dominant motive is not to give preference over other creditors the assignment is good: see *Middleton* v. *Pollock* (1876), 2 Ch. D. 104 at p. 108; *Adams* v. *Bank of Montreal* (1901), 32 S.C.R. 719. There is no difference between a request and a demand as far as the doctrine of pressure is concerned. On the duties of the

trustee see *Sharp* v. *Jackson* (1899), A.C. 419; *The Molson Bank* v. *Halter* (1890), 18 S.C.R. 88.

Armour, for respondent: The transaction was fraudulent, and the learned trial judge so found. It was entirely for the purpose of saving Rice, who had gone surety. The trial judge found there was sufficient evidence to make that finding, and he should not be interfered with. On the question of pressure, a mere request is not sufficient.

MACDONALD, C.J.A.: I think the appeal must be allowed. In view of such authorities as *Stephens* v. *McArthur,* and *Adams* v. *Bank of Montreal,* and it appearing that the pressure was not sham pressure, but, on the contrary, applied insistently by the Bank manager, we are bound, I think, to hold that there was such pressure as the law recognizes as sufficient to sustain an assignment of this kind. I have no doubt there was insolvency, and I have no doubt that the Bank manager was aware of the financial condition of the Company, but that does not matter if there was pressure and there was no fraud. Following the authorities, it seems to me there is nothing to do but to allow the appeal.

MACDONALD, C.J.A.

MARTIN, J.A.: I agree, and I have nothing to add except to say this, that what is or is not sham pressure was settled by *Adams* v. *Bank of Montreal* (1899), 8 B.C. 314 at p. 317. In *Koop* v. *Smith* (1914), 20 B.C. 372, our decision was reversed on appeal by the Supreme Court of Canada on quite another branch of law, on the ground of maxim of prudence, as it is referred to in the Ontario cases, in which it is held that there is a certain amount of presumption where there is any family relationship. I agree with what has been stated by the Chief Justice.

MARTIN, J.A.

MCPHILLIPS, J.A.: I would allow the appeal. I think it is quite possible this assignment could have been set aside if it had been attacked within 60 days. However, this attack was later than 60 days.

MCPHILLIPS, J.A.

The principle was well enunciated, and the question of pressure fully dealt with in *Adams* v. *Bank of Montreal,* which

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case was affirmed by the Supreme Court of Canada, and which decision is binding upon us.

Koop v. *Smith* (1914), 20 B.C. 372, was reversed by the Supreme Court of Canada on the ground that, owing to the close relationship of brother and sister, there was an onus which had not been satisfactorily discharged. Until that decision there was no settled principle that where such relationship existed independent evidence must be adduced. But the question of relationship does not exist in this case.

I think, with all respect to the learned trial judge, that his decision in holding fraud, was quite unwarranted upon the evidence.

Appeal allowed.

Solicitors for appellant: *Billings & Cochrane.*

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

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T. R. NICKSON CO. v. DOMINION CREOSOTING CO.

T. R. NICKSON COMPANY, LIMITED v. THE DOMINION CREOSOTING COMPANY, LIMITED *ET AL.*

Company law—Contract—Assignment of debt—"Mortgage or charge"—Companies Act, R.S.B.C. 1911, Cap. 39, Sec. 102.

N., a company, entered into contracts with V. for the paving of portions of three streets, N. to keep the streets in complete repair for one year from the completion of the work and V. to retain for said period ten per cent. of the contract price in each case as a guarantee that N. would live up to the contract to keep in repair for that period of time. Creosoted blocks required for the work were purchased by N. from D. and N. assigned absolutely to D. the ten per cent. of the contract price in each case that was held back by V. in part payment for the price of the blocks. Some time after the contracts were completed and the amounts due thereon ascertained, N. assigned for the benefit of its creditors. The assignments from

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N. to D. were never registered with the registrar of joint-stock companies. An action by the liquidator to set aside said assignments to D. as void under section 102 of the Companies Act was dismissed.

Held, on appeal (reversing the decision of CLEMENT, J.), that although the assignments were absolute in form, they were given to secure an indebtedness either present or to be incurred in the future, and therefore fall within section 102 of the Companies Act, and must be registered in order to be valid as against a liquidator.

APPEAL by plaintiff from the decision of CLEMENT, J., of the 27th of January, 1916, on an interpleader issue tried by him at Vancouver on the 27th of January, 1916. The issue arose out of three contracts entered into between the City of Vancouver and the plaintiff Company for laying creosoted block pavements on portions of Pender Street, Hastings Street and Fourth Avenue, in the City of Vancouver. The plaintiff Company purchased creosoted blocks from the defendant Company as they required them for the work. The contract for the Pender Street work was made on the 28th of May, 1912, the work was completed on the 22nd of August, and the final certificate of completion of the work was issued by the city engineer on the 17th of September of the same year. The Hastings Street contract was dated the 28th of July, 1913, the work completed on the 21st of May, 1914, and the certificate of completion dated the 1st of September, 1914; and the Fourth Avenue contract was dated the 8th of September, 1913, the work completed on the 4th of July, 1914, and certificate issued on the 10th of August, 1914. The amounts due from the City in each case were ascertained when the final certificates were issued. The contracts provided that the contractors should maintain the roads for one year from completion of the work, and it was further provided that the City should retain 10 per cent. of the contract price for one year after the completion of the work in each case to insure the carrying out of the contract to keep in repair. The Dominion Creosoting Company supplied the T. R. Nickson Company with all the creosoted blocks required for the work under these contracts. Under an instrument of the 3rd of September, 1912, after referring in the preamble to the Pender Street contract, that it was completed, and that there was still due from the City

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thereon the sum of $2,084.75 (being 10 per cent. of the contract price held for one year for repairs, as provided in the contract), and that the T. R. Nickson Company was indebted to the Creosoting Company for the purchase of creosoted blocks, the T. R. Nickson Company assigned to the Dominion Creosoting Company the final payment from the City of $2,084.75. By a second instrument, dated the 26th of May, 1913, the said Company made a blanket assignment of the 10 per cent. of the contract price retained by the City for the year 1913, and on the 11th of June, 1914, they made a similar assignment with reference to all contracts during the year 1914. The assignments provided that the assignor would only receive credit for 90 per cent. of the moneys assigned on the indebtedness due the assignee, the remaining 10 per cent. being allowed the assignees in consideration of the one year's delay in the payment by the City of the moneys assigned. Notice of the assignments was duly served on the City, but the assignments were never registered with the registrar of joint-stock companies under section 102 of the Companies Act. The T. R. Nickson Company assigned for the benefit of its creditors on the 26th of October, 1914. The liquidator brought action against the City for the amount due on said contracts. Upon the application of the City the money due on the contracts was ordered to be paid into Court, and that the plaintiff and the claimants proceed to trial. The plaintiff's contention was that as the assignments were not registered with the registrar of joint-stock companies and they being in the nature of a mortgage or charge, were void under section 102 of the Companies Act as against the creditors of the T. R. Nickson Company. The learned trial judge held in favour of the Dominion Creosoting Company.

Statement

The appeal was argued at Vancouver on the 22nd of May, 1916, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Stuart Livingston, for appellant: The assignment we attack was not registered under section 102 of the Companies Act. We say this was an equitable assignment that was subject to the above section, and should have been registered: see *Bank of Scotland* v. *McLeod* (1914), A.C. 311 at p. 317; Encyclopædia

Argument

of the Laws of England, Vol. 1, p. 357. Where there is an expectancy, and there is no immediate fund upon which the legal assignment could operate, the assignment comes within the term "mortgage or charge," and must be registered. The assignment was absolute in form, but as it was intended by the parties to operate as a "charge," it must be registered: see *Re The Metropolitan Mortgage, &c., Co.* (1915), 7 W.W.R. 1204; *Mercantile Bank of London, Lim.* v. *Evans* (1899), 68 L.J., Q.B. 921.

J. H. Senkler, K.C., for respondent: My contention is that the assignment never was in the nature of a charge or mortgage. Although the actual receipt of the funds assigned was to be paid at a future date, it was an assignment in which the assignor had no further interest in any shape or form, so that it does not come within section 102. The liquidator cannot be in a better position in this regard than the assignor. On the question of what is a charge or mortgage, see *Santley* v. *Wilde* (1899), 2 Ch. 474; *Tancred* v. *Delagoa Bay and East Africa Railway Co.* (1889), 23 Q.B.D. 239 at p. 242; *G. and C. Kreglinger* v. *New Patagonia Meat and Cold Storage Company, Limited* (1914), A.C. 25 at p. 47; *Durham Brothers* v. *Robertson* (1898), 1 Q.B. 765; *Hughes* v. *Pump House Hotel Company* (1902), 2 K.B. 190; *Buntin* v. *Georgen* (1872), 19 Gr. 167 at p. 171; *Skipper & Tucker* v. *Holloway and Howard* (1910), 2 K.B. 630. The definition of the term "charge" is clear. It is a document that gives a right of payment of a certain sum out of a fund or security, but does not pass the fund or security. In this case the fund is absolutely disposed of by the assignor. The assignments in question clearly took away from the assignor any right of redemption; therefore they cannot be regarded as a security: see judgment of Lord Parker in the *Kreglinger* case, *supra.*

Argument

Livingston, in reply.

MACDONALD, C.J.A.: I think the appeal must be allowed. I think there is sufficient evidence to shew that the assignments were given to secure an indebtedness either present or to be incurred in the future of Nickson to the Creosoting Company, and that, therefore, they would fall within section 102 of the

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statute, which requires that a charge or mortgage must be registered in order to be valid as against the liquidator. I think that when that conclusion is reached there is really no more to be said in the case, and it becomes unnecessary to consider whether they were legal assignments or equitable assignments. In my opinion they were equitable assignments, but I do not think they are thereby excluded from the operation of section 102. An equitable assignment may be in writing, and put in a form capable of registration. The one question being answered in favour of the liquidator, namely, that these assignments were charges or mortgages, the case of the defendant falls to the ground, and judgment must be given accordingly and the appeal allowed.

MACDONALD, C.J.A.

MARTIN, J.A. MARTIN, J.A.: I agree.

MCPHILLIPS, J.A. MCPHILLIPS, J.A.: I also agree, with, however, some considerable hesitation, in view of the fact that the learned trial judge took a contrary view, apparently, of the question of fact. I am, though, not so fixed in my opinion that I would disagree with my brothers, and therefore I agree in the general result.

Appeal allowed.

Solicitors for appellant: *Livingston & O'Dell.*
Solicitors for respondent: *Senkler & Van Horne.*

RE SUCCESSION DUTY ACT AND ESTATE OF MOSSOM MARTIN BOYD, DECEASED.

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Taxes—Succession duty—Partnership—Lands and timber leases—Non-resident firm—Testator resident outside Province—R.S.B.C. 1911, Cap. 217.

Under section 5 of the Succession Duty Act duty is payable in respect of the share of a deceased partner in partnership lands and timber leases situate within the Province, though the head office of the partnership place of business and the domicile of the deceased were situate elsewhere (MACDONALD, C.J.A., and GALLIHER, J.A. dissenting).

The King v. *Lovitt* (1912), A.C. 212 followed.

The Court being equally divided, the appeal was dismissed.

APPEAL from the order of HUNTER, C.J.B.C. of the 20th of December, 1915, dismissing the petition of the executors of the estate of Mossom Martin Boyd, deceased, for a declaration that no succession duty is payable in British Columbia in respect of certain lands and timber limits within the Province. Mossom Martin Boyd died on the 8th of June, 1914, his residence at the time of his death being Bobcaygeon, in the Province of Ontario. Prior to his death he, with his brother, W. T. C. Boyd as a partner, under the firm name of "Mossom Boyd Company," carried on the business of manufacturing lumber, the purchase and sale of real estate, and other business ventures that they might agree upon. The assets of the partnership at the time of M. M. Boyd's death, in addition to properties in Ontario, Quebec, Manitoba and Saskatchewan, consisted of certain freehold lands and five timber leases in British Columbia, purchased with partnership moneys and registered in the names of the two partners. All outlays on the lands with respect to taxes, licence fees or other charges were paid by the partnership from its office in Bobcaygeon, it being the only office the Company had. Liability to pay succession duty is denied by the petitioners on the grounds that said lands and timber leases are assets of the partnership and not part of

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deceased's estate, also that the Province of Ontario claims duty in respect of the testator's interest in the surplus assets of the Mossom Boyd Company, including the partnership property in British Columbia. The learned Chief Justice dismissed the petition and the petitioners appealed.

The appeal was argued at Victoria on the 12th of January, 1916, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Luxton, K.C., for appellants: Boyd and Company owned timber properties in British Columbia, Saskatchewan and Quebec. They lived in Bobcaygeon, Ontario, where they carried on the business of manufacturing lumber. They carried on no business in British Columbia. The lands mentioned in the petition should not be considered as real estate, but as part of the partnership assets: see Lindley on Partnership, 8th Ed., 406-7. No interest in British Columbia passed under the will at all: see *In re Ritson, Ritson* v. *Ritson* (1898), 1 Ch. 667; (1899), 1 Ch. 128; *Waterer* v. *Waterer* (1873), L.R. 15 Eq. 402; *Forbes* v. *Steven* (1870), L.R. 10 Eq. 178. The assets of a partnership are situate where the business is carried on: see *Stamp Duties Commissioner* v. *Salting* (1907), A.C. 449 at p. 453. The Court below held the interest was real estate, and as such, subject to duty here, and in Ontario they are claiming a similar duty on the same property.

Maclean, K.C., for respondent: There is reciprocity between the Provinces as to property paying succession duty twice. The fact of there being a partnership does not exempt it from liability. The assets are about $18,000. This matter has been decided in *Re Succession Duty Act* (1902), 9 B.C. 174, and *The King* v. *Lovitt* (1912), A.C. 212. The Privy Council has decided that it is a tax on property, and is part of the revenue of the Province in which the land is situate.

Luxton, in reply: The cases referred to do not apply to a partnership.

Cur. adv. vult.

2nd June, 1916.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would allow the appeal for the reasons given by GALLIHER, J.A.

MARTIN, J.A.: This case is, I think, indistinguishable in principle from *The King* v. *Lovitt* (1911), 81 L.J., P.C. 140, and as I agree with the judgment of my brother MCPHILLIPS, I shall only add that as the Privy Council in that case, because of a statute corresponding to ours, placed a limitation upon the principle expressed in the maxim *mobilia sequuntur personam*, therefore I cannot say the learned judge below took a wrong view of our statute in interpreting it analogously so as to limit the application of the partnership doctrine relied upon by the appellants.

MARTIN, J.A.

GALLIHER, J.A.: This is an appeal from the order of HUNTER, C.J.B.C., dismissing the petition of Ida L. Boyd and others, praying for a declaration that no succession duty is payable in the Province of British Columbia upon the death of one Mossom Martin Boyd, in respect of certain lands and timber limits situate in the Province of British Columbia set out in said petition.

In November, 1892, a partnership was entered into between the deceased Mossom Martin Boyd and William Thornton Cust Boyd for the purpose of carrying on the business of lumber manufacturers and real-estate dealers. The head office of the partnership, and the place where all the business was carried on, and where both partners resided, was at Bobcaygeon, in the Province of Ontario. The lands and timber limits situate in British Columbia were purchased and paid for by the partnership out of partnership funds. Mossom Martin Boyd died on or about the 8th of June, 1914, and his will was probated in the Surrogate Court of the County of Victoria, Province of Ontario, on the 31st of August, 1914, and exemplification of probate of said will was filed in the Supreme Court of British Columbia on the 9th of November, 1915. The Province of British Columbia claims succession duty in respect of the lands situate within its borders. The section of the Succession Duty Act, R.S.B.C. 1911, cap. 217, under which duty is claimed, 5 (1.) (*a*), is as follows:

GALLIHER, J.A.

"On the death of any person . . . . the following property shall be subject to succession duty: All property of such deceased person situate within the Province, and any interest therein or income therefrom,

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whether the deceased person owning or entitled thereto was domiciled in the Province at the time of his death, or was domiciled elsewhere passing either by will or intestacy."

The short question is, does this property come within the above section? These lands were partnership lands, and the rule laid down by Sir James Hannen in *In the Goods of Ewing* (1881), 6 P.D. 19 at p. 23, is:

"The share of a deceased partner in a partnership asset is situate where the business is carried on."

This rule was referred to and approved in *Stamp Duties Commissioner* v. *Salting* (1907), A.C. 499, *per* Lord Macnaghten, at p. 453.

GALLIHER, J.A.

Mr. *Maclean,* for the Attorney-General, cited *Re Succession Duty Act* (1902), 9 B.C. 174; and *The King* v. *Lovitt* (1912), A.C. 212. Both these cases decided that where money is deposited in a bank in one Province, and the deceased resides without that Province, duty is payable in the Province where the money is deposited. These were both cases of deposits by individuals; here the property is partnership property, and all that those claiming under the deceased would be entitled to would be a share in the surplus of assets over liabilities of the partnership, and under the above rule that share is situate in the Province of Ontario, where the business was carried on.

The appeal should be allowed, and the petitioners are entitled to the declaration prayed for.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The matter to be determined is whether the executors of the will of Mossom Martin Boyd, deceased, are liable to pay succession duty in respect of land in the petition mentioned, and is by way of appeal from the order of HUNTER, C.J.B.C. of the 20th of December, 1915, the learned Chief Justice having held that succession duty is payable in respect of the lands, notwithstanding that the said lands are assets of the partnership of Mossom Boyd Company, and claimed to be, on the submission of the appellants (petitioners), personal estate, the business of the partnership being carried on at Bobcaygeon, Province of Ontario, also the place where the partners were resident and domiciled. The lands are registered in the land registry office in British Columbia in the names of the

partners, *viz.*: Mossom Martin Boyd and William Thornton Cust Boyd. It is also alleged that—

"Duty is claimed by the Government of the Province of Ontario in respect of the whole of the interest of the testator at the time of his death in the surplus assets of the partnership of the Mossom Boyd Company, including the partnership property in British Columbia."

Probate of the will of the deceased was sealed on the 1st of November, 1915, in British Columbia, under the Probates Recognition Act, R.S.B.C. 1911, Cap. 184 (probate being first obtained in the Province of Ontario), and is of the like force and effect and of the same operation in British Columbia as if granted by the Court of Probate of the Province of British Columbia (Cap. 184, Sec. 3).

Mr. *Luxton,* the learned counsel for the appellants, strongly contended that all that passed by the will was the partnership interest of the deceased (no interest in land in British Columbia passing by the will), and referred to Lindley on Partnership, 8th Ed., 406-7; and the Partnership Act, R.S.B.C. 1911, Cap. 175, section 25, which section is the same as section 22 of the Partnership Act, 1890 (Imperial). Section 25 reads as follows:

"Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representative of a deceased partner), and also as between the heirs of a deceasd partner and his executors or administrators, as personal or movable and not real or heritable estate."

MCPHILLIPS, J.A.

It will, however, be observed that the language is "shall . . . be treated as between the partners." Previously to the enactment the decisions were conflicting.

It was also pressed that the share of the deceased partner is situate, and situate only, where the business was carried on at the time of the death. *Stamp Duties Commissioner* v. *Salting* (1907), A.C. 449 at p. 453 was cited. Lindley on Partnership, at p. 404, says:

"As regards real property and chattels real, the legal estate in them is governed by the ordinary doctrines of real property law [and section 20 of the Imperial Act is referred to, being section 23 of Cap. 175, R.S.B.C. 1911] and, therefore, if several partners are jointly seised or possessed of land for an estate in fee or for years, on the death of any one, the legal estate therein will devolve on the surviving partners."

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The land in question was not held by the partners as joint tenants, but as tenants in common (see Cap. 127, Sec. 52, R.S.B.C. 1911). There could not be, in the present case, any title by survivorship, and the presumptive half share or interest in the lands necessarily passes under the will of the deceased.

The case of *Re Succession Duty Act* (1902), a decision of the Full Court reported in 9 B.C. 174, is instructive upon the question arising upon this appeal and was referred to by Mr. *Maclean,* the learned counsel for the Crown. It was there decided that succession duty was payable upon money on deposit in a bank in this Province belonging to a person domiciled in a foreign country at the time of his death. The Succession Duty Act, R.S.B.C. 1911, Cap. 217, well defines that all property situate within the Province is subject to succession duty (section 5, subsection (1) (*a*). The property in question in the present case being land, the *lex situs* governs; that is, it must be held to be subject to the law of British Columbia. Without referring in greater detail to the principle and the leading cases, I refer to the judgment of GREGORY, J. in *Barinds* v. *Green* (1911), 16 B.C. 433.

MCPHILLIPS, J.A.

The decision which in my opinion determines the appeal is that of *The King* v. *Lovitt* (1912), A.C. 212, and the statute law there under review may be said to be, for all practical purposes and an understanding of the case, the same as the statute law of British Columbia. Lord Robson delivered the judgment of their Lordships of the Privy Council and at p. 218 said:

> "The actual *situs* of the property is therefore the first question to be determined."

Can there be any question as to the *situs* of the property in question in the present case? It must be admitted that it is land within the Province of British Columbia. Lord Robson, even in dealing with "movables" was impelled to say in *The King* v. *Lovitt, supra,* p. 220:

> "Executors find themselves obliged in order to get the property at all to take out ancillary probate according to the locality where such property is properly recoverable, and no legal fiction as to its 'following the owner' so as to be theoretically situate elsewhere will avail them."

Mr. *Luxton* contended that it was not really necessary to get ancillary probate in British Columbia or have the probate sealed under the Probates Recognition Act, and whilst not at all deciding the point, as a matter of practice it has always been insisted upon in the land registry office when registration of title to land is applied for, when land is passing by will, and would appear to me to be a very necessary requirement in real property law.

Lord Robson makes it clear that in determining the law the statute law governing must be carefully looked at. The rule of law may be affected. At p. 221 we find him saying:

"Its application may be excluded by the use of apt and clear words in a statute for the purpose. The question now to be determined is whether that has been done in the present case by a Legislature having full authority in that behalf."

Lord Robson refers to the amending Act of Queensland, in reference to the decision of the Privy Council in *Harding* v. *Commissioners of Stamps for Queensland* (1898), A.C. 769, and in my opinion the British Columbia Succession Duty Act is equally forceful. Lord Robson says at pp. 221-2:

"Lord Hobhouse, in delivering the judgment of the Board, said that if this amendment were retrospective it would be conclusive in favour of the Commissioners who were claiming the duty. This weighty opinion is precisely in point as regards the present case. Here the Legislature of New Brunswick has expressly enacted that all property situate in the Province shall be subject to a succession duty though the testator may have had his fixed place of abode outside the Province."

The land in question, in my opinion, is subject to succession duty. The statute law declaring that land, being partnership property, shall be treated as personalty, is declaratory of the law as between the partners, and can have no application to the Crown. The Legislature has imposed the succession duty as a tax to be paid on the property, *i.e.*, the land situate in British Columbia, and the *lex situs* must govern. Upon the death of Mossom Martin Boyd the land passed by the will and not otherwise, and, in the language of Lord Robson, "apt and clear words in a statute for the purpose" appear in the British Columbia statute (see Cap. 217, Sec. 5, Subsec. (1.) (*a*)).

In my opinion, therefore, the learned Chief Justice of British Columbia rightly determined that succession duty was payable

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in respect of the lands in the petition mentioned, and I would dismiss the appeal.

Appeal dismissed,
Macdonald, C.J.A. and Galliher, J.A. dissenting.

Solicitors for appellants: *Pooley, Luxton & Pooley.*
Solicitors for respondents: *Elliott, Maclean & Shandley.*

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LANNING, FAWCETT & WILSON, LTD. *v.* KLINK-HAMMER

LANNING, FAWCETT & WILSON, LIMITED v. KLINKHAMMER.

Attachment of debts—Claim by judgment debtor of damages for wrongful dismissal and malicious prosecution—Settlement of claim—Debt contracted—"Obligations and liabilities," meaning of—Attachment of Debts Act, R.S.B.C. 1911, Cap. 14, Secs. 3 and 4.

Where a judgment debtor claims damages against a municipality for wrongful dismissal and malicious prosecution, and the parties arrive at a settlement whereby the municipality agrees to pay a certain sum, a debt is thereby contracted for which the municipality is liable, and the amount so agreed upon is subject to attachment under sections 3 and 4 of the Attachment of Debts Act.

Statement

APPEAL from an order of HOWAY, Co. J., made at New Westminster on the 1st of February, 1916, dismissing an application by the judgment debtor to set aside a garnishee order of the 13th of December, 1915. The plaintiffs obtained judgment for $215.15 on the 18th of December, 1914. On the 3rd of August, 1915, the judgment debtor gave a promissory note to the plaintiffs, payable in one year, for the balance due. When the attaching order was issued on the 13th of December, 1915, there was still due on the judgment $188.65. In October, 1915, the judgment debtor was employed by the Municipality of Delta as a policeman and collector of taxes.

After an interval he was dismissed and criminal proceedings were taken against him at the instance of the municipality, for, it was alleged, misappropriating certain moneys he had collected for taxes. On the trial it was discovered that the municipality had made a mistake in their accounts, that no moneys were missing, and the charge was dismissed. The judgment debtor then threatened the municipality with action for wrongful dismissal and malicious prosecution, and Mr. *A. D. Taylor, K.C.*, acting for the judgment debtor, and Mr. *C. B. Macneill, K.C.*, for the municipality, discussed settlement. Affidavits by Mr. *Taylor* and Mr. *Macneill* were read on the motion, in which they both stated a final settlement had not been arrived at between them, but a letter dated December the 10th, 1915, from Mr. *Macneill* to the municipality, that was put in evidence, recited that the judgment debtor's counsel wanted $150 as damages for malicious prosecution and $75 for a month's salary in lieu of notice of dismissal; that he (Mr. *Macneill*) stated he was of opinion that the claim for salary could not be recovered, and Mr. *Taylor* then said that if he could not get the month's salary he would want $225 as damages for malicious prosecution, and it then went on to say that Mr. *Taylor* would not accept less than $225, and he advised the municipality to pay this sum in full settlement. The council of the municipality met on the 11th of December and by resolution decided to pay the $225. The garnishee order was served on the municipality on the 13th of December, and on the following day a cheque for $225 and the garnishee order were handed by the municipality to Mr. *Macneill* to carry out the settlement. The judgment debtor sought to set aside the attaching order on the grounds (1) that no settlement had been arrived at between the municipality and the debtor when the garnishee was served; (2) that the only substantial claim they had being for malicious prosecution, damages arising out of a tort were not subject to an attaching order, and (3) a promissory note that was still current had been accepted for the debt. Upon the dismissal of the application the judgment debtor appealed.

Statement

D. Whiteside, for plaintiffs.

A. D. Taylor, K.C., for defendant.

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LANNING, FAWCETT & WILSON, LTD. v. KLINK-HAMMER

1st February, 1916.

HOWAY, Co. J.: This is an application to set aside an order attaching certain moneys to which the defendant is entitled. The ground of the application is mainly that the moneys in question arise under such circumstances as will not allow of their being attached. These moneys arise out of two separate claims for damages by the defendant against the Municipality of Delta; one of these claims is for damages for wrongful dismissal from his office as a policeman; the other is for damages for malicious prosecution. Before the attaching order was issued the Corporation of Delta had recognized their liability to the defendant, but the amount thereof had not been settled. There is no doubt whatever that under the law as it exists in England neither of these sums can be attached. Order XLV., r. 1 of the English Rules shews that in order to be attachable the "moneys must be debts owing or accruing." The strictness with which this Order has been construed is shewn by such cases as *Holmes* v. *Millage* (1893), 1 Q.B. 551; *Howell* v. *Metropolitan District Railway Co.* (1881), 19 Ch. D. 508 at p. 515; *Webb* v. *Stenton* (1883), 11 Q.B.D. 518. But the point which I have to consider here is whether the words of our statute, R.S.B.C. 1911, chapter 14, sections 3 and 4, are wide enough to include these claims, or either of them. Under section 3 are attachable "all debts, obligations, and liabilities owing, payable or accruing due," so that I must concern myself with the construction and meaning of the words "obligations and liabilities." It is to be observed that the trend of legislation in connection with this subject has been towards bringing additional property of the debtor into liability to satisfy a judgment, and also to enable moneys to be retained pending the decision of the defendant's liability. Our statute finds its origin in Consolidated Statutes of Manitoba, 1880, Cap. 37, Sec. 44, Administration of Justice Act, now Rules 741 and 742 of The Queen's Bench Act, 1895, of Manitoba, and it does not seem improper that in construing a statute with such an origin I should, in analogy with the rule in *Trimble* v. *Hill* (1879), 5 App. Cas. 342 at p. 344, be governed by the interpretation which the Court of that Province had placed upon this statute. In *Gerrie* v. *Rutherford* (1885), 3

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Man. L.R. 291, cited with approval in *Lake of Woods Milling Co.* v. *Collin* (1900), 13 Man. L.R. 154 at p. 162, Killam, C.J. held that a claim against a railway company for damages may be attached by a creditor of the person injured. Though at that time no action had been brought in respect thereof and the amount of damages recoverable remains unsettled, he had no difficulty in finding that such a claim is a liability within the meaning of the statute. It will be noticed that the liability in this case was one arising out of contract—a claim for damages for breach of contract to carry the defendant safely. Section 4 of our statute dealing with the meaning of the term "debts, obligations, and liabilities" states that these words shall include all claims and demands of the defendant against the garnishee arising out of trusts or contracts where such claims and demands could be made available under equitable execution.

"There is no doubt that such provision widens the range of debts, obligations and liabilities which may be garnishable. It means that certain claims and demands which could not be reached by ordinary proceedings in law, but which might be the subject of equitable relief and could be made available by the appointment of a receiver, can now be attached by garnishing order":

Per Dubuc, J. in *Lake of Woods Milling Co.* v. *Collin* (1900), 13 Man. L.R. 154 at pp. 170-1.

The nature of the claim in this matter which has been attached is two-fold: one a claim for damages for breach of contract; (2) a claim for damages for tort. I have no doubt as regards the second heading that any moneys arising thereunder are not the subject of an attaching order, inasmuch as they do not arise upon a claim originating in either "trust or contract," but as regards the other heading, it is a claim arising out of contract and is a liability within the meaning of sections 3 and 4 of Cap. 14: see *Gerrie* v. *Rutherford, supra; Lake of Woods Milling Co.* v. *Collin, supra; Canada Cotton Company* v. *Parmalee* (1889), 13 Pr. 308; and *Brookler* v. *Security National Insurance Co.* (1915), 8 W.W.R. 861. *Simpson* v. *Chase* (1891), 14 Pr. 280, which was specially relied upon by Mr. *Taylor* in support of the application, is not applicable, inasmuch as there was not in the Division Courts Act, which was being interpreted, a section corresponding to

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rule 935, upon which the *Canada Cotton Company* case was decided.

As, therefore, the garnishee was, when served with the attaching order, liable to the defendant within the meaning of chapter 14, the application to set it aside will be refused, with costs.

COURT OF APPEAL

April 27.

The appeal was argued at Vancouver on the 27th of April, 1916, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

LANNING, FAWCETT & WILSON, LTD. *v.* KLINK-HAMMER

A. D. Taylor, K.C., for appellant: The claim the defendant had against the municipality was unsettled when the garnishee was served on Mr. *Macneill,* and was not subject to attachment at the time. The only dispute between us was as to the action for malicious prosecution, and damages arising out of tort is not the subject of an attaching order. The defendant gave a note for the debt upon which the attaching order was obtained and it is still current, and the taking of the note suspends the plaintiffs' remedy for action on the original debt.

Argument

Whiteside, K.C., for respondents: Mr. *Taylor* and Mr. *Macneill* agreed on $225 as a settlement in full of all claims, and in making up the amount Mr. *Taylor* claimed $75 for wrongful dismissal. We say the whole amount is attachable, as they arrived at an agreement as to the amount that should be paid for all claims and the municipal council passed a resolution confirming the agreement. When an agreement is arrived at a debt is contracted which is subject to attachment: see *Davidson* v. *Taylor* (1890), 11 C.L.T. 1. As to the note given by the debtor for the debt, that is still current. The debt being a judgment debt is a specialty, and the note does not suspend the plaintiffs' remedy on the debt: see Falconbridge on Banking, 2nd Ed., 722.

Taylor, in reply: The argument that there was a settlement is answered by section 4 of the Attachment of Debts Act.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the learned judge came to the right conclusion in dismissing the application to set aside the order of attachment. Without expressing any opinion about the propriety of the procedure taken in this case, I think we

can decide it on what is before us, and let it go back to be disposed of by the learned judge in the ordinary way in which garnishee proceedings are disposed of.

There is a resolution of the council passed on the 11th of December, 1915, after perusing the letter of the solicitor of the council, advising that at an interview with the solicitor for the judgment debtor, the solicitor for the judgment debtor had offered to take $225 in settlement of the matters between himself and the council. With that letter before them the council accepted the advice of their solicitor and passed that resolution, and thereupon, on that date, the 11th of December, the claim for damages in respect of malicious prosecution, and the claim for damages for breach of contract of hiring, became merged in a contract to pay $225 in money, which could have been recovered in an action against the council. If that be so, the debt was undoubtedly subject to attachment. In that view of the case, the learned judge took the right course in dismissing the application to set aside the writ.

MARTIN, J.A.: I think that as there was the agreement to pay the money, and the money therefore became due, consequently the learned judge came to the right conclusion, and the appeal should be dismissed.

GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.: In my opinion, the learned judge in the Court below was entirely correct in his view of the law, but if the order had carried out his decision upon the law, the order would have been limited to $75. An error, in my opinion, took place in regard to the order when it was drawn up. In my view, the decision of this Court ought to be that the order should be reformed to limit it to the $75.

Appeal dismissed,
McPhillips, J.A. dissenting in part.

Solicitors for appellant: *Taylor & Campbell.*

Solicitors for rspondents: *Whiteside, Edmonds & Whiteside.*

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1916

May 5.

HONESS v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Negligence — Contributory negligence — Ultimate negligence — Collision between interurban electric-car and motor-car.

HONESS v. B.C. ELECTRIC RY. CO.

In an action for damages owing to a collision between an interurban electric-car and the plaintiff's motor-car the jury found that the defendant was guilty of negligence in that the motorman did not give warning as soon as the plaintiff's car was visible (he having already given the statutory warning required when approaching a crossing by whistling). They also found the plaintiff guilty of contributory negligence in not looking out for the electric-car directly the track became visible. The question, "did the defendant do anything or omit to do anything constituting a proximate cause of the accident despite such contributory negligence?" was answered "Yes, they should have given warning on seeing the plaintiff's car." Judgment was entered for the plaintiff.

Held, on appeal, that on the findings of the jury judgment should have been entered for the defendant; that the motorman, after giving the statutory warning, was not bound to give further warning to persons approaching the crossing, unless he had reason to apprehend that such persons were oblivious of his presence and of the danger of crossing the track, but there was no evidence or finding by the jury that such a contingency arose.

APPEAL from the judgment of SCHULTZ, Co. J., entered upon the verdict of a jury in favour of plaintiff. The action was for damages on account of injuries sustained by the plaintiff, and for the destruction of his motor-car through a collision with a car of the defendant Company, and was tried at Vancouver on the 1st, 5th and 6th of October, 1915. The accident took place where the interurban double-track line of the defendant Company crosses Pine Street immediately north of Sixth Avenue in Vancouver. The Pine Street approach to the track from the north rises up on about a four per cent. grade. A building stands on the north-east corner of the street, the south side of which is 23 feet from the north track, and when travelling up the hill from the north, on coming level with the south side of said building, the track easterly can be seen for a distance of about 250 feet. On the 8th of

Statement

June, 1915, about 3 p.m., the plaintiff, with a companion, drove his motor-car up the aforesaid hill from the north at a speed of about 5 miles an hour, and on arriving level with the south side of the building aforesaid, which was to his left, he swore he looked both east and west on the track, and seeing no cars approaching he continued on. When the front wheels of his motor-car were about touching the north track he saw a car on the north track, coming from the east at about ten miles an hour, close to him. He only had time to stop his machine when it was struck and overturned. The motorman on the interurban swore that as he approached Pine Street at from six to eight miles an hour he saw the motor-car as it appeared past the building before referred to, that it was moving slowly, and the driver was facing him. He assumed he would stop, and did not realize danger until about ten feet away from where the collision took place, when he immediately put on the emergency brake and rang his foot gong. There was some conflict of evidence as to the motorman blowing his whistle when approaching Pine Street, but on the trial it was conceded that the Act had been complied with in this regard, and that the whistle was blown three-quarters of the distance from Fur Street to Pine Street. The jury found for the plaintiff and answered questions put to them as follows:

"1. Was the accident caused by the negligence of the defendant Company? Yes.

"2. If so, in what did such negligence consist? Answer fully. In not giving warning as soon as plaintiff's car was visible.

"3. Was the plaintiff guilty of contributory negligence, which was a proximate cause of the accident? Yes.

"4. If so, in what did such contributory negligence consist? Answer fully. In not looking out for street car directly he passed the shed.

"5. If you answer one and three both in the affirmative, did the defendants do anything or omit to do anything constituting a proximate cause of the accident, despite such contributory negligence? Yes.

"6. If so, what should the defendants have done which they did not do or left undone which they should do? They should have given warning immediately on seeing plaintiff's car.

"7. When did the plaintiff first look towards the interurban car after he could look east when he got south of the shed? A moment before his companion jumped from auto.

"8. Damages, if any. $325."

Statement

The defendant Company appealed on the grounds that the

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accident was due to the plaintiff's own negligence; that the judge was in error in holding that the answers of the jury shewed the cause of the accident was the motorman's failure to give warning when he first saw the motor-car, and there was, in fact, no evidence of negligence on the part of the motorman.

The appeal was argued at Vancouver on the 5th of May, 1916, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

McPhillips, K.C., for appellant: This case narrows down to whether the jury should, on the evidence, have found that the failure of the motorman to give the plaintiff warning when he saw the motor-car was the proximate cause of the accident. The motorman was justified in assuming the plaintiff saw him and would stop. This is a case where the Court of Appeal should reverse the finding of the jury: see *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1155; *Canadian Pacific Railway* v. *Frechette* (1915), A.C. 871 at p. 879; *Tait* v. *B.C. Electric Ry. Co.* (1916), 22 B.C. 571.

Argument

The motorman gave such warning as is required by statute as he approached the crossing, and was not called upon to further ring his gong when he saw the motor: see *Gowland* v. *Hamilton, Grimsby and Beamsville Electric R. Co.* (1915), 24 D.L.R. 49; *Grand Trunk Rway. Co.* v. *McKay* (1903), 34 S.C.R. 81.

Harper, for respondent: The question is whether the motorman could, by taking reasonable care, have avoided the accident notwithstanding the plaintiff's negligence. There was evidence to go to the jury on this point, and their finding should not be reversed: see *Jones* v. *Toronto and York Radial R.W. Co.* (1911), 25 O.L.R. 158 at p. 167; *Long* v. *Toronto Rway. Co.* (1914), 50 S.C.R. 224; *City of Calgary* v. *Harnovis* (1913), 48 S.C.R. 494; *The Halifax Electric Tramway Company* v. *Inglis* (1900), 30 S.C.R. 256.

McPhillips, in reply.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would allow the appeal. It seems to me that, on the findings of the jury, judgment should have

been entered for the defendant. It is quite clear to my mind that if the motorman did, as it is conceded he did, give the statutory warning when approaching the crossing, he was not bound to give any other warning to persons approaching the crossing, unless he had reason to apprehend that those persons were oblivious of his presence and of danger in crossing the track. It is quite true that, if the motorman ought to have apprehended from the conduct and appearance of the plaintiff that he, the plaintiff, was oblivious of his danger and was going to cross the tracks, it was the motorman's duty either to give another warning or stop his car, and if he could in that way have prevented the injury which occurred, and did not do so, the defendant is responsible for his breach of duty—his negligence towards the plaintiff. But the jury have not found that that was the negligence of which the motorman was guilty. They have found that he should have given warning immediately on seeing the plaintiff's motor-car. It appears to me that he should not have done so. There is nothing to shew why he should have given warning when the plaintiff's car was 30 or 40 or 50 feet away, with the plaintiff's face turned towards him—looking towards him, apparently not unaware of the oncoming street-car. I can see no reason why he should have given warning at that time. The motorman himself says that when he did finally realize, at a later time, that the plaintiff was going to cross the track, notwithstanding the danger, he did then everything he could to prevent the accident. Under those circumstances it cannot be said that the judgment was properly entered on the findings, or, if it was, that the jury had any evidence upon which they could reach the sixth finding.

MACDONALD, C.J.A.

MARTIN, J.A.: I entertain very serious doubts indeed whether, apart from any contributory negligence, there was negligence at all in this case; that is, in other words, if on the finding of the jury there was no contributory negligence on the part of the plaintiff, whether the verdict could be sustained, because the only finding of negligence that we have is in the second question, in not giving warning as soon as the plaintiff's car was visible. Having given the statutory warning, I must confess I cannot understand why it should be held at that stage

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that it was necessary for the motorneer to give a new warning, because no circumstance, on the face of the evidence as I have been able to see, would suggest to the mind of a reasonable man that the time had come to give another warning. But I am assuming, for the purpose of what I am about to say, that the jury were justified in arriving at that conclusion. If I had been counsel in the case I would have argued that there was no case in favour of negligence. But assuming that there was negligence, then we have contributory negligence, and that is the end of the case unless it can be shewn that thereafter something occurred which rendered it necessary for the defendant's servant to do something more. Now, what was that? The only suggestion is that, because the plaintiff became, as it has been suggested, oblivious to his danger, then the motorneer should have done something further. Now, on the question of fact I am prepared to make this statement quite positively, that there was no evidence before the jury on which they could find that that oblivious state of mind ever existed. There was no evidence on which reasonable men could find that, because we see that the only three persons from whom that state of mind could be extracted were the plaintiff, Matheson, who was with him, and the motorneer, and they do not say that. The motorneer says that the plaintiff was in a state of reasonable alertness. The plaintiff himself repudiates that he was in an oblivious state of mind. On three different pages he persists that he did look for this car, and Matheson, the man who was sitting with him, repudiates, at page 46 of the evidence, the idea that he was talking to such an extent as to engage the plaintiff's attention to the detriment of his personal safety. In the face of that, how can it be said that that state of mind existed? To my mind it is absolutely impossible to say that. That is all there is to it. If that state of mind did not exist, there is nothing upon which what we call the ultimate negligence could be founded.

MARTIN, J.A.

Now, supposing something had been adduced in evidence that would have raised that question. Then the jury would have found that that state of negligence had arisen consequent upon the oblivious state of mind being apparent, but they do not find

that to be the case at all. They simply revert back to the finding of the second question, and say that the motorneer should have given warning immediately upon seeing the plaintiff's car. That brings us back to precisely where we started. I have never before seen such a finding of the jury which relates to what we will call the ultimate negligence, bearing in mind what the Privy Council has just lately said in regard to the more or less looseness of this term. How the ultimate negligence can be thrown back to something which has disappeared by reason of the contributory negligence I cannot see. For these reasons I think that the judgment should be set aside and the appeal allowed.

MARTIN, J.A.

MCPHILLIPS, J.A.: I agree that the appeal should be allowed. It seems to me that *British Columbia Electric Railway* v. *Loach* (1915), 85 L.J., P.C. 23; (1916), 1 A.C. 719, is not one really in point in this case. I think that case, if carefully studied, will shew this, that had it not been for the defective brakes the plaintiff would not have succeeded. That is, it was the excessive speed plus defective brakes that imposed the liability there. Therefore, at the moment of accident there was an act of negligence in not having effective brakes, as the evidence was in that case that proper brakes would have avoided the accident.

In this case the finding of the jury is that the defendant's servant should have given warning immediately upon seeing the plaintiff's motor-car. On the evidence it is admitted that the statutory warning was given. Now, what further warning should be given unless it was present to the mind of the motorneer at the first instant of time that he saw the plaintiff's car that the plaintiff was intending to virtually throw his motor-car in front of the electric-car? If that were so, that might be evidence upon which to found the answer that the motorneer should have given warning immediately upon seeing the plaintiff's car; but when you read all the questions and answers together that is not at all borne out, nor does the evidence bear it out, and, as indicated by the Chief Justice in his judgment, when the motorneer did have that impressed upon his mind, he

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then acted with the greatest of promptitude. There is no evidence whatever that the car was not well equipped and that it did not have effective brakes, but the accident nevertheless ensued. Therefore, that absolutely disposes of the question, when you take the facts and the law together. That is, the defendant's servant could not, when he became aware of the negligence of the plaintiff, do anything at that moment which would have prevented the accident occurring.

It may be rightly said that this is not a sensible answer of the jury and that they have not acted reasonably. I am always impressed with the language used by Lord Loreburn, L.C. in *Kleinwort, Sons, and Co.* v. *Dunlop Rubber Company* (1907), 23 T.L.R. 696 at p. 697, wherein he laid stress that the verdict of the jury must not be lightly overturned, but as Lord Loreburn puts it, the jury must come to a sensible conclusion. Here a sensible conclusion has not been arrived at. That being so, the judgment as entered for the plaintiff should be set aside and judgment entered for the defendant.

MCPHILLIPS, J.A.

Appeal allowed.

Solicitors for appellant: *McPhillips & Wood.*
Solicitors for respondent: *McCrossan & Harper.*

PELLY AND PELLY v. THE CORPORATION OF THE CITY OF CHILLIWACK.

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PELLY v. CITY OF CHILLIWACK

Municipal law—Expropriation under by-law—Arbitration—Local improvement assessment—"Instalments"—One payment included in term—B.C. Stats. 1913, Cap. 49, Secs. 9, 30 (1) (e), 38, 42 (2), 43 and 44; 1914, Cap. 52, Secs. 180 and 275—Taxes.

By virtue of section 44 (2) of the Local Improvement Act defects in a by-law or assessment roll for local improvements cannot be set up in defence to an action for the rates levied on the defendant's land if the assessment has been confirmed under section 38 of said Act (McPHILLIPS, J.A. dissenting).

By virtue of section 43 of the Local Improvement Act the provisions of the Municipal Act, as to the collection and recovery of taxes and the proceedings which may be taken in default thereof, apply to rates imposed under the Local Improvement Act. A municipality has, therefore, the power to recover taxes and rates by suit.

An assessment for local improvements made payable in one payment is valid and within the meaning of the word "instalments" in sections 30 (1) (e) and 42 (2) of the Local Improvement Act.

APPEAL by defendant Corporation from the decision of McINNES, Co. J., dismissing the defendant's counterclaim in an action tried at New Westminster on the 25th of February, 1916. The plaintiffs are the owners of lot 13 in block 28, division "B," in the City of Chilliwack. A strip of the lot was, under a by-law, expropriated by the Corporation for a lane. The plaintiffs' claim for damages was, by consent, heard by SCHULTZ, Co. J. as sole arbitrator, who awarded the plaintiffs $250. The plaintiffs brought action to enforce payment of this amount, and the Corporation counterclaimed for the local improvement assessment on said lot for opening up alleys and for cement sidewalks in the City. The learned trial judge gave judgment for the plaintiffs and dismissed the counterclaim. Statement

The appeal was argued at Vancouver on the 18th of May, 1916, before MACDONALD, C.J.A., MARTIN, GALLIHER and McPHILLIPS, JJ.A.

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Davis, K.C. (*Bowes,* with him), for appellant: A by-law was passed by the Council, under section 9 of the Local Improvement Act, to put a lane through certain property, a portion of which belonged to the plaintiffs, who were awarded $250. They sued for this amount, and the defendant Corporation counterclaimed for the taxes levied for local improvements on the plaintiffs' land. The defence that there was double taxation cannot be raised, as the Court of Revision dealt with this, dismissing their appeal from the assessment. The answer to the argument that no portion was charged to the City, under subsection (4) of section 24 of Cap. 49, B.C. Stats. 1913, is that this subsection was repealed by section 6, Cap. 54, B.C. Stats. 1914. As to there being a right of action for the taxes, the Act provides for this, and the City can take such course as they are advised in recovering the taxes: see B.C. Stats. 1914, Cap. 52, Sec. 275. This statute applies here under section 43 of the Local Improvement Act. The word "instalment," as read in section 30 (1) (*e.*), Cap. 49, B.C. Stats. 1913, includes a case where there is one payment only: see *Biggs* v. *Freehold L. and S. Co.* (1899), 26 A.R. 232 at p. 240. The by-law cannot be attacked now: see B.C. Stats. 1914, Cap. 52, Sec. 180.

Argument

Reid, K.C., for respondent: This is a case of compensation under the guise of local improvement; the charge is made back at once and the owner gets nothing. The taxing Acts must be construed strictly: see *Cox* v. *Rabbits* (1878), 3 App. Cas. 473 at p. 478. They taxed on two fronts of the property and attempted to make an assessment roll on one instalment: see *City of Toronto* v. *The Canadian Pacific Railway Company* (1896), 26 S.C.R. 682 at pp. 693-4; *The City of Halifax* v. *Lithgow, ib.* 336 at p. 339; *Murne* v. *Morrison* (1882), 1 B.C. (Pt. 2) 120 at p. 127; *Bell* v. *Town of Burlington* (1915), 34 O.L.R. 619 at pp. 622-3; *Hall* v. *City of Moose Jaw* (1910), 12 W.L.R. 693; *Pease* v. *Town of Moosomin and Sarvis* (1901), 5 Terr. L.R. 207; *Minto* v. *Morrice* (1912), 2 W.W.R. 374; *Traves* v. *City of Nelson* (1899), 7 B.C. 48; *Yokham* v. *Hall* (1868), 15 Gr. 335; and *Toronto Railway* v. *Toronto Corporation* (1906), A.C. 117.

Davis, in reply.

Cur. adv. vult.

3rd October, 1916.

MACDONALD, C.J.A.: The plaintiffs sue on an award of $250 for land taken under Cap. 49 of the Statutes of 1913, known as the Local Improvement Act.

Defendant counterclaimed for the rates levied on plaintiffs' land under by-laws under which the local improvements in question were made.

The learned County Court judge gave judgment for the plaintiffs for the amount of the award, and dismissed the defendant's counterclaim. The plaintiffs' defence to the counterclaim may be divided into two parts: (1) defects in the by-law and assessments, and (2) that the rate is against the land and not against the owner—that there is no right of personal action against the plaintiffs. As regards the first of these defences, it is, in my opinion, not open to the respondent to set up the alleged defects in view of sections 38 and 44 of the said Act. With regard to the second defence, section 43 of the above Act makes all the provisions of the Municipal Act "as to the collection and recovery of taxes and the proceedings which may be taken in default thereof" applicable to the rates imposed under this Act, and section 275 of the Municipal Act gives the municipalities power to recover taxes and rates by suit.

The appeal should be allowed, and judgment should be entered below for the defendant on its counterclaim.

MARTIN, J.A.: Several points were raised on this appeal. That as to double taxation we disposed of at the argument in favour of the appellant.

As to the meaning of "number of instalments" in section 30 (*e*), I am of opinion that language, taken in regard to the subject-matter, is satisfied by the payment of one instalment. The expression is not free from doubt, but by section 25 (2) of the Interpretation Act, words importing the singular number import more than one, and also the converse, the greater including the less. It would be strange if the statute were to be held to require that a small total assessment on a work for, say, $50 should inexorably have to be extended over more than one year. Different meanings are, in law particularly, attached to the same

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word in different circumstances. In the case of a mortgage, for example, Maclennan, J.A. said in *Biggs* v. *Freehold L. and S. Co.* (1899), 26 A.R. 232 at p. 240, referring to the expression "instalments hereby secured," said:

> "'Instalment,' no doubt, primarily signifies a part of a larger sum. But I think it is here used in the sense of 'payment,' and was intended to mean every sum which by the deed the mortgagor was to pay, every sum hereby secured, and to include liens, taxes, rates, charges, insurances and incumbrances mentioned in paragraph 5. It is as if it said the whole of the payments, or the whole of the money, hereby secured, shall become payable. It would not be incorrect to say that the principal money of a mortgage was all payable in one instalment. That would plainly mean in one sum or in one payment, and not in several."

And see Moss, J. at p. 247, who, after pointing out the difficulties, nevertheless comes to the same conclusion, the other judges concurring.

MARTIN, J.A.

I have not overlooked the fact that in section 42 (2) the expression "annual instalments" is used in relation to these special assessments, but the result of the best consideration that I am able to give a point of some difficulty is that I think the Council has the power to assess for one or more instalments.

As to the right of the Municipality to sue for these taxes, I am of the opinion that section 43, which is sweeping in its terms, introduces the provisions of the Municipal Act to such an extent as to render the plaintiffs liable to an action.

I would allow the appeal.

GALLIHER, J.A.: I would allow the appeal. I think any defects in the special assessment roll or in the by-law are cured by the provisions of sections 38 and 44 (2) of the Local Improvement Act, Statutes of B.C. 1913, Cap. 49.

There only remains the question as to whether the Corporation could sue for the special rates as a debt. Section 43 of the above Act says:

GALLIHER, J.A.

> "All the provisions of the Municipal Act as to the collection and recovery of taxes, and the proceedings which may be taken in default of payment thereof, shall apply to the special assessments and the special rates imposed for the payment of them."

This, taken with section 275 of the Municipal Act of 1914, makes it clear that these rates can be recovered in an action.

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: I find myself unable to agree with the

majority view of the Court. With great respect, I would dismiss the appeal. The ground upon which I would dismiss the appeal is that by-law No. 161, 1915, and the assessment thereunder for a work of local improvement is illegal. It was contrary to the plain reading of the statute to make the payment of the cost of the work payable in one instalment. Section 42 of the Local Improvement Act, B.C. Stats. 1913, Cap. 49, in part reads as follows:

"The same shall be payable in such annual instalments as the Council shall prescribe."

In Dr. Murray's New English Dictionary, "Instalment" is defined to be "The arrangement of a payment of a sum of money by fixed portions at fixed times"; also " 'The payment, or the time appointed for payment, of different portions of a sum of money, which, by agreement of the parties, instead of being payable in gross, at one time, is to be paid in parts, at certain stated times' (Tomlins Jacob's Law Dict. 1797)." In Wharton's Law Lexicon, 10th Ed., 407, we read:

"Instalment, a portion of a debt. When a debt is divided into two or more parts, payable at different times, each part is called an instalment, and the debt is said to be payable by instalments. Where, in a County Court, judgment has been obtained for not more than 20*l.*, exclusive of costs, the Court may order payment by instalments.—County Courts Act, 1888, 51 & 52 Vict. c. 43, s. 105. As to delivery by instalments of goods sold, see s. 31 of the Sale of Goods Act, 1893, by which 'unless otherwise agreed, the buyer is not bound to accept delivery by instalments.' "

MCPHILLIPS, J.A.

Unless it be that there is statute law which absolutely inhibits the question of illegality being raised the Court may declare the by-law illegal. A great body of authority can be found to support this proposition. I only refer to two recent cases in the Supreme Court of Canada where the question of illegality was considered—*Anderson* v. *Municipality of South Vancouver* (1911), 45 S.C.R. 425, Duff, J. at p. 446; and *District of West Vancouver* v. *Ramsay* (1916), 53 S.C.R. 459.

Section 38 of the Local Improvement Act is relied upon as being a statutory validation of the special assessment, but it is to be observed that the validation is after all limited in its nature, "notwithstanding any defect, error or omission therein or any defect or error in the by-law for undertaking the work or in any notice given or proceeding taken or the omission of

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any proceeding or thing which ought to have been taken or done before the passing of the by-law for undertaking the work or thereafter down to and including the completion of such revision." I would apply the language of Duff, J. in *Anderson* v. *Municipality of South Vancouver, supra,* at p. 446, to the position of matters we have to deal with on this appeal: "It" (Duff, J. is referring to section 126 (3) of Cap. 33, Municipal Act, 1892; R.S.B.C. 1897, Cap. 144, Sec. 86 (2), and the application here is to section 38 of the Local Improvement Act, Cap. 49, B.C. Stats. 1913) "has, I think, nothing whatever to do with proceedings so fundamentally defective as those we have to consider in this appeal." Further, the Local Improvement Act itself shews that the question of illegality will always be open. This is seen to be set forth in the clearest terms, section 44 (2), reading as follows: [His Lordship read the subsection and continued].

In that the judgment of the Court does not adjudge the by-law for imposing the special assessment to be invalid, no order to carry out this enactment is required. In my opinion, the by-law imposing the special assessment is illegal, and the assessment cannot be supported. It would, therefore, follow that in my opinion the learned trial judge was right in dismissing the counterclaim, which was suit brought by way of counterclaim in respect of what was an illegal assessment. It was at least necessary that there should have been two annual instalments, and I think, according to the decisions, they should be equal annual instalments. Had there been no illegality, my opinion is that the special assessments may be sued for as taxes may be sued for. Mr. *Davis,* the learned counsel for the appellant, referred to *Biggs* v. *Freehold L. and S. Co.* (1899), 26 A.R. 232, Maclennan, J.A. at p. 240, as being authority for the proposition that although the statute reads "annual instalments," it is satisfied by making the assessment in one instalment. With deference, I cannot adopt the argument advanced, nor do I think the Court of Appeal so decided. Maclennan, J.A. said:

MCPHILLIPS, J.A.

> "It would not be incorrect to say that the principal money of a mortgage was all payable in one instalment. That would plainly mean in one sum or in one payment, and not in several."

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With this statement of that distinguished judge I quite agree, but when we turn to the statute we have to construe we are confronted with very different language—"annual instalments." The language is intractable, it is plain, it cannot be misunderstood. To construe it otherwise is to run counter to the patent meaning of the Legislature.

I would, therefore, dismiss the appeal.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellant: *J. H. Bowes.*

Solicitor for respondent: *D. S. Wallbridge.*

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Mines and minerals—Yukon Territory—Creek and river—Placer claims—Dredging lease—Surface rights—"River," what constitutes—Erosion—Trespass—Measure of Damages—Placer Mining Regulations, 1898—Dredging Regulations, 1898—View.

A creek placer mining claim cannot include or pass over the submerged bed of a river.

Per MACDONALD, C.J.A.: The policy of the mining laws in force at that time in the Yukon Territory would exclude the acquisition of mining rights in the river-bed except under dredging leases.

The side boundaries of a river-bed held under a dredging lease issued pursuant to the Dredging Regulations of the 18th of January, 1898, are fixed by low-water mark on the 1st of August of the year in which the lease is issued, and said boundaries are not affected by erosion of the banks of the river during the existence of the lease.

Per MARTIN, J.A.: The mining rights and areas secured by the due location of river claims are fixed by said location once and for all, and are not subject to diminution by erosion any more than they are entitled to augmentation by accretion.

Observations by MARTIN, J.A. upon the effect of a view.

Measure of damages for trespass on mining property discussed.

Statement

APPEAL by defendant Company from the decision of MACAULAY, J., delivered at Dawson, Y.T., on the 21st of

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Statement

November, 1914, in an action for damages for trespass, for an injunction restraining the defendant Company from further trespass, and for an account of the gold taken by the defendant Company from the plaintiff Company's property. The plaintiff is the owner of the surface rights of what is known as Lee Pate Island, in the Klondike River, about one mile from its mouth. The island contains 32 acres, the main channel of the Klondike River flowing past its northern bank, and a slough or narrow channel, averaging about 50 feet wide, running around its south side, a portion of the waters of the main channel of the river entering the slough at the east end of the island and running again into the main channel at the west or lower end of the island. The surface rights of the island were first applied for by one H. C. Gingg on the 25th of July, 1897, who transferred his rights under the application to one Lee Pate, who obtained a Crown grant on the 28th of January, 1903, the property, after a number of transfers, being acquired by the plaintiff Company. The mining rights on the island were granted to the plaintiff Company on the 25th of April, 1910, under and by virtue of an order in council of the 31st of July, 1906, in two river placer claims known as numbers 12 and 13 above Maris discovery, left limit of Klondike River, the claims being staked from the bank of the main channel of the river on the north side of the island. The stakes were placed approximately at the point of high-water mark on the Klondike River on the 1st of August, 1898, so that the claims adjoined the submerged bed of the river as defined by the Dredging Regulations. The plaintiff Company acquired the surface rights of Lee Pate Island for the purpose of erecting thereon machine shops and other buildings required for maintaining its extensive mining operations, the cost of constructing said buildings alone being about $179,000. The Company later acquired the mining rights (*i.e.*, river claims 12 and 13 above Maris discovery), mainly for the purpose of protecting the surface from possible incursion through others obtaining the mining rights on the property.

The defendant Company is the owner of creek claim the lower half of 105, below Discovery on Bonanza Creek, and of the Guerin dredging lease, which consisted of the submerged

bed of the Klondike River for five miles from its mouth up the river.

A grant for the creek claim was first issued on the 11th of January, 1899, and a Crown grant was issued to Michael Guerin for the dredging lease on the 18th of March, 1898. The plaintiff Company complains (1) that the defendant Company, while dredging said creek claim number 105 encroached upon the south side of Lee Pate Island, and (2) that in dredging from the main stream of the Klondike (under the Guerin lease) it encroached on the north side of the island in both cases destroying the surface and threatening the destruction of buildings thereon, also that they at the same time extracted all the gold within said area. As to the southern trespass, the defendant's creek claim being the prior location, the main question was how far the side boundary line of said claim extended? The regulations fix the side boundary line at a point on bedrock three feet above the level of the stream upon which the claim is located, but in no case to exceed 1,000 feet from the middle of the stream. The question as to bedrock did not arise, as it was below water level for a considerable distance beyond the 1,000-foot limit. The slough, or southern branch of the Klondike River was at this point about 300 feet from the Bonanza stream, and the question was whether creek claim 105 could extend across the slough (which was about 60 feet wide at this point) and extend on Lee Pate Island to the limit of 1,000 feet from the middle of Bonanza stream? The plaintiff contended that the slough was part of the Klondike River, that a creek claim could not extend over the submerged bed of a river under the regulations, and the side boundary line of the creek claim must, therefore, be the southerly side of the slough, and in any case they could not extend their lines on Lee Pate Island, as the surface rights thereto were acquired prior to the location of creek claim 105, and if it were allowed to be so extended it would include ground upon which buildings were erected to the value of $60,000. The defendant, on the other hand, contended the slough was not part of the river, and that in any case they were entitled to extend their lines to the 1,000-foot

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limit, as there was no bedrock three feet above the level of the stream that intervened.

As to the northern trespass, the defendant Company extended its operations about 100 feet beyond the side line of the Guerin lease as fixed by the high-water mark on the 1st of August of the year in which the lease was granted (*i.e.*, 1898), the contention of said Company being that the surface of the area included in the alleged trespass had been carried away by erosion after they had obtained the lease, but prior to their work, and that they were entitled to work out from time to time any area that subsequently to the date of their lease had become submerged owing to the surface being carried away by the waters of the Klondike River, and, in any event, the plaintiff Company was not entitled to any portion of the placer claims (river claims 12 and 13 below Maris discovery) that had become submerged owing to erosion, and they, therefore, had no status for complaining of the alleged trespass. The plaintiff, on the other hand, contended that the line as fixed on the 1st of August, 1898, as the side boundary of the dredging lease was not subject to changes owing to erosion, but was a fixed boundary during the existence of the lease; also that the river claims under which it claimed title to the ground include the area as originally staked, and the fact of a portion of the area being subsequently submerged by erosion does not deprive them of the right to all gold that may be below such submerged portion. The learned trial judge found that the defendant Company had trespassed on the plaintiff Company's property in both cases, and assessed the damages at $11,700.

Statement

Congdon, K.C., Pattullo, K.C. and *Smith,* for plaintiff.
Tabor, and *Gosselin,* for defendant.

The appeal was argued at Vancouver on the 3rd, 4th and 5th of November, 1915, before MACDONALD, C.J.A., IRVING,* MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Davis, K.C. (*J. S. Mackay,* with him), for appellant: The case narrows down to two trespasses on Lee Pate Island by the defendant Company, one from creek placer mining claim the

Argument

*No judgment was delivered by IRVING, J.A. in this case, nor in *Re Succession Duty Act and Boyd, ante,* p. 77.

lower half of 105, below Discovery on Bonanza Creek, on the southerly side of the island, and the other from the Klondike River, which was held for dredging purposes at that point under the Guerin dredging lease, on the northern side of the island, the above mentioned placer claim and the Guerin lease being the properties of the defendant Company. First as to the southern trespass, placer claim the lower half of 105, below Discovery on Bonanza Creek, was staked on the 11th of January, 1899. The title to the surface rights of Lee Pate Island originated with an application by H. C. Gingg on the 15th of July, 1897, through whom the plaintiff Company had title, and the mining rights on the island were acquired by the plaintiff on the 25th of April, 1910, so that the sole question is whether the defendant's claim (which is the prior location) can extend across the slough and include a portion of the island, as it would if extended 1,000 feet from the centre of Bonanza Creek. The trial judge held the slough was part of the Klondike River, and the submerged bed of a river could not be included in a placer claim. It is my submission that the slough in question is not a river within the meaning of the regulations, and that it could not come within the term "river" in the Dredging Regulations, as it is too small for practical use for dredging as a submerged bed. In certain portions of the year there is no water in the slough. The next objection to the validity of claim 105 is that it is outside the jaws of Bonanza Creek proper (which are at about claim 90 below Discovery) and is located in the valley of the Klondike River, through which the stream from Bonanza Creek runs before it enters the Klondike, citing *Landreville* v. *Boulais et al.* (1914), 29 W.L.R. 466, the principle being that a creek must flow in a valley of its own. But this case was decided by MACAULAY, J. absolutely contrary to the principle laid down by the Full Court of the Yukon (DUGAS, CRAIG and MACAULAY, JJ.) in *Boyle* v. *Sparks* (not reported), where they pronounced the validity of claim 20, below Discovery on Bear Creek, which was staked on the stream of Bear Creek after it had entered the Klondike valley. Some 20 claims were staked along Bonanza waters in the Klondike flat in 1897 and 1898, and have been recognized up to the present time, and

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their location along the stream is a substantial compliance with the regulations in force at that time. We contend the staking of river claims 12 and 13 on the island, under a special order in council, for which grants were issued, are a nullity, as the locations are within the city limits, and under the Placer Mining Act of 1906 a location could not be located within the city limits without first applying to the gold commissioner for leave to stake, and this had not been done. As to the northern trespass, we say that our dredging lease was obtained by one Guerin on the 8th of March, 1898, and through him the defendant Company obtained title; under this lease we are entitled to dredge the submerged bed of the Klondike River. From year to year, through erosion, the northern bank of Lee Pate Island was washed away, and the portion for which a trespass is now claimed had been washed away before we dredged it. We have been assessed for exemplary damages, following the rule laid down in *Lamb* v. *Kincaid* (1907), 38 S.C.R. 516. That case can be distinguished, as there the gold was taken out during litigation, and should not be applied here. The value, we contend, is in any case too great, and the expense of moving our dredge without finishing our ground should be considered in estimating damages.

Argument

Congdon, K.C., of the Yukon bar (*Pattullo, K.C.,* and *Smith,* of the Yukon bar, with him), for respondent: The title to the surface rights of Lee Pate Island commenced when applied for on the 15th of July, 1897, which is prior to any mining rights held by the defendant Company through which they claim the right to encroach on our property. An applicant is entitled to possession immediately under section 218 of the Dominion Land Act. On the question of creek claim the lower half of 105 below Discovery being staked in the Klondike basin, we rely on the judgment in *Landreville* v. *Boulais et al.* (1914), 29 W.L.R. 466. They claim ground on Bonanza Creek that in fact is in the Klondike flat. On the definition of a creek claim, see section 21 of the Interpretation Act, R.S.C. 1906, Cap. 2, and *Crain* v. *Trustees Collegiate Institute, Ottawa* (1878), 43 U.C.Q.B. 498; *Roy* v. *Fortin* (1915), 22 B.C. 282. The Klondike cases on this point are *Fleishman* v. *Getchel, Fleishman* v. *Crease,* and *Boyle* v.

Sparks (not reported); see also *Victor* v. *Butler* (1901), 8 B.C. 100, and *Nelson & Fort Sheppard Ry. Co.* v. *Jerry et al.* (1897), 5 B.C. 396. The main contention of the appellants is that the side boundary line of creek claim the lower half of 105 should have extended 1,000 feet from the centre of Bonanza stream and across the slough, in which case it would include a considerable portion of Lee Pate Island. We say that the trial judge having found as a fact that the slough is a branch of the river, the creek claim's side boundary cannot extend into or beyond the slough, and the south side of the slough is the natural side boundary of the claim, as, by virtue of the mining regulations, it cannot extend into or include any of the submerged bed of a river. The northern trespass by the defendant from the submerged bed of the Klondike River (held under the Guerin dredging lease) was an encroachment on river claims 12 and 13 above Maris discovery, on the left limit of the Klondike River. These claims, which were staked from the north bank of Lee Pate Island in order to include the mining rights on the island, were acquired in 1910, and although the Guerin lease was obtained long prior to that, we say they extended their dredging beyond the boundary of their lease holdings when they encroached on these claims. The boundary was fixed in 1898, the lease including the submerged bed of the river to low-water mark on either side on the 1st of August, 1898. This is a fixed boundary and is not affected by erosion of the bank subsequently; that they can follow the submerged bed as the bank is washed away is their only argument on this trespass, and there is no doubt the boundary is as established in 1898 and cannot be changed. The dredging regulations of 1907 do not apply to this lease: see *Bulmer* v. *The Queen* (1893), 23 S.C.R. 488 at p. 494; *Chappel* v. *The King* (1904), A.C. 127 at p. 135; *Martyn* v. *Williams* (1857), 1 H. & N. 817. As to our locations (12 and 13 above Maris discovery) being within the city of Dawson, the order in council authorizing our locations was passed before the Act excluding the city from location, and there is no clause in the Act making it retrospective. The fact of the grants being issued subsequently does not affect our rights: see *Garnett* v. *Bradley* (1878), 3 App. Cas. 944; *Attorney-General* v. *Esquimalt and*

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Nanaimo Ry. Co. (1912), 17 B.C. 427; 19 W.L.R. 693 at p. 697; *Taylor* v. *Corporation of Oldham* (1876), 4 Ch. D. 395 at p. 410. We were in actual possession of the ground at the time of the trespass, both under our patent for the surface rights and our placer mining grants to the mineral rights. On the question of damages being assessed on the harsher scale, see *Lamb* v. *Kincaid* (1907), 38 S.C.R. 516.

Argument

Pattullo, K.C., on the same side: We have accepted Mr. Boyle's evidence as to the values taken from the ground trespassed upon. There is no authority for the proposition that the ground included in a placer location is affected by erosion. On the south trespass the trial judge fixed the side boundary line of creek claim number 105 at the slough as the natural boundary, the slough being held as a branch or portion of the river. The damages accruing through the removal of the surface must be included, as the plaintiff Company's works spread over the larger portion of the island.

Davis, in reply.

Cur. adv. vult.

4th April, 1916.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The argument before us was confined to much narrower limits than that before the learned judge of the Yukon Territory. Apart from some minor considerations which I shall refer to presently, two substantial questions are involved in this appeal, referred to in argument as the south trespass and the north trespass respectively. The south trespass has to do with the taking of gold from plaintiff's river claim No. 12 under colour of right claimed by defendant as owner of the lower half of creek claim No. 105 below Discovery on Bonanza Creek. Accepting, as I do, the finding of fact of the learned judge, that what is called the slough is an arm of the Klondike River, the neat question of law is whether or not a creek claim may extend across a river. The said creek claim, if given its full width of 1,000 feet north from its base line, would be carried across the slough and would come in contact with plaintiff's said claim No. 12, which was granted to it subsequently to the grant of the creek claim to the defendant. If, therefore, the creek claim could be carried

across the river, the placer ground in dispute belongs to the defendant and not to the plaintiff. Plaintiff's counsel argued that admission No. 2 of the defendant's admission of facts concluded the question of the ownership of the ground in dispute, but I think this cannot be so. The said claim No. 12 was granted subject to the existing rights of others, and if the creek claim was lawfully located to the full distance of 1,000 feet from its base line, notwithstanding that this would carry it across the river, then the disputed ground was not within the plaintiff's claim No. 12, because of the exception just mentioned.

The policy of the mining laws in force at that time in the Yukon Territory would, it seems to me, exclude the acquisition of mining rights in the river bed except under dredging leases. A river claim might be staked only on one side of the river. A creek claim is of the same nature as a river claim except that it may include the bed and both banks of the creek. I think the ground between the creek and the river might have been located either as creek claim or river claim, but I think that if located as a creek claim it could not be carried across and include the bed of the river any more than could a river claim. The river was the obstacle beyond which the creek claim could not extend, because mining rights in the river bed could not be acquired by grant of either a creek or a river claim.

In view of this conclusion it becomes unnecessary to consider other grounds of appeal relating to the south trespass, as the appellant is not concerned with the validity of the creek claim in respect of ground south of the slough. The learned judge applied the severer rule to the measure of damages in respect of this branch of the case, and I am unable to say that he was clearly wrong in doing so.

The question involved in the other branch of the appeal, the northern trespass, arises out of the encroachment of the Klondike River upon the northern end of the plaintiff's said claim No. 12. The defendant's predecessor in title obtained from the Crown in 1898, under dredging lease No. 23, a grant of mining rights in the bed of the Klondike River from the mouth thereof to a point five miles upstream. Under the regulations then in force the side boundaries were declared to be low-water

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mark as it was on the 1st of August of the year in which the lease was granted. In the year 1907 new regulations were made, and river bed was therein declared to mean "the bed and bars of the river to the foot of the natural banks." It was further declared that "every lessee under these regulations or under the regulations hereby rescinded shall have the exclusive right to dredge the river bed within the length of the river leased to him." In 1910 plaintiff obtained its grant of said claim No. 12, situated on the south bank of the main arm of the river about two miles from its mouth. By the action of the river and of surface water, part of the river bank included within the boundaries of said claim No. 12 have become eroded and submerged. This erosion was not gradual or imperceptible, but occurred in the spring of each year: the encroachments in the three years in question here approximate 100 feet. The trespass complained of is that the defendant dredged this accretion to the river bed, which plaintiff claims to be still part of its claim No. 12.

The authorities to which we were referred shew that as between landowners on opposite sides of a river ownership does not change in case of sudden erosion or accretion, such as took place yearly in this case. This is a rule of common law, and unless it be inapplicable to conditions under which placer mining is carried on in the Yukon Territory, which was not suggested by counsel in argument, or was abrogated by statute, it must be given effect to here. Mr. *Davis,* defendant's counsel, did contend that the regulations above mentioned enlarged the defendant's rights. He contended that on the true construction of the regulations, the dredging lessee was entitled to dredge to the natural banks as they existed from day to day during the period of the lease.

MACDONALD, C.J.A.

The Yukon Placer Mining Act, as enacted in 1906, declared that no placer mining rights should be acquired except under that Act, but in the following year an amendment was passed declaring that—

> "Nothing in this Act shall prevent the enactment by the Governor in Council of regulations under which dredging leases may be issued of the whole of the bed of any river in the Territory."

This would authorize the making of the regulations of 1907

so far as they relate to leases thereafter to be granted, but, in my opinion, would not authorize the enlargement, by regulations alone, of the rights of the holder of then existing leases. To do this it would be necessary to grant new leases. The defendant therefore has title, under its lease, only in the bed of the river to low-water mark as it was on the 1st of August, 1898, and has no title to the ground in dispute.

But, as it was contended that plaintiff had no title to, and could not be in actual possession of the disputed area, I must go a step further and examine the plaintiff's title. The Governor in Council had authority to define for the purpose of all leases to be granted thereafter "river bed," and he defined it in the regulations of 1907. Plaintiff's claim No. 12 was granted after the passing of the regulations, and its rights would be governed by the law as it stood at the date of its grant. It could take only down to the foot of the natural bank, and if its boundary is fixed for all time except as regards imperceptible erosion or accretion, then the northern boundary is the foot of the natural bank as it was at that date. Under the provisions of the Yukon Placer Mining Act, and also under the Dredging Regulations, the grantee may be required to survey his claim, which goes to shew that fixed boundaries were contemplated. In my opinion, therefore, there is nothing in the statutory law governing this case to support the claim of the appellant that sudden accretions to the river bed revert to and become the property of the Crown as against the person whose lands have been submerged, and hence their contention, that even if the ground in dispute were not within the area leased to them the respondent was neither the owner nor was it in possession of the same, cannot, in my opinion, be supported.

MACDONALD, C.J.A.

An attack was made upon plaintiff's said claim No. 12 on the ground that it was located on a townsite without due authority. I think this is met by defendant's admission of facts.

Another point raised by the defendant's counsel had to do with the measure of damages, but I see no reason for disturbing the finding of the learned judge with respect thereto.

The appeal should be dismissed.

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MARTIN, J.A.: This case has been a lengthy one, but the important points are few and short, in view of the finding of fact that lot 8 is an island in the Klondike River and that the slough in question is part of the same. I see no reason whatever for disturbing this finding, quite apart from the fact that the learned judge had the great advantage of having taken a view of the *locus,* which I have found in my experience as a trial judge in cases in connection with watercourses may be, as here, of much importance. It has been said that a judge cannot "put a view in the place of evidence": *London General Omnibus Company, Limited* v. *Lavell* (1901), 1 Ch. 135 at p. 139, *per* Lord Alverstone, C.J., and applied in *Rex* v. *De Grey and Another; Ex parte Fitzgerald* (1913), 77 J.P. 463, yet Vaughan Williams, L.J. said in the first case, p. 141, that it may very well be that in some cases no proof is "required beyond that of the mere resemblance" observable upon a view, and in *Blue* v. *Red Mountain Ry. Co.* (1907), 12 B.C. 460 at p. 467, I pointed out the restricted application of Lord Alverstone's said expressions and cited authorities in support of a much more extended application of the benefits of a view, which I now refer to, merely adding thereto *Holdsworth* v. *M'Crea* (1867), L.R. 2 H.L. 380, a patent case, wherein Lord Westbury said, p. 388:

"Now, in the case of those things as to which the merit of the invention lies in the drawing, or in forms that can be copied, the appeal is to the eye, and the eye alone is the judge of the identity of the two things. Whether, therefore, there be piracy or not is referred at once to an unerring judge, namely, the eye, which takes the one figure and the other figure, and ascertains whether they are or are not the same."

MARTIN, J.A.

This language was adopted by Lord Watson in *Hecla Foundry Co.* v. *Walker, Hunter & Co.* (1889), 14 App. Cas. 550 at p. 557, respecting a registered design, and Lord Herschell said, p. 555, "the eye must be the judge in such a case as this"; and in *Payton & Co.* v. *Snelling, Lampard & Co.* (1901), A.C. 308, a case respecting two similar coffee labels, Lord Macnaghten said, p. 311, after referring to the evidence of certain witnesses on the likelihood of deception:

"But that is not a matter for the witness; it is for the judge. The judge, looking at the exhibits before him and also paying due attention to the evidence adduced, must not surrender his own independent judgment to any witness,"

which, as Farwell, J. says in *Bourne* v. *Swan & Edgar, Limited* (1903), 1 Ch. 211 at p. 226—

"I take to mean that the judge is not to take the answers of any witness, on the very question that he is to try, to the surrender of his own judgment."

A striking recent illustration of the value of a view, wherein it was the turning point of the case and "the appeal to the eye" established the obvious truth at a glance, is to be found in the *City of New Westminster* v. *The "Maagen"* (1915), 21 B.C. 97, an action before me in the Admiralty Court.

I pause here to note for correction that there is a strangely inaccurate footnote of the editor of the B.C. Reports in *Blue* v. *Red Mountain Ry. Co., supra,* 467, wherein he wrongly says that the decision I referred to in *Star* v. *White* as "not yet reported" was "not yet decided" on the 15th of November, 1906, as I correctly stated it was, as appears by the report thereof in 2 M.M.C. 401 at pp. 407-8.

To resume: I think the learned judge rightly decided that the northerly (side) boundary of the defendant's creek claim on Bonanza Creek (the lower half of 105), of which the side lines have never been defined, does not in any event extend beyond the bank of the slough, *i.e.,* the southerly bank of the Klondike River. This view of the application of the regulations is in accordance with the principle more or less involved in previous decisions of the Yukon Court, both of single judges and on appeal, extending over a period of 15 years, and much weight should be attached to the working application of the regulations as construed by the Courts of the country in which they are in operation, which Courts are in a much better position than we are, from their local experience and knowledge, to grasp and give effect to the true intent of the regulations as enacted for, and to facilitate practical mining operations in, that district, which has peculiarities of its own. Of course, if the construction were one not in our opinion consistent with any reasonable view, it would be our duty to give what we think is the true one, but nothing of that kind presents itself in this case, which is one where the constructions put forward by both sides will lead to difficulty in their ultimate application in the various circumstances which have been pos-

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tulated. For example, the argument advanced by the defendant involves the construction that a creek claim might be so located that one of its side lines would extend beyond the bank of an adjacent river, across the water to a narrow island in the stream 200 feet from the bank, and again extend across that narrow island and across the intervening water to the further bank, and up into that bank a considerable distance so long as the whole extension did not exceed 1,000 feet. But these difficulties will have to be met when they arise, and do not now prevent the present adoption of the learned judge's construction.

I am also in accord with his view that, entirely apart from original lot 8, the mining rights and areas secured by the due location of river claims 12 and 13 are fixed by said location once and for all, and are not subject to diminution by erosion any more than they are entitled to augmentation by accretion, and therefore the plaintiff is entitled to the damages caused by the defendant's operations in the Yukon River under its dredging lease, whereby said claim 12 was trespassed upon at both its northerly and southerly ends.

This is quite apart from the admissions which go to the unusual length of admitting that the plaintiff is "the owner and in possession of" said river claims, all the boundaries of which have always been defined, and that they "are now in good standing" which really establishes the plaintiff's case, because a free miner who "owns" and "possesses" a mining claim "in good standing," which in mining parlance means original valid location and subsequent compliance with the regulations, can hold his ground against all comers.

MARTIN, J.A.

As regards the defendant's right to dredge the bed of the river, I share the view that the statutory amendment of 1907 did not authorize that to be done in the case of existing leaseholders who did not apply for and obtain a new lease; the mere general declaration of the right by the 4th regulation of 1907 is not a sufficient compliance with the statute. In other respects I am of the opinion that no good ground has been shewn to justify our interfering with the judgment, and, therefore, the appeal should be dismissed.

I only add, by precaution, that while I agree as aforesaid

with what was held below respecting the side line of 105 ending at the Klondike River under the Yukon Regulations, yet my views as to lode locations on land covered by water, frozen (glacial) or otherwise, under our British Columbia laws, as set out in *Sandberg* v. *Ferguson* (1904), 2 M.M.C. 165, have not changed.

GALLIHER, J.A.: This is an action for trespass for entering upon and dredging upon lands claimed by the plaintiff, and for the value of the gold recovered therefrom by the defendant. The ground in question is what is known as Lee Pate Island in the Klondike River, and being lot 8, group 1, Yukon Territory. On the 5th of December, 1901, Lee Pate obtained a Crown Patent for those lands, from which was reserved a strip of land 100 feet wide around the shores of the island from the river banks, and also the precious metals under the island. On the 28th of January, 1903, a new Crown Patent was issued to Lee Pate, in which the 100 feet reserved in the original grant was granted, but the minerals reserved as in the former patent. The present plaintiff has acquired these lands through Lee Pate and his successors in title.

On the 31st of July, 1906, by order in council, the Yukon Consolidated Gold Fields Company, Limited, the holders of the surface rights, were granted the right to stake out and acquire the ground included in said lot 8 for placer mining purposes upon their complying with the placer mining regulations, subject to all and any existing rights, and that such right shall not be transferable. It is objected that it is not proved that the Yukon Consolidated Gold Fields Company and the plaintiff are one and the same, but I think that is covered by the admissions in this case.

The plaintiff did not stake out the said lands as placer claims until 1910, since which time they have been kept fully in force as existing claims as river claims Nos. 12 and 13.

Two trespasses are charged, one on the northern side of the island and one on the southern side. The defendant denies trespass, and claims that it is working on its own ground —on the north under dredging lease prior in time to the plaintiff's rights acquired under the order in council above

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referred to of the 31st of July, 1906, and to the staking in 1910, and on the south under rights acquired also prior in date to plaintiff's rights, and being under a creek claim staked on Bonanza Creek and extending over and upon the plaintiff's claim 12 on the island.

Dealing with the southerly trespass first: The first matter to decide is whether the slough which separated Lee Pate Island from the mainland on the south is a part of the Klondike River. The trial judge has found as a fact that it is, and I do not see any reason to differ from his conclusion. Having so found, the next question is, can the creek claim under which the defendant justifies be staked so as to cross the slough and take in any portion of the island? If so, the defendant has committed no trespass. If not, it has, provided claims 12 and 13 are valid claims.

Two classes of claims mentioned in the regulations only need be considered—"river claims" and "creek claims."

These are described in the regulations of 1901 as follows:

"A river claim shall be situated only on one side of the river and shall not exceed 250 feet in length, measured in the general direction of the river. The rear boundary of the claim which runs in the general direction of the river shall be defined by measuring 1,000 feet from low-water mark of the river.

"A creek or gulch claim shall not exceed 250 feet in length, measured along the base line of the creek or gulch, established or to be established, by a Government survey. The rear boundaries of the claim shall be parallel to the base line, and shall be defined by measuring 1,000 feet on each side of such base line. In the event of the base line not being established, the free miner may stake out the claim along the general direction of the creek or gulch, but it will be necessary for him to conform to the boundaries which the base line, when established, shall define."

In spite of the unambiguous nature of the language used in describing a creek claim, I do not think that a creek claim can be staked so as to cross and occupy land on both sides of a river. The class of claims to be staked on a river are designated "river claims" and can only be staked on one side of a river, so that, supposing there had been no Bonanza Creek at this point, anyone desiring to occupy ground on the Klondike River would have had to stake as a river claim and on one side only of the river; then, does the fact that Bonanza Creek happens to be at this point close to the Klondike River enable the

defendant to stake as a creek claim and acquire lands that it could not possibly have acquired even under the class of claims applicable to lands situate on a river? I think that cannot have been the intention of the Act or the regulations. If so, it might be that large areas of lands lying on both sides of a river could not be staked as river claims at all if some one came in and occupied these lands under creek claims. Of course, it may be said that if the Act and regulations are defective that is a matter for legislation and not for the Courts, but, looking at it broadly, I cannot think that such was the spirit or intent of the Act.

As to plaintiff's claims 12 and 13, it is objected that these are wrongly staked as river claims, the defendant claiming that if the slough is a part of the Klondike River, then the southerly bank of the slough is the bank of the river and not the northerly bank of the slough, from which plaintiff staked. In my judgment, the waters which wash the south shore of the island, and being the northern boundary of the slough, are, as respects the island, the southern boundary of the Klondike River. This, as to location, then would make them valid, and they have been kept alive ever since, and as I have held that the defendant's claim cannot cross the river, or a part of it, to the island, the defendant had no rights in the ground trespassed upon in the south, which were, so far as damages were awarded, all comprised in the plaintiff's lands across the slough on the island. The trial judge, in awarding damages for this trespass, applied the severer rule, allowing nothing for cost of working. This finding is, of course, based on the evidence, and should not be lightly interfered with. In that view, and further, in view of the decision in *Lamb* v. *Kincaid* (1907), 38 S.C.R. 516, which, as I view it, is at all events no stronger than the present case, I would refuse to interfere. I think this disposes of the main features urged in respect of the southern encroachment.

GALLIHER, J.A.

As to the northern trespass a somewhat different condition arises. In 1898 the defendant obtained a dredging lease for dredging certain areas of the bed of the Klondike River, the boundary to be fixed as of the 1st of August of the year the lease was issued, but subsequently in 1907, and before the plaintiff had exercised its right to stake the minerals in

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question, new dredging regulations for the Yukon were, by order in council, put in force and the old regulations rescinded. In these regulations "river bed" is defined to mean "the bed and bars of the river to the foot of the natural banks," and by section 4, "Every lessee under these regulations, or under the regulations hereby rescinded, shall have the exclusive right to dredge the river bed within the length of river leased to him," subject (section 9) "to the rights of all persons who received entries for claims under the provisions of The Yukon Placer Mining Act, or under former regulations, prior to the issue of [the dredging] lease."

When Morrison staked placer claims 12 and 13 for the plaintiffs in 1910, he did so to a bank shewn on plan 1.2 as line of Morrison river bank. This bank is some distance south of the river bank established by Gibbon in 1897, due to the fact that the original bank had eroded by action of water and melted snow.

GALLIHER, J.A.

The trial judge has given judgment only for such areas as have been dredged by the defendant to the south of the Morrison river bank line established when the plaintiff's placer claims were staked, as the plaintiff's right to the minerals did not extend beyond the river bank as it then was. The defendant could not, under its dredging lease or the Dredging Regulations of 1907, work beyond that river bank in 1910, but since 1910 the river bank has further eroded, and was in 1913 (when the alleged trespass complained of was committed) as shewn on plan 1.2. It is as to the area (or so much of it as the defendant has dredged) lying between the bank of the river as it was in 1910 and the bank as it existed in 1913 that the dispute arises. The mineral rights in this area were undoubtedly granted to the plaintiff in 1910, but the defendant says that as the river has encroached and washed away the surface of this area, and it was covered by the waters of the Klondike River, we have the right to follow the bank from time to time as it recedes, and to recover any minerals we find between bank and bank, under our lease and the regulations. That depends upon whether the plaintiff has lost its rights by reason of the advance of the river and erosion of its banks.

In regard to this two things have to be decided, one a question of fact, the other a question of law.

The trial judge has decided as a fact that the erosion does not belong to the class which is referred to in the authorities as gradual or imperceptible, nor yet to the class where is is caused by sudden changes that occur by a violent effort of nature, but rather to an intermediate class, being due to the nature of the soil forming the surface of the land being principally composed of muck, and the action of the waters caused by the melting of the snow in or about the month of June in each year. I have scaled the distance on map 1.2, and roughly I should say that the bank has eroded at the average rate of 25 feet per year between the years 1910 and 1913. I do not think this could by any stretch of imagination be deemed to be gradual or imperceptible, but occurs at certain periods of the year and in very considerable quantities, so that the trial judge, in my opinion, put the case rather favourably to the defendant in terming it an intermediate change. I should say it partakes rather of the nature of sudden change, and in that view the authorities are clear that the plaintiff does not lose its right.

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Mr. *Davis* objected that in the area marked on map Q, where the value of 63 cents is noted, that 63 cents should not be included in striking an average of the gold values recovered, and that the damages should be reduced by some $2,000, but beyond stating that generally, failed to point to anything which would warrant me in excluding it. I can ascertain nothing from map Q to guide me as to why it should be excluded, and I would infer from the examination of Boyle for discovery that this map was prepared by him at the plaintiff's request to shew the yardage and values respectively in the areas dredged upon the ground in dispute.

It follows, in my view, that the appeal should be dismissed.

MCPHILLIPS, J.A.: I agree with the Chief Justice and concur in dismissing the appeal.

MCPHILLIPS, J.A.

Appeal dismissed.

Solicitor for appellant: *C. W. C. Tabor.*
Solicitor for respondent: *J. P. Smith.*

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May 9.

FERRERA v. NATIONAL SURETY COMPANY (No. 2).

Practice—Court of Appeal—Reserved judgments—Delivery of in absence of a member of Court—Court of Appeal Act, R.S.B.C. 1911, Cap. 51, Sec. 26.

FERRERA v. NATIONAL SURETY CO.

Where judgment is reserved after argument and the decision of one of the judges, in his own handwriting, but not signed, is later handed to the presiding judge of the Court, who subsequently, in delivering judgment, announces the decision of the absent judge:—

Held, that if the Court is satisfied that the opinion which reaches them is the opinion of the judge, though not signed, it must be accepted as an effective judgment from the day it is pronounced, and the subsequent filing thereof with the registrar of the Court is a sufficient compliance with the requirements of the Court of Appeal Act.

Statement

MOTION by the appellant to vary the judgment of the Court on the ground that no judgment of Mr. Justice IRVING had been read upon the delivery of judgment or filed with the registrar of the Court, as required by section 26 of the Court of Appeal Act. A sheet of paper with a list of the cases reserved for judgment in their short style of cause had been left with Mr. Justice IRVING (who was confined to his house through illness) and opposite each case, in his own handwriting, was written either the word "dismissed" or the word "allowed." Opposite the words "Ferrara v. National Surety Company" was written the word "dismissed." The paper, without any signature to it, was delivered to the Chief Justice, and when the judgment in this appeal was delivered by the Court, composed of MARTIN, GALLIHER and MCPHILLIPS, JJ.A., Mr. Justice IRVING's judgment was announced by the presiding judge of the Court, MARTIN, J.A., to whom the Chief Justice had handed the said opinion of IRVING, J.A. The paper was never filed with the registrar of the Court.

The motion was argued before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A. on the 9th of May, 1916.

Argument

O'Dell, for the motion: The sheet upon which Mr. Justice IRVING was purported to have given his decision was not signed.

[MACDONALD, C.J.A.: His decision in each case was in his own handwriting.]

Sections 11 and 26 of the Court of Appeal Act deal with the delivery of judgment, and in case of a written judgment it should be signed. The Act also requires that it should be filed with the registrar, but it has not been so filed: see *Booth* v. *Ratte* (1892), 21 S.C.R. 637.

Bird, contra, was not called upon.

MACDONALD, C.J.A.: This point was settled yesterday, that notice in writing, where the statute does not require it to be signed, is not necessarily bad because not signed.

MACDONALD, C.J.A.

MARTIN, J.A.: We are all of the opinion that in the circumstances, this opinion having been, in the words of the statute, handed to the Court, that it is not necessary, then, that it should be signed by the judge. So long as we are satisfied that the opinion which reaches us is the opinion of the judge, it is not necessary for it to be signed. It is a question of identification of purpose, and, as was pointed out by my learned brother, the Chief Justice, in that case in which judgment was given yesterday—I take the interpretation of it from my brothers as I was not present—that it was held that notice in writing, if under the statute it was not required to be signed, was satisfied with the notice given, not in the handwriting of the person who wanted to give the notice, but in typewriting. Now, for instance, in this case Mr. Justice IRVING had handed to my brothers and myself his opinion in writing, which reached us through the Chief Justice. If it were typewritten and not signed by him I have no doubt at all the statute would be satisfied; then, having the opinion in writing handed to the Court, the only question is (as Mr. *O'Dell* said, it comes down to this), is the remaining provision of the statute, which says that the judgment is "then to be left with the registrar of the Court," complied with? Well, that has not been done yet, but on behalf of the Court, I state that it will be done today; and there seems to be no time fixed within which the statute is to be complied with, and certainly it would be a compliance with it if the judgment is still unsigned. I do not think it could

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be done after, but until judgment is signed then it would undoubtedly be a compliance with it.

GALLIHER, J.A.: I think what my brother has stated is sufficient. The statute is satisfied when the opinion is filed.

MCPHILLIPS, J.A.: There is no break in the continuity of things here. The judgment came from the learned judge himself, being unsigned matters not—signature, it would seem to me, is quite unnecessary. It, of course, would be dangerous if it were otherwise held, *i.e.*, lack of continuity and delivery—because some learned judge might write out his opinion not intended to be his final opinion. Here we have the continuity of things, and it is the final and considered opinion of MR. JUSTICE IRVING.

Motion dismissed.

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May 23.

BAKER & ELLICOTT v. WILLIAMS

BAKER & ELLICOTT v. WILLIAMS *ET AL.*

Mechanic's lien—Sub-contractor—Contract for improvements by lessee—Owner—Knowledge of works—Mortgagee—Mechanics' Lien Act. R.S.B.C. 1911, Cap. 154, Secs. 10 and 16.

In an action to enforce a lien where the owner of the property did not contract for the work or improvements, it is incumbent upon the plaintiff, under section 10 of the Mechanics' Lien Act, to shew that the owner had knowledge of such works or improvements.

Statement

APPEAL from the decision of SCHULTZ, Co. J., of the 28th of October, 1915, in an action by sub-contractors for the enforcement of a lien. The property in question, owned by the defendant Williams, and upon which the defendant Doering held a mortgage, had been leased to the Provincial Hotels Company, Limited. The lessee entered into a contract with the J. J. Frantz Construction Company, Limited, for installing

certain improvements in a hotel (known as the Lotus Hotel) on the premises for $1,650, and the Construction Company sub-contracted to the plaintiffs. The sub-contractors completed the work, and after being paid $225 on account there was still due them $404.70, for which they filed the lien in question. During the negotiations one Lurie, who was a shareholder in the Provincial Hotels Company, Limited, and a real-estate agent, entered into an agreement with the J. J. Frantz Construction Company, Limited, for the construction by them of a building on another property for $5,400, and the Construction Company agreed to accept, in lieu of the two payments of $1,650 and $5,400, a conveyance of certain property in South Vancouver from Lurie, and in pursuance of the agreement, when the Provincial Hotels Company, Limited, paid the J. J. Frantz Construction Company, Limited, the sum of $1,650 upon the completion of the contract for repairs on the Lotus Hotel, the cheque was indorsed by the Construction Company and delivered over to Lurie. It was held by the trial judge that the payment by the defendant Company was not *bona fide,* that the owner (Williams) had knowledge of the contract, and judgment was entered for the plaintiffs against all the defendants. The defendants appealed.

Statement

The appeal was argued at Vancouver on the 23rd of May, 1916, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

E. J. Deacon, for appellant (Provincial Hotels Company, Limited): The money was paid by the Provincial Hotels Company to the contractors, and the fact that the contractors had a deal in real estate with another does not affect the position of the Hotels Company.

Thomas E. Wilson, for appellants (owner and mortgagee): There is no evidence that the owner had knowledge of the contract as required under section 10 of the Mechanics' Lien Act, so that there can be no lien against his property, and if the owner's property is not liable the mortgagee's interest is not liable, as by depriving him of a portion of his security the owner will be deprived of the same interest.

Argument

W. C. Brown, for respondents: The trial judge has found as

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a fact that the owner had knowledge of the contract, and his finding should not be disturbed: see *Brown* v. *Allan & Jones* (1913), 18 B.C. 326.

MACDONALD, C.J.A.: I think the appeal should be allowed in so far as this lien is made enforceable against the property of the owner; that is to say, the interest of the owner in the lands. That seems to be the only point in the case remaining after what we stated to Mr. *Deacon*. His case, it seemed to me, failed on the ground that the transaction was in contravention of section 16 of the Mechanics' Lien Act. With regard to the mortgagee, who is an appellant, the judgment below was against him on the assumption that there was a lien against the owner's interest, the mortgagee is only concerned to this extent with these liens: that if it can be shewn that the work done increased the value of the property, the lienholder is entitled to have that increased value; that is to say, to have the difference between the value of the property without the work that was done and the value of the property with the work that was done, and to the extent of that increase he has priority over the mortgagee on the owner's estate; but if the owner's estate is not liable at all, then the question of priority does not arise. If the interests of the owner are not subject to the lien, then the increased value is an accretion to the value of his property to which he is entitled. If you give the lienholder that accretion you are depriving the owner of what belongs to him. What is the claim as far as the mortgagee is concerned? His mortgage would be subsequent to the extent of the increase in value given by the law to the lienholder. The lienholder is given the first mortgage on the land to the extent of the increase and the mortgagee is made second in respect of the increase, and that is all the interest of the mortgagee that is involved. Now, on what is that first mortgage? It is on the owner's estate, and if you cannot attack the owner's estate, how can you get it? There are cases where the mortgagee's interests might be subject to liens independently of the owners. The mortgagee might erect a building and thus subject his interest to liens, but that is not this case. The mortgagee's appeal should be allowed.

MACDONALD, C.J.A.

MARTIN, J.A.: I reach the same conclusion. My view of section 10 is that it is clearly incumbent upon the lienholder to shew that the owner had knowledge. Unless the owner has that knowledge brought home to him it cannot be inferred that the work was done at his "instance and request," and so the onus is cast upon the lien claimant. With all due respect to the learned trial judge, it is clearly apparent that there was no evidence before him which would justify him in his finding. This is one of those cases where, to adopt the language of the Supreme Court of Canada, the judge was "clearly wrong" on the facts. The only method of getting on record, so to speak, is through the owner's interest, and it is impossible to treat the "mortgaged premises" under section 9 apart from the interest of the owner, and unless you can attack the owner's interest, either at his own request or through the implied request of section 10, you cannot make an attack on it at all.

MARTIN, J.A.

MCPHILLIPS, J.A.: I find difficulty in supporting the learned trial judge on the most important point which is before us now, *i.e.*, the knowledge in the owner. I would feel disposed in these mechanic lien cases to go a long way to support the judge's finding on questions of fact because we do not really get these cases before us, as far as the evidence is concerned, in a very complete form as a rule. If I were able to say that this case comes within the language of Lord Loreburn, L.C. in *Bobbey* v. *W. M. Crosbie & Co. (Lim.)* (1915), 60 Sol. Jo. 173, where the question was one arising under the Workmen's Compensation Act, I would support the learned trial judge in his finding of fact that there was knowledge. In the case that I refer to, Lord Loreburn said: "Except for some evidence, which his Lordship agreed was faint." In this particular case before us it is even worse than faint. Lord Loreburn further said: "He thought in substance that that was what was found by the learned judge, and in his opinion there was material for coming to that conclusion." Therefore the appeal was allowed. That was a case where the House of Lords supported the learned County Court judge although the Court of Appeal had taken a different view. But I am unable to find any material here upon which the learned trial judge

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could say that there was knowledge in the owner. I do not wish to express an opinion on the point that you must, to make a case against the mortgagee, first establish a case against the owner—that not being necessary for decision on this appeal.

Appeal allowed.

Solicitors for appellants Williams and Doering: *E. M. Yarwood.*

Solicitors for appellant Hotel Company: *Deacon, Deacon & Wilson.*

Solicitors for respondents: *Ellis & Brown.*

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May 30.

REX v. EVANS

REX *EX REL.* BURROWS v. EVANS.

Criminal law—Stated case—Medical Act—Violation of—R.S.B.C. 1911, Cap. 155, Sec. 73.

Appeal—Jurisdiction—Construction of statutes—Summary Convictions Act, R.S.B.C. 1911, Cap. 218, Sec. 92—Court of Appeal Act, R.S.B.C. 1911, Cap. 51, Sec. 6.

Practice—Lodging case—Waiver—Summary Convictions Act Amendment Act, B.C. Stats. 1914, Cap. 72, Sec. 7, Subsec. (4).

The accused, charged with a violation of the Medical Act, held himself out as a "doctor of chiropractic" and "spine and nerve specialist." He treated a patient for asthma by what was termed the "adjustment treatment," the process being the rubbing of the spinal column, varied at intervals with the twisting of the head. He received from the patient $1 per treatment. On appeal from the magistrate's conviction:—

Held, that he practised medicine and was properly convicted of a violation of the Medical Act.

The Court of Appeal Act being subsequent in date of passage to the Summary Convictions Act, the provisions of section 6 of the later Act prevail over section 92 of the earlier one. The Court of Appeal has, therefore, jurisdiction to hear an appeal from the decision of a

Supreme Court judge on a stated case from a conviction by a magistrate under the Summary Convictions Act.

The provisions of subsection 4 of section 7 of the Summary Convictions Act Amendment Act, 1914, that the appellant shall, within three days after receiving the case stated, transmit it to the Court, is a condition precedent to the jurisdiction of the Court to hear the appeal, and it cannot be waived. The provisions of the subsection not having been complied with, the Court, notwithstanding strong circumstances shewing waiver, struck out the appeal (McPHILLIPS, J.A. dissenting).

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CRIMINAL APPEAL from the decision of MORRISON, J. on a stated case from the conviction by the deputy police magistrate at Vancouver of one George Evans for a violation of the Medical Act, in that he practised medicine for gain without being registered. The facts are set out fully in the reasons for judgment of MORRISON, J. Two preliminary objections to the appeal were raised by the Crown: first, that there was no jurisdiction to hear the appeal, as, under section 92 of the Summary Convictions Act, the judgment of the Court from which the appeal is taken is final and conclusive; secondly, that the appellant did not comply with the provisions of subsection (4) of section 7 of the Summary Convictions Act Amendment Act, 1914, under which the appellant must, within three days after receiving the case, transmit it to the Court, first giving notice in writing of such appeal, with a copy of the case as signed and stated to the other party to the proceedings. What actually took place was that the magistrate filed the stated case with the registrar of the Supreme Court, and on the same day sent a duplicate thereof to the appellant's solicitors. The appellant's solicitors (who had previously sent a copy of the proposed stated case to the Crown's solicitors) immediately notified the Crown's solicitors by letter what the magistrate had done, but did nothing further in compliance with the subsection.

Statement

A. C. Mackintosh, for the informant.

Sir C. H. Tupper, K.C., for the accused.

31st January, 1916.

MORRISON, J.: George Evans, who holds himself out to the public as a "Doctor of Chiropractic" and as a spine and nerve specialist, was on the 27th of August, 1914, convicted by the

MORRISON, J.

MORRISON, J. deputy magistrate for Vancouver for a violation of the Medical Act, *viz.*, practising medicine without being registered.

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The matter comes before me in the form of a case stated by the magistrate. A preliminary question as to my jurisdiction was raised and fully argued. Having regard to the view I hold on the merits of the case, I shall not go further than to say that I think there is jurisdiction to hear the case stated.

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The complainant Burrows is a detective, who seems to have been desirous of securing a conviction against the accused, Evans, and with that object in view secured the services of one Corkish, a mining prospector sojourning in the city, and at the time out of employment and suffering from asthma. He was given $10 by Burrows, who instructed him to go to Evans and endeavour to get him to treat him for his ailment, the main object being, however, to trap Evans and so secure sufficient evidence upon which he might be convicted of an infringement of the Medical Act. Corkish forthwith proceeded to fulfill his engagement, sought out Evans, to whom, upon inquiry, he told that he had asthma, whereupon Evans informed him that he should have an "adjustment treatment," and in due course Evans had his patient stripped of his clothing, and placing him face downward on a couch, proceeded to rub his spinal column, varying the process by a "couple of twists or yanks of the head." He told his victim that he could not say whether he

MORRISON, J. could cure him or not ultimately. He would not give him a guarantee. I am satisfied that had Corkish not ceased calling that Evans would have continued treating him. This "treatment" did not take very long. Evans was paid $5, and he secured the signature of Corkish to the following document, saying that the Medical Society was after him, presumably for similar practices on his part:

"I, T. B. Corkish, of Vancouver, hereby direct George Evans to give me a course of Spinal Adjustment, for which I agree to pay him $1.00 for each occasion.

"I also understand that no guarantee or representation is made or is to be made by him and that he undertakes only to apply his skill and knowledge in giving such adjustment to the best of his ability.

"Dated 15th August, 1914. Signed T. B. Corkish."

He also gave Corkish a card containing, on its face, the following legend:

"Office Phone, Seymour 6245 Residence Phone, Highland 859R

"Office Hours 11 to 4

"Saturdays 11 to 3

"GEORGE EVANS, D.C.

"(Doctor of Chiropractic)

"CHIROPRACTOR

"Spine and Nerve Specialist

"No Drugs No Surgery No Osteopathy

"Office, 201 Dodson Bldg. Residence

"25 Hastings St. East 1737 Bismarck St. Grandview

[Over]

On the back:

"CHIROPRACTIC (Ki-ro-prak-tik) is a scientific method of removing the cause of disease by spinal adjustment.

"The spinal column, as is well known, acts as the trunk line for nerves running from the brain to the various organs. A displaced vertebra causes a pressure on the nerve thereby causing disease.

"Chiropractic adjustments relieve these conditions and the nerves are free to carry their natural impulses to each organ in normal, healthy condition.

"Remove the cause by getting at the root of the disease, and the way to do it is through Chiropractic adjustments."

This is substantially all that happened, except that Evans informed Corkish that he knew the medical authorities were after him.

Section 73 of the Medical Act, being Cap. 155, R.S.B.C. 1911, provides as follows:

"If any person not registered pursuant to this Act, for hire, gain, or hope of reward, whether promised, received, or accepted, either directly or indirectly, practice or profess to practice medicine, surgery, midwifery, he shall, upon summary conviction thereof before a Justice of the Peace, forfeit and pay for the first offence a penalty not exceeding one hundred dollars, for the second offence a penalty not exceeding two hundred and fifty dollars, and for a third or any subsequent offence be liable to imprisonment in the common gaol for a period not exceeding three months, without the option of a fine."

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If Evans is guilty of any violation of the Act, it is that he practised "medicine" on the occasion in question, and, therefore, what is the meaning of that word must be considered. The latest edition of Murray's Dictionary, just published, in a lengthy definition of the word, says that—

"Medicine, in the largest sense of the term, comprehends everything pertaining to the knowledge and cure of disease. In a more restricted sense, the term is used in contradistinction to Surgery and Obstetrics."

However, the Act itself defines what is meant by the term, for in section 63 it enacts that—

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"Any person shall be held to practise medicine within the meaning of this Act who shall—

"(*a.*) By advertisement, sign, or statement of any kind, allege ability or willingness to diagnose or treat any human diseases, ills, deformities, defects, or injuries:

"(*b.*) Advertise or claim ability or willingness to prescribe or administer, or who shall prescribe or administer, any drug, medicine, treatment, or perform any operation, manipulation, or apply any apparatus or appliance for the cure or treatment of any human disease, defect, deformity, or injury:

"(*c.*) Acts as the agent, assistant, or associate of any person, firm, or corporation in the practice of medicine as hereinbefore set out:

"Provided always that this section shall not apply to the practice of dentistry or pharmacy, or to the usual business of opticians, or to vendors of dental or surgical instruments, apparatus, and appliances, or to the ordinary calling of nursing, or to the ordinary business of chiropodist, or bath attendant, or to the proprietor of such bath."

MORRISON, J.

As I do not think the Courts should be astute to save the face of individuals such as Evans appears to be, I view the evidence broadly and find that he undertook for gain, without being registered as a medical practitioner, to relieve, if not to cure, this man Corkish of asthma. That is what he did; he practised medicine within the meaning of the Act, and was properly convicted.

At the same time, I do not wish to be considered as approving of the method adopted in this particular case in securing the evidence in question. However, the magistrate believed Corkish's evidence, and I accept his findings.

The appeal was argued at Vancouver on the 30th of May, 1916, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Sir C. H. Tupper, K.C., for appellant.

Cassidy, K.C., for the Crown, moved to quash the appeal through lack of jurisdiction, under section 92 of the Summary Convictions Act, R.S.B.C. 1911, Cap. 218. The judgment of the Supreme Court is final.

Argument

Tupper, contra: Section 6, subsection 4 (*e.*) of the Court of Appeal Act, R.S.B.C. 1911, Cap. 51, gives the right of appeal, and this Act being subsequent to the Summary Convictions Act it must prevail: see *Deputies of Freemen of Borough of*

Leicester v. *Hewitt* (1893), 62 L.J., M.C. 51; *The City of Ottawa* v. *Hunter* (1900), 31 S.C.R. 7. In any case, the words "final and conclusive" are not intended to take away the right of appeal: see *The Queen* v. *Bridge* (1890), 24 Q.B.D. 609.

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Cassidy, in reply.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the preliminary objection must be overruled. It is a question of construction of section 6 of the Court of Appeal Act, read in conjunction with section 92 of the Summary Convictions Act. The Court of Appeal Act is subsequent in date of passage to the Summary Convictions Act, when they were both included in one consolidation. If there is any conflict, therefore, I think the Court of Appeal Act must prevail over the Summary Convictions Act. Now the language of section 6 of the Court of Appeal Act seems to me to be very clear. It may be read in this way: "without restricting the generality of the foregoing an appeal shall lie to the Court of Appeal" (subsection (4)) "from every decision of the Supreme Court or a judge thereof, or of the County Court or a County Court judge, in any of the following matters, or in any proceeding in connection with them, or any of them . . . . (*e.*) Case stated under the Summary Convictions Act." Now that is express and clear authority, and it seems to me that no other construction can be given to it; and if there is conflict, as there appears to be, between it and section 92, it prevails over section 92.

MARTIN, J.A.

MARTIN, J.A.: In my opinion we have jurisdiction. I agree with what is suggested by my brother GALLIHER that originally in section 92 it was the intention of the Legislature to restrict these appeals to the Supreme Court, whether that tribunal was sitting as constituted by one judge or all the judges thereof. Of course, it would be perfectly proper for them all to do so if they thought the matter was of sufficient import, and they might today, if they decided to do so, hold a trial at bar. But, as also intimated by my brother MCPHILLIPS, there is this later enactment which we have to deal with, which has extended that power and left it beyond question that it was

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the intention of the Legislature to enable this Court to sit in appeal from the decision of the Supreme Court, however constituted, as appears by the words to which *Sir Charles* has drawn our particular attention, that is to say, from a "decision of the Supreme Court or a judge thereof."

GALLIHER, J.A.: I think the preliminary objection must be overruled.

MCPHILLIPS, J.A.: I agree in the preliminary objection being overruled.

Preliminary objection overruled.

Cassidy, raised the further preliminary objection that subsection (4) of section 7 of the Summary Convictions Act Amendment Act, 1914, B.C. Stats. 1914, Cap. 72, had not been complied with, as the stated case had never been transmitted to the Court. The case was transmitted to the Court by the magistrate, but this does not relieve them from complying with the statute: see *Morgan* v. *Edwards* (1860), 5 H. & N. 415; *Hill* v. *Wright and Wilson* (1896), 60 J.P. 312; *Cooksley* v. *Nakashiba* (1901), 5 Can. Cr. Cas. 111; *Hughes* v. *The Wavertree Local Board* (1894), 10 T.L.R. 357; *Godman* v. *Crofton* (1914), 3 K.B. 803.

Argument

Tupper: We have substantially complied with subsection (4) of the Act, as the stated case had been transmitted by the magistrate to the Court, and the act of transmitting it was thereby taken out of our hands: see *Hughes* v. *The Wavertree Local Board* (1894), 10 T.L.R. 357; *Wills & Sons* v. *McSherry* (1913), 1 K.B. 20; *Woodhouse* v. *Woods* (1859), 29 L.J., M.C. 149. It has been held that a condition precedent has been complied with when it is impossible to comply with it: see *Godman* v. *Crofton* (1914), 3 K.B. 803 at pp. 810-11; *Dickeson & Co.* v. *Mayes* (1910), 1 K.B. 452; and *In re Banks* v. *Goodwin* (1863), 3 B. & S. 548 at p. 553.

Cassidy, in reply: There cannot be such a thing as waiver in this case. The magistrate made a mistake, but that did not relieve the appellant from complying with the Act. *Dickeson & Co.* v. *Mayes* can be distinguished, as in that case they had the stated case.

MACDONALD, C.J.A.: I think the cross-appeal should succeed. The appellant in this case has not complied, in my opinion, with the provision of section 7 of the Summary Convictions Act Amendment Act, 1914, subsection (4). What the appellant did, or rather, let me say this, what the magistrate did, instead of transmitting the signed case to the appellant's counsel, was to send it to the registrar of the Supreme Court. What he ought to have done, of course, was to send it to the appellant's solicitor. The appellant's solicitor then felt himself unable to comply strictly with the provisions of the subsections just mentioned, that is, he found it impossible, as he thought, to serve his notice of appeal, together with a copy of the stated case, upon the representative of the Crown before the transmission of the stated case to the registrar. It already had been transmitted to the registrar by the magistrate. Now, I must confess I do not quite see what the appellant's solicitor's difficulty was. Apparently the signed case was transmitted to him by the magistrate. If that be so, then it was quite feasible for him to transmit that duplicate to the registrar of the Supreme Court, ignoring what the magistrate had done gratuitously, which did not bind the appellant's solicitor at all, to transmit it to the registrar after serving the notice of appeal, accompanied by a copy of this stated case upon the other side. If he had done that, and the question had been raised in this appeal that he could not lawfully do that, or regularly do that, because of the action of the magistrate in transmitting another duplicate to the registrar, then his contention that he had done all that he possibly or rightfully could do in the premises would be perfectly well found. But I think that is where a mistake was made. The mistake was made in not ignoring what the magistrate had gratuitously done, and carrying out strictly the provisions of this subsection. Now *Sir Charles Tupper* argues that, because a copy of the drafted case was sent to the other side at the time that it was sent to the magistrate, the letter accompanying it impliedly gave notice of appeal. That, it seems to me, cannot prevail. If we take that view of it, it would be frittering away the purpose of this statute altogether. It might be done in any case if it could be done in this case. The Legislature evidently intended

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that parties should act in strict compliance with the terms of this subsection, and it said it was to be done within three days. There was to be a statement of the case, notice of appeal, accompanied by a copy of the stated case, and the transmission of the stated case to the registrar—all within three days. Now, if the other contention must prevail, part of the procedure pointed out in this subsection might have taken place months before, and, as contended in this case, it did take place months before —a year before, in fact. I do not think that was what was intended by this subsection at all, and I think we would not be giving effect to the intention of the Act, and we would be usurping the jurisdiction of the Legislature if we did not require compliance with this subsection.

MACDONALD, C.J.A.

MARTIN, J.A.: I agree, and I wish to add that in my opinion we must have regard here to the fact that the case as stated is the one which the magistrate sent to the learned counsel for the appellant. That is to say, the magistrate absolutely complied with the law in so far as sending the stated case, "signed and stated," as the statute says, subsection (4), to the counsel as aforesaid. He did something more; he sent it also, gratuitously doubtless, to the registrar of the Supreme Court. Whatever the effect of this might be, one result is this, that, simply because the magistrate did more than the law required, that does not exonerate the appellant's counsel from doing less than the law requires in respect of notice of appeal. The consequence is, as I put it before in the course of the argument, as graphically as possible, adopting the language which has been used in similar cases, that the appellant here has really closed the door of the Court upon himself. Up to that moment the door of the Court stood open, because it is true that although the magistrate had delayed beyond the statutory period in the stating of the case, yet that left the door of the Court open, because those provisions are merely directory, and do not bring the question within the ambit of jurisdiction. The door of the Court can only be closed because of a lack of jurisdiction, and it was that lack which was supplied, not by the magistrate, but by the default of the appellant himself. Then I agree so largely with what the Chief Justice has

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said that the only thing that I feel necessary to add is this, that the consideration of the case of *Dickeson & Co.* v. *Mayes* (1910), 79 L.J., K.B. 253, does not give the slightest ground for accepting the suggestion made by the learned counsel for the appeal, because it shews that the case, as I thought it must have been, had actually been stated. As the Lord Chief Justice pointed out (p. 255):

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> "Looking at the notice inclosed, it seems to me that the appellants, having procured the case to be stated for the opinion of the Court, and having sent it with that notice, which shewed that they were dissatisfied and desired to take the opinion of the Court on a question of law raised, indicated that they intended going on with the appeal."

And Bray, J. puts it very distinctly; it seems what they had there was a notice so ample that "it almost complies with the very words of the form given in Short & Mellor's Crown Office Practice." Here we find that all the chief constituents of the procedure under which jurisdiction is had are absolutely lacking; that is, service of the stated case, and secondly, notice of appeal, so there is really nothing more to say.

MARTIN, J.A.

GALLIHER, J.A.: In my view there was no jurisdiction in the Court below to hear the case. The preliminaries to be observed under the statute, which were conditions precedent to jurisdiction being conferred on the Court, were not complied with, and I cannot accede to *Sir Charles's* argument that he was placed in a position where he could not comply with them. That being so, there can be no waiver, or rather, the parties, by waiving, or attempting to waive, cannot confer jurisdiction on the Court.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I differ in opinion from my learned brothers. I think there was substantial compliance: *Dickeson & Co.* v. *Mayes* (1910), 79 L.J., K.B. 253, is, in my opinion, in point. The language looks to be imperative, nevertheless it has always been held to be language of a directory nature. Now, in this particular case, when counsel for both parties came together, and when matters which were really subsidiary to the transmitted case were, in my opinion, dealt with and agreed to, it was a case transmitted under the Act. I think counsel can take a course which a Court would be unwilling to say admits of exception being later taken that there was no jurisdiction

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—it would not be in the furtherance of the due administration of justice, upon the facts in this case, that the jurisdictional point should be given effect to.

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Appeal quashed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Tupper, Kitto & Wightman.*
Solicitors for respondent: *Kennedy & Mackintosh.*

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WELLINGTON COLLIERY COMPANY, LIMITED v. PACIFIC COAST COAL MINES, LIMITED.

Practice—Examination for discovery—"Officer"—In employ of a company that is the sole shareholder and has control of plaintiff Company—Marginal rules 370c (1) and 370d.

WELLINGTON COLLIERY CO.
v.
PACIFIC COAST COAL MINES

A person, not an officer or servant of a company party to an action, but who is an officer in a company to which the first company is subsidiary, holding all its shares and having full control of its affairs, is not subject to examination for discovery under marginal rules 370c and 370d, notwithstanding his having negotiated and his being the only person in authority to negotiate, the proceedings over which the action arose (GALLIHER, J.A. dissenting).

Statement

APPEAL from an order of GREGORY, J. of the 3rd of April, 1916. The defendant applied for an order that one H. S. Fleming be orally examined on behalf of the defendant and attend to testify. The facts are that the Canadian Collieries (Dunsmuir), Limited, had purchased all the shares of the Wellington Colliery Company, Limited. Mr. Fleming is director and chairman of the Canadian Collieries. He holds no office in fact in the Wellington Colliery Company, but his company controls and manages the Wellington Colliery Company, and runs its affairs entirely. Mr. Fleming was the man who negotiated the proceedings in question. The trial judge dismissed the application. The defendant appealed on the ground that Fleming should be subject to examination, as he was empowered

to act in and conduct and manage the affairs of the plaintiff Company.

The appeal was argued at Victoria on the 23rd of June, 1916, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

W. J. Taylor, K.C., for appellant: All shares in the Wellington Colliery Company were sold to the Canadian Collieries (Dunsmuir), Limited, by which it is operated and controlled, and of which H. S. Fleming is an officer. He was the only man who had authority to deal with the matters in question, and is an officer of the plaintiff Company within the meaning of marginal rules 370c (1) and 370d. In any case, the action is brought solely for the benefit of the Canadian Collieries: see *Elliott* v. *Holmwood & Holmwood* (1915), 22 B.C. 335; 25 D.L.R. 765; *Dawson* v. *London Street R.W. Co.* (1898), 18 Pr. 223 at p. 226; *Casselman* v. *Ottawa R.W. Co., ib.* 261; *Schmidt* v. *Town of Berlin* (1894), 16 Pr. 242; *Maitland* v. *Globe Printing Co.* (1883), 9 Pr. 370 at p. 371; *Leitch* v. *Grand Trunk R.W. Co.* (1888), 12 Pr. 541; and Holmested's Ontario Judicature Act, 4th Ed., 800.

Argument

Harold B. Robertson, for respondent: The Canadian Collieries is merely a shareholder in the plaintiff Company, and is, therefore, an entirely separate legal entity. The cases cited are all those of employer and employed. *Magrath* v. *Collins* (1916), 10 W.W.R. 19; and *Dickson* v. *Neath and Brecon Railway Co.* (1869), L.R. 4 Ex. 87, are in our favour.

Taylor, in reply.

MACDONALD, C.J.A.: I think the appeal must be dismissed. Mr. *Taylor* has made a very able argument, and while I am quite in sympathy with the object he has in view in wishing to examine this man, I do not think we can safely extend the application of the rules to a case of this kind. I think where a statute gives power to examine officers of a company that it means officers of the company in the ordinary sense, not of another company, which happens to have rightly or wrongly intermeddled with the first company's affairs.

MACDONALD, C.J.A.

There is a method of obtaining discovery, one peculiarly

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adaptable to discovery in the case of companies. The appellant is not, therefore, without a remedy, but even if he were, that could make no difference. If the statute has failed to make provision for a case of this kind, the Court cannot supply the omission.

GALLIHER, J.A.: I am of opinion that the circumstances of this case bring the applicant within the rule, and an order for examination should go.

McPHILLIPS, J.A.: In my opinion the appeal should be dismissed. The whole foundation for this procedure is based upon the fact that the parties litigant shall be subject to examination previously to trial.

As a matter of fact, this *viva voce* examination does not obtain in England even to this day. There they only have a method of discovery by way of interrogatories. But the clear premise is that the defendant or plaintiff be examinable. Therefore, if either the defendant or plaintiff is a corporation, provision is made that any officer or servant of "such" corporation, as the rule reads, shall be examined. The plaintiff in this case is the Wellington Colliery Company, and the desire is to examine Mr. Fleming, a director of the Canadian Collieries. The Canadian Collieries is neither plaintiff nor defendant, and at once it is seen that it is endeavouring to apply this rule to a set of circumstances that certainly the rule does not appear to provide for or comprehend.

McPHILLIPS, J.A.

It is conceivable that if a corporation employs an individual, that individual might be held to come within the category of officer or servant, but apparently, if a corporation employs a corporation, it would not appear to me that the rule is capable of being exercised at all. The only procedure would be possibly by way of interrogatories. However, upon that point I express no opinion.

With regard to rule 370d that the action is being prosecuted for the benefit of the other company, I do not consider that it is possible to so read the material that we have before us, nor do I think that in the case of a corporation it can be said that even if one company holds the majority of stock in the other

company, that that creates a position similar to that of an individual who is bringing an action on behalf of another.

Therefore, in my opinion, the appeal should be dismissed.

Appeal dismissed, Galliher, J.A. dissenting.

Solicitors for appellant: *Eberts & Taylor.*

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

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LYONS v. THE NICOLA VALLEY PINE LUMBER COMPANY.

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LYONS *v.* NICOLA VALLEY PINE LUMBER CO.

Master and servant—Injury to servant—Negligence—Employers' Liability Act, R.S.B.C. 1911, Cap. 74—Finding of jury—View of mill other than where accident occurred—Appeal.

The plaintiff, a sawyer, was injured, having been crushed between the saw frame and a log that broke through the guard rail of the deck upon which it was sliding to the carriage in a sawmill. The log slid down the deck with one end lower than the other, and on the lower end reaching the carriage the upper end was from two to three feet up the deck and close to the guard rail. The case centred on whether the upper end of the log broke through the guard of its own weight or whether it was driven through by the sawyer moving the carriage with the lever, which was at the time under his control. The judge and jury viewed the premises of a mill, but not the one in which the accident occurred. The jury brought in a verdict for the plaintiff under the Employers' Liability Act, for which judgment was entered.

Held, on appeal (GALLIHER, J.A. dissenting), that the jury having taken the view that the log came in forceable contact with the guard and broke it with its own weight, and there being evidence to support this view, the verdict should stand.

Remarks on judge and jury taking view of a mill premises other than the one at which the accident occurred.

APPEAL by defendant from the judgment of HUNTER, C.J.B.C. of the 11th of November, 1915, and the verdict of a

Statement

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jury in an action for damages for injuries sustained by a sawyer in a sawmill owing to a log breaking through the guard rail on the side of the deck. It was alleged that the guard rail was of insufficient strength for the purpose for which it was constructed. Tried at Nelson on the 8th of November, 1915. The facts are set out fully in the head-note and reasons for judgment.

The appeal was argued at Vancouver on the 13th and 14th of April, 1916, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Harvey, K.C., for appellant: There was a verdict of $3,375 under the Employers' Liability Act. The complaint was that the guard was not strong enough and that the log broke through of its own weight, causing injury to the plaintiff. There was the plaintiff's evidence alone as to this, whereas three witnesses state positively the log was forced through the guard by the plaintiff starting the carriage when the lower end of the log was pinned against it. The guard was amply strong to withstand the weight of any log.

A. H. MacNeill, K.C. (*A. Macneil,* with him), for respondent): The jury came to the conclusion, after considering the evidence, that the guard was not strong enough for the purpose for which it was constructed. There was evidence that it was shaky immediately prior to the accident. The Court will not interfere with this finding when there is evidence to support it.

Harvey, in reply.

Cur. adv. vult.

3rd October, 1916.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiff, respondent, was injured while employed as a sawyer at defendant's mill. He admitted in his evidence that his whole complaint was that the railing or guard, designed to protect the sawyer from such an accident as happened to him, was not of sufficient strength or stability for the purpose for which it was erected.

The action was tried by a judge with a jury, and a view of a mill—not the one in which the accident occurred—was taken. No point was made in argument that this view was improperly

taken, and I may, therefore, assume that the jury may have received some assistance from the view. The evidence is conflicting, and if that of the plaintiff and his witnesses was believed by the jury, the verdict cannot, in my opinion, be interfered with.

The jury may have taken the view that the log came in forceable contact with the guard and broke it, thereby throwing the plaintiff upon the levers and putting in motion the machinery, without his own volition, and if this view be correct, and I think there is evidence to support it, the fact that the log was forced still further against him by the action of the machinery, thus in the end bringing about his injuries, does not, in my opinion, free the defendant from liability in this action.

MACDONALD, C.J.A.

In this view of the case, it was the weakness of the guard which was responsible for setting in motion the forces which brought about the plaintiff's injury.

I would dismiss the appeal.

MARTIN, J.A.: There was, in my opinion, evidence to go to the jury upon which their verdict may reasonably have been founded, and therefore it should not be interfered with.

This is a case wherein the jury had the benefit of a visit to a mill and a demonstration of its operation, and I note the learned trial judge, in his charge to the jury, says:

"For my part and without that model and visit I would have had very little knowledge of what they were talking about."

It seems to me that in such case much weight should be attached to the view had by the judge and jury, and I refer to my recent observations upon this subject in *Yukon Gold Co.* v. *Boyle Concessions, Limited* (1916), [23 B.C. 103]; 10 W.W.R. 585, adding to the list of authorities there considered *Marshall* v. *Gates* (1903), 10 B.C. 153, as an illustration of a case wherein I was of opinion that a view would not be beneficial. And in support of my statement in the latter case (p. 155), that "a view is undoubtedly evidence of a certain kind," I cite the old and high authority of *Bushell's Case* (1670), Vaugh. 135, 142, 147, which is a mine of legal lore on the duties of jurors, wherein Chief Justice Vaughan, in giving the judgment of ten out of the eleven judges of the Common Pleas, sets forth (p.

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147), in enumerating the various heads of "evidence which the jury have of the fact," this fourth one :

"4. In many cases the jury are to have view necessarily, in many, by consent, for their better information; to this evidence likewise the judge is a stranger."

It follows that the appeal should be dismissed, with costs.

GALLIHER, J.A.: This is an appeal from the judgment of HUNTER, C.J.B.C., upon the verdict of a jury, awarding the plaintiff the sum of $3,375 under the Employers' Liability Act.

The unfortunate plaintiff was seriously injured, and there is no question as to the amount of the verdict.

The plaintiff was engaged as a sawyer in the defendant's mill, and, according to his story, at the time of the accident he had just finished sawing a log which was on the carriage when another log came down to be placed on the carriage. Instead of coming down straight it came at an angle and, it is alleged, jumped the loaders, one end resting on the carriage and the other breaking through a railing which was put up to prevent the end of the log, in just such circumstances, from coming over against the levers, which were being operated by the sawyer.

GALLIHER, J.A.

The plaintiff says the end of the log which broke through the railing caused the broken railing to fall against his hand, knocking it off the lever he was holding, and throwing him over against the levers which operated the carriage, thus setting it in motion, with the result that he was pinned in by the log and suffered the injuries complained of. His only complaint as to negligence on the part of the Company is that this railing was not strong enough. If the railing was not strong enough, and that was the cause of the injury, the judgment should stand.

As to the strength of the railing and the manner in which it was fastened there is conflicting evidence, and the jury would be entitled to come to the conclusion they did upon the evidence, if they were justified in coming to the conclusion they must have as to how the accident occurred.

This, in my mind, is the serious point in the whole case.

On the one hand we have the evidence of the plaintiff as to how the accident occurred, in the manner I have just described,

and on the other hand we have the evidence of three employees of the mill, eye-witnesses of the accident, and within a few feet of the plaintiff at the time.

Counsel for the plaintiff sought to throw discredit on the testimony of these witnesses because they were employees, and had dealings with the Company. That, to my mind, is a poor ground of attack, and I must say their evidence impresses me as being fairly and honestly given. However, the jury could refuse to believe these witnesses and believe the story told by the plaintiff, and if it rested there we might be powerless to interfere. These three witnesses were Carl Neilson, the deckman, August Walden and Haaken Walden, log setters, who worked on the carriage. Neilson's account of the accident, which is practically corroborated by the other two witnesses, is as follows: [His Lordship quoted the evidence and continued].

GALLIHER, J.A.

Then there is the uncontradicted evidence of Robinson, the mill foreman, and the evidence of the Company's manager, Meeker, as to the condition of the guard, and post sustaining same, after the accident [quoting the evidence].

This evidence as to condition of guard and post is consistent with the account given by Neilson and the two Waldens as to how the accident occurred, and is, in my opinion, inconsistent with the account given by the plaintiff.

I think, therefore, that the jury could not reasonably find that the accident occurred in the manner described by the plaintiff, and that the action fails.

The appeal should be allowed.

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: This is an appeal from the judgment of HUNTER, C.J.B.C. upon a trial had with a jury, being an action of negligence and for personal injuries received by the plaintiff when acting in the capacity of sawyer in the sawmill of the defendant. The verdict of the jury was a general verdict, no questions were submitted, and the finding of the jury was that the plaintiff was entitled to damages under the Employers' Liability Act, and assessed the same at $3,375.

The evidence may be said to be very complete, and there was sufficient evidence, in my opinion, to have supported the verdict at common law, and much heavier damages could well have been

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imposed upon one ground alone—that the plaintiff was not given a safe place to work (*Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420). The jury, however, would appear to have taken the more lenient view, finding, as they did, that the liability was under the Employers' Liability Act. It must be assumed, and there is sufficient evidence for so finding, that there was a defect in the condition or arrangement of the ways and plant in use, and that by reason thereof the plaintiff suffered the injury. Specifically the evidence led at the trial was that the guard rail to hold the log coming down the deck was insufficient, and defectively constructed, not being attached to posts inserted into the floor and securely bolted. The situation was one of the gravest danger to the sawyer, especially if a log at any time in coming down from the deck got out of position, which would appear to have been the case when the accident happened, *i.e.,* the guard rail gave way, and the sawyer, at his post of duty, was crushed between the log and saw frame, and suffered injuries of the most serious character. It would appear that the learned Chief Justice submitted the issues for trial to the jury with a very complete and proper direction both as to the law and the evidence. This being done I fail to see, with all deference to the able argument addressed to us by the learned counsel for the appellant, how this Court can disturb the verdict and the judgment entered thereon when it is found that the jury had before them sufficient evidence upon which they, as reasonable men, might find, as they have, a verdict for the plaintiff. The verdict being a general one (*Newberry* v. *Bristol Tramway and Carriage Company (Limited)* (1912), 29 T.L.R. 177 at p. 179), this disposes of all questions such as contributory negligence and the plea of *volenti non fit injuria* (*McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43), and, in my opinion, no sufficient evidence was adduced at the trial which would have entitled the jury to have found, if questions had been submitted, that there was any contributory negligence, or that the plea of *volenti non fit injuria* had been established. In *Kleinwort, Sons, and Co. v. Dunlop Rubber Company* (1907), 23 T.L.R. 696, the Lord Chancellor (Lord Loreburn) at p. 697 said:

"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."

It would be impossible to find language more fitting in its application to the present case than that of the Lord Chancellor just quoted.

Appeal dismissed, Galliher, J.A. dissenting.

Solicitor for appellant: *M. L. Grimmett.*
Solicitors for respondent: *Macneil & Spreull.*

LILJA v. THE GRANBY CONSOLIDATED MINING, SMELTING AND POWER COMPANY, LIMITED.

Master and servant—Injury to servant—Negligence—Defective system—Powder—Care in storing and thawing—Pleading statutes—Evidence—Examination for discovery—Use of under rr. 370c and 370r.

In an action for damages for injuries sustained by a blaster from an explosion of dynamite while in the act of inserting it into a hole in a mine, a defective system was alleged as to the storage and thawing of the powder. There was evidence that the defendant Company had kept a large quantity of powder in a store-house on its premises for over a year in an atmosphere of from 75 to 95 degrees of Fahrenheit, in which circumstances powder may become in a condition that renders it more dangerous to handle and load. The jury found in favour of the plaintiff.

Held, on appeal, that the jury could properly infer from the evidence that no systematic precautions were taken by the defendant Company for the proper care of the powder, and that the system in use for its storing and thawing was a dangerous and defective one.

APPEAL from the judgment of CLEMENT, J. entered upon the verdict of a jury on the second trial of the action heard at Vancouver on the 4th to the 16th of December, 1915. On

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appeal by the plaintiff from the judgment on the first trial the Court of Appeal ordered a new trial (21 B.C. 384), which was affirmed by the Supreme Court of Canada (9 W.W.R. 662). The action was brought for damages for injuries received by the plaintiff while employed as blaster at the defendant Company's copper mine at Granby Bay. On the day of the accident 18 holes had been drilled into the mountain at the end of a tunnel. The plaintiff and two other workmen were putting sticks of dynamite into the holes, it being the plaintiff's duty in particular to push the sticks into the holes with a wooden stick provided for the purpose. They had filled 17 holes, and the plaintiff was in the act of pushing a second stick of dynamite into the eighteenth hole when it exploded, the result being that the plaintiff's arm had to be amputated above the wrist, and he sustained other injuries. The plaintiff claimed that the accident was due (1) to a defective system as to the manner in which the dynamite was stored and thawed, that the dynamite was over a year old and had been kept in a room that at intervals was overheated, whereby the nitro-glycerine in the stick would separate from the absorbent and settle in the end of the stick, rendering it more dangerous and more liable to explosion; and (2) that the system was defective as to the arrangement for properly cleaning and blowing the holes after the drilling was completed, there being small bits of granite and flint left in some of the holes, thereby rendering them highly dangerous, and caused the explosion. The defendant Company raised the defence that the injuries were caused by the plaintiff's own negligence in using too much force in inserting the stick of dynamite; that it was his duty to see that the hole was properly cleaned before he inserted the dynamite; also, that if the injuries were caused by any negligence other than that of the plaintiff himself, it was caused by the negligence of a fellow servant in not cleaning out the holes before the insertion of the dynamite. The jury found in favour of the plaintiff in the sum of $10,000, for which judgment was entered. The defendant Company appealed.

The appeal was argued at Vancouver on the 17th of May,

1916, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

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S. S. Taylor, K.C., for appellant: The question is whether there was evidence of a defective system as to the care of the powder. It is contended, first, that the powder was too old, but there is no evidence to shew how long the powder was in the store-house; secondly, that the room in which it was kept was too hot and the powder ran, thus making it dangerous for use. The evidence, in fact, was that the powder had not run. The Company employed a competent superintendent to regulate the system, and that is as far as it need go: *Bergklint* v. *Western Canada Power Co.* (1914), 50 S.C.R. 39 at p. 49; *Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326. The judge's charge was wrong in that he said there was no evidence of *volens* or of contributory negligence, and an additional ground for a new trial is that only a portion of the examination for discovery was put in on the trial: under rule 370d, if any part of the examination for discovery is put in, it all must be put in.

Argument

J. W. deB. Farris, for respondent: There was no system of inspection of the powder; it was stored and thawed in a room used for other purposes. The negligence alleged was the violation of a statutory duty and the question of *volens* does not arise. As to the pleadings, all that is necessary is to set out the facts: see Bullen & Leake's Precedents of Pleadings, 6th Ed., 10, 45 and 443; *Partridge* v. *Strange & Croker* (1553), 1 Pl. Com. 77; 75 E.R. 123; and *Boyce* v. *Whitaker* (1779), 1 Doug. 94; 99 E.R. 65.

Taylor, in reply.

Cur. adv. vult.

3rd October, 1916.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The only substantial point in this appeal is whether there is legal evidence of a defective system of caring for powder at defendant's mines, and if so, whether the system can be held responsible for the plaintiff's injuries.

There is evidence that defendant kept in its thawing-room a large quantity of powder, some of which remained there in an atmosphere of from 75 to 95 degrees Fahrenheit for months; that in such circumstances powder may get into a condition

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which renders it more dangerous to handle and load than if kept in an ordinary magazine in a frozen state until needed at the thawing-room for immediate use. I think the jury could properly infer that the system of storing and thawing and distributing the powder was a dangerous and defective system. I think they might also infer from the evidence that no systematic precautions were taken by defendant to avoid the dangers of keeping powder in that way. The defendant's superintendent said that the man in charge of the thawing-room was to deal with the boxes of powder as a grocer deals with his stock of potatoes. He was to keep them going, "first in first out." But the powder was of different kinds. Some kinds were not so much needed as others. That which caused the explosion was allowed to remain for months in this heated room. There was no system of tally or inspection worthy of the name. Had there been, the defects of the system might have been cured.

I would dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: There was, in my opinion, sufficient evidence of a defective system upon which the verdict of the jury may be supported at common law, apart from the obligation by statute (Metalliferous Mines Inspection Act, R.S.B.C. 1911, Cap. 164, Sec. 31 (2)) to store explosives "in a magazine provided only for this purpose," which duty, I think Mr. *Taylor* is right in submitting, has not been properly pleaded, and cannot now be relied on, the facts not being set out to bring the case within the statute (Odgers on Pleading, 7th Ed., 99), quite apart from the question as to whether or no the statute should be referred to. Strictly speaking, I do not think it is necessary in a statement of claim in a case of negligence to do so: cases are constantly before us based, *e.g.*, on Lord Campbell's Act and the Employers' Liability Act wherein the statute is not cited, though the plaintiff is seeking to enforce rights conferred that were unknown to the common law, and examples of this sort relating to the Statute of Frauds and Conveyancing Act, Married Woman's Property Act, and Judicature Act (*re* assignments) are given in Odgers, *supra*, pp. 99-100. But at the same time, where the plaintiff is attacking the defendant for non-compliance with a particular provision in a general statute of many

provisions imposing new duties, whereby it is sought to establish negligence, the position is in practice, if not in theory, somewhat different, and it would at least lead to a very desirable certainty to adopt the following good advice, given in Bullen & Leake's Precedents of Pleadings, 7th Ed., 37:

"Where the action is brought for the breach of some statutory duty arising independently of contract, the statute should be referred to and the facts which bring the case within it sufficiently stated in the pleading."

A question of the reception of the evidence of Macdonald, the defendant's mine superintendent, has arisen under rules 370c and 370r. The Order, XXXIA., in which they are included has the word "(Ont.)" in brackets under its number, but our rule greatly differs from the corresponding Ontario rule 327, in providing that "such examination may be used as evidence at the trial if the trial judge so orders," whereas the Ontario rule says "but such examination shall not be used as evidence at the trial." Our rule 370r, relating to the admission (subject to the direction of the judge as to "connected" parts) of "any part of the examination of the opposite party" is the same as Ontario rule 330. It was submitted that the words "such examination," in 370c (1) mean the whole of the examination, and that it must go in all or none, and that rule 370r does not apply. The matter is not without difficulty, but I think, after a careful consideration of the rules in both Provinces, that the expression "such examination," and the power of the judge thereover, must be read in connection with his powers conferred under rule 370r. The word "such," I take there to mean "all of the," or "the whole of the," and as the greater includes the less, the permission given to use it all may be exercised to a lesser degree in the use of part of it, subject to the control of the judge, under rule 370r, whereby all parties are protected.

MARTIN, J.A.

Other objections to the verdict were raised, but, while they have not been overlooked, they do not call for special notice. It follows that the appeal should be dismissed.

GALLIHER, J.A.: I find myself unable to say that the verdict of the jury should be interfered with.

The appeal should be dismissed.

GALLIHER, J.A.

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MCPHILLIPS, J.A.

McPHILLIPS, J.A.: I remain of the view formed upon the argument of the appeal, and that is that the appeal must be dismissed. The appeal is from the judgment entered for the plaintiff upon the second trial, the verdict of the jury being a general verdict. The second trial was heard following upon an appeal to this Court, which directed a new trial ([(1915), 21 B.C. 384]; 8 W.W.R. 690), affirmed on appeal to the Supreme Court of Canada (9 W.W.R. 662).

The case which went to the jury was very concisely stated in the charge by CLEMENT, J. The learned counsel for the appellant strenuously argued that, upon the facts, it was not shewn that there was any defect in the powder used, or any defective system, that the superintendence was proper and efficient, and in the alternative, that the appellant was entitled to succeed upon the plea of *volenti non fit injuria*. It is apparent that the new trial has been helpful to the respondent in narrowing the case to one distinct issue, *i.e.*, the defective powder, yet the respondent is entitled to have the judgment stand if there is sufficient evidence to support it. Sir Arthur Channell, in delivering the judgment of their Lordships of the Privy Council in *The Toronto Power Company, Limited* v. *Paskwan* (1915), A.C. 734 at p. 739 said:

> "It is unnecessary to go so far as Middleton, J. 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."

I would certainly hesitate greatly, in fact, would not, upon the facts of the present case, say that the jury arrived at the right conclusion.

In *Jones* v. *Spencer* (1897), 77 L.T. 536, Lord Herschell said at p. 538:

> "I think that the hesitation of a Court to set aside the verdict of a jury is very natural, and that it is expedient that verdicts of juries, when that is the tribunal to determine the question between the parties, should not be set aside, except where one is satisfied that there has been a miscarriage, because a verdict has been found that could not reasonably have been found if the attention of the jury had been directed to the whole of the facts of the case, and to the question in issue which they had to determine. But it seems to me to be a condition of any such rule that the question which had to be determined should have been so left to them that one is satisfied that it was before their minds, that their minds were

applied to it, and that they did really on the determination of that question give their verdict."

It is true that the learned trial judge told the jury that there was but one issue, *i.e.*, defective powder, yet I am unable to say that the charge to the jury was not, in accordance with the statute law, "a proper and complete direction to the jury upon the law and as to the evidence applicable to [the] issues" (Supreme Court Act, R.S.B.C. 1911, Cap. 58, Sec. 55). In *Blue & Deschamps* v. *Red Mountain Railway* (1909), 78 L.J., P.C. 107 at p. 110, Lord Shaw, in delivering the judgment of their Lordships of the Privy Council, said:

"Misdirection, to be a ground of new trial, must be substantial misdirection."

In *Kleinwort, Sons, and Co.* v. *Dunlop Rubber Company* (1907), 23 T.L.R. 696, Lord Atkinson at p. 698 said:

"He [the learned trial judge] said nothing which amounted to a misdirection, and though possibly the conclusion to which the jury came is not that at which one would be disposed to arrive, still I do not think their finding can be disturbed as being against evidence or the weight of evidence."

Further, unquestionably the case as presented by the plaintiff was formulated *simpliciter* upon the one act of negligence—the supply of defective powder. The verdict being a general verdict, all the defences, inclusive of contributory negligence and the plea of *volenti non fit injuria,* must be held to have been found against the appellant, and it cannot be said that the learned trial judge failed to present to the jury the various defences advanced by the appellant. The effect of the general verdict is dealt with by the Master of the Rolls (Lord Cozens-Hardy) in *Newberry* v. *Bristol Tramway and Carriage Company (Limited)* (1912), 29 T.L.R. 177 at p. 179:

"Now if the jury had simply given a general verdict his Lordship thought they could not have interfered."

This is not a case where the Court of Appeal would be entitled to exercise the power, which it admittedly has, of entering judgment for the appellant notwithstanding the verdict of the jury. The Supreme Court of Canada considered the exercise of that power in *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43; and see *per* Duff, J. at p. 53.

I am unable to say that "no reasonable view of [the] evidence could justify [the] verdict for the plaintiff," and to direct a

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new trial would mean a third trial in the action, and I cannot say that a new trial would enable the production of any further relevant evidence in respect to the issues already determined, or that any different result would follow.

The respondent is rightly entitled to a trial before a judge and jury. This cannot be withheld from him. The law so provides, and it is not the province of the Court of Appeal to interpose, or attempt to discharge the duty which in accordance with law devolves upon the jury when the issues are committed to them after a charge both upon the law and the facts, save, as we have seen—*McPhee* v. *Esquimalt and Nanaimo Rway. Co., supra*—where "no reasonable view of that evidence could justify a verdict for the plaintiff."

In *Kleinwort, Sons, and Co.* v. *Dunlop Rubber Company, supra,* the Lord Chancellor (Lord Loreburn) said 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."

MCPHILLIPS, J.A.

I am unable to say that there has been error in law which affected the verdict, or any miscarriage, or that the jury in any way misunderstood the points put to them. That the conclusion they came to might not, in the language of Lord Atkinson in the *Kleinwort* case, be "that at which one would be disposed to arrive" does not constitute good ground for disturbance of the verdict, it not being against evidence or the weight of evidence, nor, in the language of Mr. Justice Duff, can it be said that "no reasonable view of that evidence could justify a verdict for the plaintiff."

I would dismiss the appeal.

Appeal dismissed.

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

Solicitors for respondent: *Farris & Emerson.*

BUSCOMBE v. JAMES STARK & SONS, LIMITED.

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Landlord and tenant—Lease—Covenant to restore—Breach of covenant—Measure of damages.

The general rule as to measure of damages in an action for breach of covenant by a lessee to restore the demised premises to its original condition on the determination of the lease, is that such damages are the cost of putting the premises into the state of repair required by the covenant.

Such measure of damages is not affected by the lessor's intentions as to restoration of the premises.

Joyner v. *Weeks* (1891), 2 Q.B. 31 followed.

APPEAL from the decision of HUNTER, C.J.B.C. of the 17th of December, 1915, in an action for damages for breach of a covenant in a lease. The plaintiff leased a shop on Hastings Street in Vancouver to the defendant for a term of five years from the 23rd of October, 1908. The lease contained a repairing covenant that the lessee would, at the expiration of the lease, forthwith restore, if required to do so by the lessor, the galleries and show windows to the condition they were in at the commencement of the lessee's occupation. Subsequently the lessee was allowed to install an elevator on the same terms. The improvements made left the premises, in fact, in better condition than they were at the commencement of the lease. On the expiration of the lease a letter was written by the lessor's agent stating that at present he would not insist on the removal of the elevator or restoration of the shop front to its original condition, as a tenant might be found who would not require the change. Ten days later the lessee was requested by letter to restore the premises to its original condition, as called for by the lease. The lessee removed the elevator, but did nothing further to restore the premises to their original condition. The learned trial judge gave judgment for the plaintiff for $1,059.04 and costs. The defendant Company appealed, mainly on the ground that the learned Chief Justice was in error in finding that the measure of damages was the

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reasonable cost of restoring said shop front and galleries to their former condition instead of the actual damage suffered by the lessor.

The appeal was argued at Vancouver on the 23rd of May, 1916, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Harris, K.C., for appellant: The lessee covenanted to restore the windows if the lessor desired, at the expiration of the lease. We contend the measure of damages is what was the actual loss to the landlord owing to the breach, and not the cost of restoring the front. *Joyner* v. *Weeks* (1891), 2 Q.B. 31, does not apply, as this is a covenant to replace, and not to repair. The learned judge found in fact that the premises were in a better condition now than when the lease was taken: see *Wigsell* v. *School for Indigent Blind* (1882), 8 Q.B.D. 357 at p. 363. If an action is brought for damages the damage must be shewn: see *Hosking* v. *Phillips* (1848), 3 Ex. 168; *Marshall* v. *Mackintosh* (1898), 78 L.T. 750 at p. 753.

Argument

Armour, for respondent: It is, we submit, a covenant to repair: *Joyner* v. *Weeks* covers this case; see also *British Westinghouse Electric and Manufacturing Company, Limited* v. *Underground Electric Railways Company of London, Limited* (1912), A.C. 673 at p. 691.

Harris, in reply.

Cur. adv. vult.

3rd October, 1916.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: This case is not distinguishable in principle from *Joyner* v. *Weeks* (1891), 2 Q.B. 31, referred to with approval by Haldane, L.C. in *British Westinghouse Electric and Manufacturing Company, Limited* v. *Underground Electric Railways Company of London, Limited* (1912), A.C. 673 at p. 691.

There is, in my opinion, no real distinction, so far as it affects the particular matter, between a covenant to repair and one to replace. In this case the lessee was permitted to change the shop front, but covenanted to put it back into its original condition at the end of the term if requested by the

landlord to do so. The only contention made by appellant's counsel which is not covered by the authorities above referred to is this: they say the defendant was not notified to replace the shop front until after the expiration of the term. They concede only respondent's right to elect before the expiration of the term, and say that as she did not do so, her right of election was lost. It is not necessary in this case to decide that question of law, as it is plain from the correspondence that an arrangement was made between the parties that the shop front should be left as it was until it should be seen whether the new tenant would be satisfied with it. The time for election was by this arrangement enlarged, and the right was not lost.

MACDONALD, C.J.A.

I would dismiss the appeal.

MARTIN, J.A.: In my opinion, this covenant is, in principle, one to repair by restoring. The alterations authorized by the lease involved the partial destruction of the premises, which is waste at common law, and I regard the covenant as equivalent to a special one to repair, and the damages for breach thereof come within *Joyner* v. *Weeks* (1891), 2 Q.B. 31. The case is quite distinct from *Wigsell* v. *School for Indigent Blind* (1882), 8 Q.B.D. 357, which was an action on a covenant to build a new wall round a piece of property purchased by the defendant corporation. In certain cases, where the lease contemplates them, the making of such alterations as enlarging windows, opening external doors, and removing partitions do not amount to a breach of covenant to repair (*Doe dem. Dalton* v. *Jones* (1832), 4 B. & Ad. 126), but here acts of that nature are specially provided for. The position is analogous to a covenant to leave in repair under which the landlord is entitled to the cost of repairs, and, as Cave, J. said, "none the less so because in fact the landlord ultimately resolved to pull the house down"—*Inderwick* v. *Leech* (1885), 1 T.L.R. 484; and *cf. Rawlings* v. *Morgan* (1865), 18 C.B.N.S. 776.

MARTIN, J.A.

MCPHILLIPS, J.A.: This is a case between lessor and lessee, and an action for the breach of a covenant by the lessee, the covenant being that the lessee would, at the expiration of the lease, if required by the lessor, restore the gallery and show

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windows to their condition as at the date of the demise. Structural changes were made in the shop premises, and although the request was made, the restoration to the original condition was not carried out. The action went to trial before HUNTER, C.J.B.C., and judgment was entered for the respondent (the lessor) for the amount which would effect the restoration called for by the covenant. The appellant's (the lessee's) counsel very ably advanced the argument that the true measure of damages was not what it would cost to restore the shop premises in their original condition, but what (if any) depreciation to the shop premises there was by the non-performance of the covenant, that, in fact, the premises were improved in value rather than depreciated, that the rentable value was increased rather than decreased, and pointed to some observations of the learned Chief Justice upon this head. Upon careful consideration of the law governing in the matter, and, in particular, the case of *Wigsell* v. *School for Indigent Blind* (1882), 8 Q.B.D. 357, upon which the learned counsel for the appellant, amongst other cases, relied, I am of the opinion that the decision of the Court of Appeal in *Joyner* v. *Weeks* (1891), 60 L.J., Q.B. 510, is conclusive. Lord Esher, M.R. at p. 515 said:

"The rule on the question, which has been well laid down, is that where there is a lease with a covenant to leave the premises in repair at the end of the term, the measure of damages for breach of that covenant is the amount which the landlord proves to be the fair and reasonable amount necessary to put the premises into the state of repair in which he is entitled to have them left."

MCPHILLIPS, J.A.

With respect to the argument advanced that it is improbable, in fact, may almost be taken for granted that the respondent will not restore the shop premises as called for in the covenant, that, in my opinion, in no way meets the breach of covenant. The covenant was made and it is to be performed. In the present case there are no facts to enquire into which would entitle consideration or relief from the terms of the covenant. Even in *Joyner* v. *Weeks, supra,* Lord Esher at p. 516 said:

"The defendant has nothing to do with what will happen between the plaintiff and the third person after the termination of the lease between himself and the plaintiff. . . . . These damages are in no way affected by any arrangement which may have been made by the plaintiff with a third person."

And see *per* Fry, L.J. in the same case at p. 517.

In the present case the respondent is the freeholder, and she is entitled to have the covenant performed. What she may do with the shop premises it does not occur to me matters. In *Conquest* v. *Ebbetts* (1896), 65 L.J., Ch. 808, Lord Herschell at p. 810 had the following to say:

"It was said that, owing to the nature of the premises and the changed circumstances of the neighbourhood, the freeholder would make an entirely different use of the site when the term he had created came to an end; that he would not desire to have the buildings then upon his land put in good repair, and that he would arrive at some arrangement with his lessee by which he would accept from him a sum less than the cost of effecting these repairs. I do not think the Court would do right, in assessing the damages in the present case, to involve itself, at the instance of the appellants, in considerations of that character. The duty of the appellants as between themselves and the respondents was to fulfil the obligation of the covenant into which they entered and to keep the premises in repair. If they had done so, the present question would not have arisen. They have broken their covenant, and when sued for the breach, they have, in my opinion, no right to demand that a speculative enquiry shall be entered upon as to what may possibly happen and what arrangement may possibly be come to, under the special circumstances of the case, when the superior lease expires by effluxion of time."

In *British Westinghouse Electric and Manufacturing Company, Limited* v. *Underground Electric Railways Company of London, Limited* (1912), A.C. 673 at p. 691, *Joyner* v. *Weeks, supra,* is referred to by Viscount Haldane, L.C., when dealing with the measure of damages.

MCPHILLIPS, J.A.

Were it open to view the appeal unfettered by authority, it is indeed questionable if complete justice would be accomplished in saying that no damages have been proved, *i.e.,* that the shop premises have, by the changes made, been increased in value rather than depreciated. There is no certainty that this is the true situation. The shop premises at the time of the trial were unlet, and it might result that the restoration of the premises to their previous condition, or other equally onerous changes may be necessary to bring about the reletting thereof. It is preferable that the principles of law be adhered to, and that there be as much certainty as possible in exacting compliance with matters of contract. It is true that in the application of principles in what is, after all, the inexact science of law there may be at times seeming instances of injustice, yet, to enter into fields of speculation as to the probable subse-

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quent happenings is to render nugatory the solemnity and responsibility of contract. Parties to contracts (where there is no fraud or misrepresentation) cannot complain if they are held to them.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Harris, Bull, Hannington & Mason.*
Solicitors for respondent: *Davis, Marshall, Macneill & Pugh.*

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Negligence—Contributory negligence—Collision—Electric-car and wagon—Railway crossing—Defective brakes—Speed approaching a crossing.

In an action for damages arising out of a collision at a street crossing between an electric-car and a wagon drawn by a team of horses, the trial judge found that the Railway Company was guilty of negligence in running their car at a speed of 40 miles an hour approaching a street crossing on a down grade and that the driver of the wagon was guilty of contributory negligence in not taking precautions when approaching the track, but that he could do nothing to avoid the collision after he became aware of the danger. He also found that the brakes of the car were defective, but that efficient brakes would not have avoided the accident. He gave judgment for the plaintiff.

Held, reversing the judgment of MURPHY, J. (MARTIN, J.A. dissenting), that as the evidence shewed that the accident could not have been avoided with efficient brakes and as the accident did not take place in "any thickly peopled portion of any city, town or village" and there was no excessive speed, the action should be dismissed.

British Columbia Electric Railway Company, Limited v. *Loach* (1916), 1 A.C. 719 distinguished.

Statement

APPEAL from the decision of MURPHY, J., in an action tried at Vancouver on the 7th of April, 1914, and the 14th of September, 1915, for damages for killing two of the

plaintiff's horses and wrecking the wagon and harness, occasioned by the alleged negligence of the defendant's servants. The facts are that on the 3rd of August, 1912, the plaintiff's servant (one Hall) was driving a team of horses and a wagon, the property of the plaintiff, along a road known as Townsend Road in an easterly direction, starting from the Company's office, which was about three-quarters of a mile from the defendant's railway. On the way one Sands got up from the road and sat beside the driver. As they approached the track the view to their left (north) was partially obstructed by an orchard, and close to the track to their left was a small station-house, but there was a space between the orchard and the station through which a view of the track to the north could be obtained. The width of this space was not definitely fixed. On nearing the track, which was approached by an up grade, the two men were engaged in conversation and took no precautions. When the horses were partially across the track they were struck by a tramcar of the defendant Company coming from the north. Sands and the two horses were killed, Hall was thrown from the wagon, and the wagon was damaged. The tramcar at the time was coming down grade at about 35 miles an hour. There was evidence that the brakes on the tramcar were defective. The learned trial judge gave judgment for the plaintiff for $1,100. The defendant Company appealed.

Statement

Macdonell, and *Spinks,* for plaintiff.
McPhillips, K.C., for defendant.

16th September, 1915.

MURPHY, J.: I am asked by defendant to find, in addition to facts already found at the conclusion of the trial, that the driver deliberately drove upon the tracks after he knew the car was coming, through Sands's exclamation. I must decline to do so. In my opinion it was impossible for him to prevent the accident after he became aware the car was rushing upon him. The plaintiff desires me to find that had the brakes been efficient, and applied as soon as the motorman saw the team, the car would have been slowed down sufficiently to allow time enough for the team to have cleared the tracks. It is possible the horses might have got over, but I do not think

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I can hold it proven that the wagon would also be across, and if not, the horses would probably have been killed and certainly the wagon would have been damaged. Applying the law as laid down in *British Columbia Electric Railway Company, Limited* v. *Loach* (1916), 1 A.C. 719, in reference to this same accident to the facts as found at the conclusion of the trial, I think plaintiffs are entitled to judgment. The argument that defendant, because it operates under the Dominion Railway Act, and because the Railway Board has made no rules regulating their speed, are relieved from all civil responsibility no matter how reckless they may be in the matter of speed, is so startling that I must decline to give effect to it until compelled to do so by binding authority.

There will be judgment for plaintiffs for $1,100.

The appeal was argued at Vancouver on the 19th of May, 1916, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Argument

McPhillips, K.C., for appellant: Although this action arises out of the same accident as *British Columbia Electric Railway Company* v. *Loach* (1916), 1 A.C. 719, the facts are different on certain points. A witness who said in the *Loach* case that the car would have stopped with a proper brake, in this case changed his evidence and said it would not have stopped. On the question of the regulation of speed, there is no limit unless regulated by statute: see *Grand Trunk Rway. Co.* v. *McKay* (1903), 34 S.C.R. 81 at p. 86. No jury or judge has the right to question the matter of speed of a train unless it is limited by statute: see *Grand Trunk Ry. Co.* v. *Hainer* (1905), 36 S.C.R. 180; *Andreas* v. *Canadian Pacific Ry. Co.* (1905), 37 S.C.R. 1; *Gowland* v. *Hamilton, Grimsby and Beamsville Electric R. Co.* (1915), 24 D.L.R. 49.

Macdonell (*J. H. Senkler, K.C.,* with him), for respondent: There is a public highway that is crossed. The Railway Company must take precautions to avoid accident. To do this they must not indulge in excessive speed. The Privy Council in the *Loach* case applied the language of Anglin, J. in *Brenner* v. *Toronto R.W. Co.* (1907), 13 O.L.R.

423 at pp. 439-40, following the decision in *Scott* v. *Dublin and Wicklow Railway* (1861), 11 Ir. C.L.R. 377.

McPhillips, in reply.

Cur. adv. vult.

3rd October, 1916.

MACDONALD, C.J.A.: The following facts were found by the learned trial judge. He found that the defendant was guilty of negligence in running its car at a speed of 40 miles an hour approaching a level highway crossing on a down grade of 2.4 per cent.; that plaintiff's driver was guilty of contributory negligence in not looking out for the approaching car; that the driver could do nothing to avoid the collision after he became aware of the danger; that the brakes of the defendant's car were defective, and that with efficient brakes the car could not have been stopped in time to avoid the collision. On these findings he gave judgment for the plaintiff, and, with deference, I think he was in error in doing so. He relied upon *British Columbia Electric Railway Company* v. *Loach* (1916), 1 A.C. 719.

In my opinion there is a very important distinction between that case and this. That decision was influenced by the fact which was there accepted as proven that had the brakes been in good order the motorman could have stopped his car, and thus have avoided the collision after realizing the danger of it. But here the learned judge has found that the motorman could not do this, and I think the evidence amply bears out that finding.

There is a suggestion that with efficient brakes the motorman could have reduced the speed of his car to about ten miles an hour at the time of impact. The learned judge thought that even then the horses could not have been saved from death nor the wagon from injury. I do not think the evidence even supports the suggestion that the speed could have been reduced to ten miles an hour. The witness Andrews thought that such a reduction of speed might have been effected, also that with good brakes a car travelling 40 miles an hour down that grade could not be brought to a standstill in a distance of less than 1,000 to 1,200 feet. The motorman saw the team at 400 feet from the

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point of contact, and it seems to me to be absurd to say that the speed could be reduced from a rate of 40 miles an hour to ten miles an hour while the car travelled a distance of only 400 feet, and yet a further distance of from six to 800 feet must be covered in reducing the speed from ten miles to a standstill. I think the evidence of the motorman, Hayes, also shews that no such reduction of speed as from 40 to ten miles an hour could have been effected within a distance of 400 feet. It was suggested that had the brake been in good order the speed would have been checked enough to have allowed the team to get past before the car reached the crossing. A simple calculation will shew this to be erroneous. The motorman had 400 feet in which to reduce the speed of the car. Unbraked, the car would travel that distance in seven seconds. A good brake would have delayed the car by three seconds. A brake of two-thirds' efficiency, as this was, would have delayed it by two seconds. The difference—one second—is all that was lost. The horses, travelling at the rate of three miles per hour, would make four feet in that time. With a good brake the car would have struck the body of the wagon instead of the front, and, travelling at a speed of over 20 miles per hour, the result would nevertheless have been fatal.

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I would allow the appeal.

MARTIN, J.A.: While, after reading the evidence, I agree with the learned trial judge that it was impossible for the driver of the wagon to have avoided the accident after he was "caught" (as he aptly expresses the result of his own negligence) by the car, while his horses were partly on the track, which I think is the fair inference from all the evidence of the eye-witnesses, yet, on the inferences to be drawn from facts about which there is no real dispute, I do not agree with him that the accident could still not have been avoided if the brake had been in good order. It is clear that even going at such a high rate of speed and equipped with only a defective brake, yet the horses had got so far across the track that the nigh one, nearest the car, was struck on the rump, and the front of the wagon was also struck; (the motorman says: "I hit the wagon"). In such circumstances only a very few feet and a very few seconds

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more would have enabled the wagon to have got clear, and if the brake had been in good order, I have no doubt, upon the evidence, that the speed of the car would have been so reduced that those few feet and seconds would have been gained and the accident avoided. That is the inference I draw from the evidence of the former motorman of the car, Andrews, who says that in 1,000 to 1,200 feet, with a good brake he could stop the car, and in about 200 feet slow it down from 40 to 10 miles an hour, but with the defective brake he could not stop within 1,400 to 1,600 feet, and, of course, a corresponding reduction in speed would follow. Hayes, the motorman at the time of the accident, says that with a proper brake the car ought to be stopped in about 900 feet, going at 35 miles per hour, and that he was running at about that rate, and that when he first saw the horses and wagon they were 400 feet away, which is double the distance within which Andrews says the rate of speed could have been reduced to ten miles per hour, which would allow ample time for the wagon to cross the track. There is no doubt about the evidence of Andrews on this point, for he was specially questioned by the Court to remove any doubt, and I do not feel justified in disregarding his very important testimony. Such being my view of the facts, there can be no doubt of the plaintiff's right to recover on the ultimate negligence of the defendant, and the appeal should be dismissed.

MARTIN, J.A.

McPHILLIPS, J.A.: I am of the same opinion as the Chief Justice. *Loach* v. *British Columbia Electric Railway Company, Limited* (1915), 23 D.L.R. 4, proceeded upon the admitted fact that if the car had been equipped with an efficient brake the accident would have been prevented, notwithstanding that the plaintiff had been guilty of contributory negligence. In the present case we find no such evidence, and, upon the facts, it is patent that with the most efficient brake the accident was inevitable. With regard to the speed, the appellants were operating the car over a railway subject to the Railway Act of Canada (R.S.C. 1906, Cap. 37), and no evidence was adduced which would entitle it being held that there was negligence by reason of excessive speed. The point at which the accident took

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place was not in "any thickly peopled portion of any city, town or village," in fact, not in a city, town or village, so that there was no requirement that the speed should be limited. Nor was there any evidence of non-compliance with the Railway Act or with the orders, regulations, and directions issued by the Railway Committee of the Privy Council or of the Board: see *Grand Trunk Rway. Co.* v. *McKay* (1903), 34 S.C.R. 81 at pp. 86, 89, 90, 91, 92, 95, 101, 102; and *Andreas* v. *Canadian Pacific Ry. Co.* (1905), 37 S.C.R. 1; Jacob's Railway Law of Canada, 2nd Ed., at pp. 307, 423, 427, 428.

I would allow the appeal.

Appeal allowed, Martin, J.A. dissenting.

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

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MACDONALD BROS. ENGINEERING WORKS, LIMITED v. GODSON AND THE ROBERTSON GODSON COMPANY, LIMITED.

Company—Shareholders' meeting—Resolution granting bonus to shareholder—Intra vires of company—All shareholders present—Secret profits—Conflict of evidence.

It is unnecessary to consider the regularity of the proceedings of a company leading up to the granting of a bonus and fixing of a salary provided it is *intra vires* of the company and consented to by every shareholder.

A shareholder is not debarred from voting or using his voting power to carry a resolution by the circumstances of his having a personal interest in the subject-matter of the vote, unless otherwise specially provided by the company's regulations.

Statement

APPEAL from the decision of MORRISON, J. in an action tried at Vancouver on the 7th, 8th and 9th of September, 1915, for $6,500, the amount of undisclosed profits or com-

mission received by the defendants on the purchase of certain steel plates for the plaintiff Company while acting as agent for the said Company, and for $21,364 owing by the defendant Godson for moneys taken by him from the plaintiff Company when a director of said Company. In 1910, J. C. Macdonald and A. J. Macdonald (not related to each other), who were partners as contractors for supplying and installing steel piping, had large contracts with the City of New Westminster and of Grand Forks for the supply of steel piping. In carrying out the contracts they bought a large quantity of material from the Robertson Godson Company, Limited. Upon the completion of the contracts, the Macdonalds having made a large profit, Godson proposed he should go into partnership with them, as he would be of assistance in financing and obtaining new contracts. A partnership was arranged, and the Macdonald Godson Company was formed, Godson obtaining a one-third interest, for which he was to pay from the future profits. In carrying out further contracts steel plates were purchased from the United States Steel Corporation through the Robertson Godson Company that, according to A. J. Macdonald, were to be purchased at cost, but it later transpired that the Robertson Godson Company received a commission of $4,068. A dividend was declared, Godson's share being $396.24 short of sufficient to pay for his share in the Company. J. C. Macdonald then sold out his interest to the other members for $15,000, which amount was paid from the Company's funds and Godson assumed half the debt, $7,500, also $4,225.38, being half of the amount J. C. Macdonald owed the Company when he retired. Godson also drew from the Company's funds $973.86, his sole indebtedness then being $13,095.48. At this time there were four members of the Company, A. J. Macdonald, C. A. Godson, W. G. Breeze and D. G. Macdonell, the latter two holding only one share each for statutory purposes. According to Godson (who was corroborated by Breeze), the four members met in Mr. Macdonell's office, and it was agreed that he (Godson) should receive a bonus from the Company of the amount he owed, and shortly after a meeting of the shareholders was held at the Company's office, all four being present, at which a resolution was unanimously passed granting him the said bonus. Macdonald

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denied that he agreed to the bonus or that he was present at these meetings. The minute book was produced, shewing that all the shareholders were present, and that the resolution was unanimously passed. The plaintiff also claimed sundry amounts improperly taken from the Company by Godson, amounting in all to $8,268.52.

S. S. Taylor, K.C., and *Stockton,* for plaintiff.
Macdonell, and *McPhee,* for defendants.

7th December, 1915.

MORRISON, J.: The present plaintiff is a continuation of the Macdonald Godson Company, Limited, which Company had been formed for the purpose of taking over a partnership which had existed for a short time between A. J. Macdonald, J. C. Macdonald and C. A. Godson. Previously to that partnership the Macdonalds had been carrying on business together as contractors for installing and constructing drains and pipe lines, and at the time of associating themselves with the defendant Godson, that is, in 1911, they had just completed a contract in the City of New Westminster from which they made a profit of some $70,000. During this work the defendant firm, through Godson, had supplied them with material and furnished them credit in large amounts, sometimes as high as $30,000. The Macdonald Godson Company was composed mainly of the Macdonalds and Godson. Some four shares were distributed amongst other individuals for statutory purposes. The Macdonalds held the controlling interest in this Company. J. C. Macdonald stated in evidence that they took Godson in with them on his representations that he would finance them and that his influence with the banks would be useful in their business. This appears to have been so. Godson's credit was better than the Macdonalds'. The defendant Company had been carrying on business for some years on the Pacific Coast, and at that time were in a strong position in the financial world at least of this Province. When the plaintiff Company was incorporated they held no contract, but the defendant Godson had a contract with the Municipality of Point Grey of considerable dimensions, and this he turned over to the concern.

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They started into work and transacted a considerable volume of business, the Macdonalds attending particularly to the practical affairs of the Company and Godson as well to the financial matters. J. C. Macdonald had previously done that. After the incorporation, J. C. did the buying and placed the orders. There is no doubt that the plaintiff utilized the credit of the defendant Company to a large extent. However, as time went on, there arose what might perhaps be called the inevitable or usual squabbling between joint business men, and J. C. Macdonald left the Company in August, 1912. He made no complaint. Godson bought in on equal shares. In October following there was an adjustment of their affairs made between A. J. Macdonald and Godson, and a report was made in December by a chartered accountant, Mr. G. E. Winter, who was the Company's auditor. The Company's affairs were soon after closed out and the present Company continued business, with A. J. Macdonald holding 90 per cent. of the stock. No action was taken by A. J. Macdonald, nor does he appear to have made any formal complaint. The first audit was made in March, 1912, and monthly reports were made shewing the state of the business as to profits. Balance sheets were made out regularly and copies given the Macdonalds. Meetings of the Company were held as occasion required, and apparently no objections were made either as to the balance sheets or resolutions. This action was commenced on the 17th of June, 1915.

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One of the matters in dispute arising out of the business of the Company is a claim for $6,500, alleged to be undisclosed profits, or commission, on the purchase by the defendant Company, as agent of the plaintiff, of steel plates from the United States Steel Corporation. As I understand that transaction, I do not think it comes by any means under that heading. Then there is a claim for $21,364 for moneys which it is alleged were moneys of the plaintiff and which Godson improperly applied or retained to himself.

In face of the facts which I have very broadly stated, and as far as I have been able to follow the rather technical and intricate transactions, I cannot go so far as counsel for the plaintiff asks me to and find that the defendant Godson had been guilty of misfeasance or fraud.

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As to the *bona fides* of the minutes of the meeting of the Company, which are attached, I have the same difficulty in finding that they were concocted and fraudulent. *Prima facie* they are a true statement of what is put down as having happened. There is a direct conflict of evidence. That is, the minutes are corroborated by one set of witnesses, and I rather think that there should be some preponderating evidence in support of the plaintiff's charges—some independent extrinsic evidence—before I could take upon myself the grave responsibility of saying that the defendant and others conspired to defraud the plaintiff in the fashion alleged. There is no doubt the trial proceeded on the footing that the plaintiff alleged fraud and overreaching on the defendant Godson's part. In my opinion, it has failed in proving that. There being no fraud proven, then it seems to me that the adjustment of its affairs effected in 1913 precludes me from opening up a consideration of its course of dealings. Mr. *Taylor* submits, however, that in respect of the item of $13,000 that that incident was unknown to the defendants at the time of the adjustment, and that, in any event, that transaction was *ultra vires*. On that point there is also a conflict of evidence, preponderating in favour of the defendants. The two Macdonalds and Godson were practically the Company. They had the whole concern in their own hands. If what the plaintiff alleges and desires me to believe be true, then it has selected the wrong tribunal. The matter is graver than those issues which are usually associated with civil Courts. The action is dismissed.

The appeal was argued at Vancouver on the 8th to the 11th of May, 1916, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

Argument

S. S. Taylor, K.C., for appellant: Although the minutes shew that Macdonald was present when the bonus was passed, he swore positively he was not there. There was no director's meeting calling the extraordinary meeting of the shareholders. The minutes are not in sequence in the minute book, and Godson and his clerk were the only ones there. We say the recitals are not true, and in any case Godson cannot vote himself the

money: see *Roray* v. *Howe Sound Mills and Logging Co.* (1915), 21 B.C. 406; *In re George Newman & Co.* (1895), 1 Ch. 674; *Caridad Copper Mining Company* v. *Swallow* (1902), 2 K.B. 44; *Young* v. *Naval and Military, &c., Co-operative Society of South Africa* (1905), 1 K.B. 687; *Hutton* v. *West Cork Railway Co.* (1883), 23 Ch. D. 654 at pp. 670-1; *Normandy* v. *Ind, Coope & Co., Limited* (1908), 1 Ch. 84. Section 5 of the articles does not apply to a bonus. It does not cover gifts or remuneration: see *Nant-y-Glo and Blaina Ironworks Company* v. *Grave* (1878), 12 Ch. D. 738; *In re Oxford Benefit Building and Investment Society* (1886), 35 Ch. D. 502; *Leeds Estate, Building and Investment Company* v. *Shepherd* (1887), 36 Ch. D. 787; *Boston Deep Sea Fishing and Ice Company* v. *Ansell* (1888), 39 Ch. D. 339. He also received a commission on the purchase of steel from the United States Steel Corporation of $4,068 when he was agent for the purchasing Company. This amount should be paid into the Company. The salary he took was never voted on and should be refunded.

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Macdonell, for respondent: There was no salary; the money received was for Godson during Macdonald's absence, as he took what Macdonald would have received had he been there. The trial judge concluded from the evidence that the bonus was agreed to by Macdonald, and was properly carried through. The Court of Appeal will not interfere. The question is dealt with in *Cook* v. *Deeks* (1916), 1 A.C. 554 at p. 563.

Argument

Taylor, in reply.

Cur. adv. vult.

3rd October, 1916.

MACDONALD, C.J.A.: The plaintiff, an incorporated Company, seeks to recover from a former member and director of that Company, C. A. Godson, the following sums of money: $13,095.48, referred to in evidence as the "bonus"; $3,000 referred to as "salary"; $4,068 referred to as "secret profits"; and $125, the value of one share in the Company's capital. These claims are made against Godson alone, with the exception of that for the recovery of "secret profits," which is made against both defendants.

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As regards the bonus, the facts are that A. J. Macdonald and Godson, at the time the bonus came in question, were the holders in equal parts of all the shares in the capital of the plaintiff Company, the name of which, at that time, was the Macdonald Godson Company, Limited. One share was nominally held by the Company's secretary, Breeze, and one by the Company's solicitor, D. G. Macdonell, to qualify them for office in the company.

At a meeting of directors held on the 4th of November, 1912, at which there were present, according to the minutes of the meeting, all the persons above named, the following resolution was adopted:

"Moved by A. J. Macdonald, seconded by D. G. Macdonnell, that whereas the Company had required financial assistance to a large extent, and whereas C. A. Godson had provided the said financial assistance by arrangements with the Dominion Bank, that for such services in connection with the said financial arrangements the sum of $13,095.48 be paid to C. A. Godson for the same."

A. J. Macdonald therein named, who is the beneficial plaintiff in this action, denies that he was present at that meeting, or had any knowledge of the said resolution. He admits that Godson told him at some time or other that he (Godson) was going to claim a bonus for his services, but the effect of his evidence is that he was opposed to giving a bonus, and that he heard nothing of it afterwards. Godson and Breeze, on the other hand, say that A. J. Macdonald was present at the meeting in question, and that the minute above recited is a true record. Mr. Winter, the Company's auditor, also says that A. J. Macdonald on one occasion discussed the bonus in his presence, and was at least aware that it had been granted. The learned judge has chosen to accept the evidence of Godson and his witnesses. On the conflicting evidence his decision would be influenced by his impressions respecting the credibility of the witnesses. In the circumstances, I am quite unable to say that he came to a wrong conclusion.

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The learned judge also found in defendants' favour on the question of the salary, on like conflicting evidence. There was no resolution authorizing the payment of the salary to Godson, but he swears that A. J. Macdonald agreed to his receiving $250 per month for the year 1913, which makes up the item of

$3,000. This is also corroborated by the evidence of Breeze. Again, I find myself unable to say that the learned judge was wrong in the conclusion of fact to which he came on this item.

It was argued that the granting of the bonus and the salary was *ultra vires* of the Company. I do not think so. Both the bonus and the salary were payments for services alleged to have been performed by Godson to the Company. The articles make provision for payment for services rendered to the Company by directors as well as by others.

It is unnecessary to consider the regularity of the proceedings leading up to the giving of the bonus and the fixing of the salary. Being *intra vires* of the Company they were consented to by every shareholder, and are, therefore, not assailable.

With regard to the claim for the recovery of the alleged secret profits, I find again that there is clear conflict of evidence. Witnesses for the plaintiff say that the defendant Company (Robertson Godson Company) were authorized to purchase steel plates required in the plaintiff Company's business. Defendant Godson held a controlling interest in the Robertson Godson Company, and is alleged by plaintiff to have agreed that the Robertson Godson Company should make no profit in connection with the purchase of these plates, but should act as gratuitous agent, whereas it is alleged by plaintiff that defendants made a profit, and the item under consideration is the item sought to be recovered as such profit. Godson denies emphatically that any such arrangement was made, but admitted that the Robertson Godson Company made a profit in the purchase of the steel plates. If they were entitled to make it, no question arises as to its being a legitimate profit. Some evidence given on discovery by Breeze is relied upon by plaintiff's counsel as corroborating the plaintiff's account of this transaction, but Breeze's evidence is hearsay in part, and is conjecture in part, based upon his knowledge of the entries in Robertson & Godson's books, he being manager of that Company. He disclaims any personal knowledge of the bargain whatever. But even if his evidence can be held to strengthen the plaintiff's case, there is positive denial by Godson, who was the person alleged to have made the arrangement, that any such arrangement existed. Now, if the learned trial

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MACDONALD BROS. ENGINEERING WORKS v. GODSON

judge believed Godson, as he must have done, I do not think, on the principles which govern Courts of Appeal, I could interfere with his conclusion in favour of the defendants. I do not say even that I should have come to a different conclusion untrammelled by his finding.

The item of $125, the value of one of the shares in the Company's capital, is too trivial to require much attention. It never would have been put forward by itself. It is so trivial that it was evidently considered of so little importance by counsel that the facts in respect of it were not clearly brought out. The suggestion is that Godson purchased this one share from Laughnan, to whom it had been given to qualify him for office in the Company, and that he caused it to be paid for out of the Company's funds instead of his own. The evidence does not satisfactorily shew this allegation to be true.

MACDONALD, C.J.A.

For the reasons above stated, I think the appeal must be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: I am unable to say that the learned trial judge was wrong in his findings of fact, though there are circumstances in the case that leave my mind far from being free from doubt.

The appeal will be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the same opinion as the Chief Justice. The learned counsel for the appellant greatly relied upon *Menier* v. *Hooper's Telegraph Works* (*Limited*) (1874), 43 L.J., Ch. 330, as being a decision which in principle demonstrated that the bonus could not be supported, *i.e.*, a bonus to one of the directors, that the analogy was complete, but, with deference, that decision went wholly upon the ground that it was not permissible for the majority of the shareholders to deal with the assets of the company for their own benefit to the exclusion of the minority. In the present case it must be held that all the shareholders approved of the paying of the bonus. Then with respect to the salary and the claimed secret profits which the Robertson Godson Company, Limited, obtained, it would seem to me, upon the facts, that all that was done is well supported by *Burland* v. *Earle* (1901), 71 L.J., P.C. 1, *per* Lord Davey at pp. 5-6.

Proceeding from the premise in the present case that all the shareholders, or that the majority of the shareholders, approved of the payment of the bonus and salary, I refer to what Kekewich, J. said in *Normandy* v. *Ind, Coope & Co.* (1907), 77 L.J., Ch. 82 at pp. 89-90.

The action here is the action of the Company, but that gives no greater rights than if brought by a shareholder on behalf of himself and all the others. Acts cannot be complained of if done with the approval of the majority of the shareholders, nor can acts which are possible of being confirmed by the majority if duly confirmed.

The present action, as the evidence shews, is really the action of A. J. Macdonald, who holds or controls, if not all, practically all the shares of the appellant Company, and the attempt is at this late date to open matters which were dealt with at directors' meetings, covered by auditor's reports, and approved at general meetings, and after a settlement was come to between Macdonald and Godson, founded upon the statement of February 17th, 1914, shewing the affairs of the Company as they stood on the 17th of February, 1914, following upon which Godson sold the 473 shares held by him in the Macdonald Godson Company, Limited (the name of the Company was subsequently changed to Macdonald Bros. Engineering Works, Limited), to Macdonald, the agreement between Macdonald and Godson, of date April 18th, 1914, reciting in part: "made on the basis that there has been no material change in the financial position of the Company since the statement of February 17th, 1914." The bonus and salary were matters which had been approved, and Macdonald was a party to their approval, long anterior to this transfer of interest of Godson to Macdonald (*Whitwam* v. *Watkin* (1898), 78 L.T. 188).

Upon the whole case I am not of the opinion that the judgment of the learned trial judge should be disturbed.

I would dismiss the appeal.

Appeal dismissed.

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

Solicitor for respondents: *D. G. Macdonell.*

MURPHY, J.

1916

Oct. 27.

MELDRAM v. MACLURE AND HOUGHTON.

Administrator's bond—Assignment to creditor—Right to enforce—Parties —Procedure.

MELDRAM v. MACLURE

A bond given to secure the due administration of the estate of an intestate cannot be put in suit by a creditor for the purpose of recovering his debt.

SPECIAL CASE heard by MURPHY, J. at Victoria on the 4th and 12th of October, 1916.

The action was brought by the plaintiff, suing "on behalf of herself and all others interested," against the defendants as sureties upon a bond, conditioned for the due administration of the estate of an intestate. The statement of claim alleged that the intestate, Mrs. Bunnett, had contracted to purchase a parcel of land from one Broadbent and had subsequently agreed to sell the same parcel to the plaintiff; that the plaintiff had paid all moneys due under the contract with her, but that the administrator of Mrs. Bunnett had failed to pay the purchase price to Broadbent and was unable to convey to the plaintiff, and had committed a *devastavit*; that the plaintiff had brought an action for specific performance against the administrator and had signed judgment in default of appearance; that the bond had been assigned to the plaintiff; and the relief claimed was payment to the plaintiff of the amount unpaid under the contract between Mrs. Bunnett and Broadbent and the costs of the action for specific performance. The special case set out the same facts, and stated the question for decision to be "whether the defendants are liable to the plaintiff for damages for breaches of the bond conditioned for the due administration of the estate of the (intestate) by the administrator of the said estate."

Statement

Hankey, for plaintiff: The administrator was a trustee for the plaintiff and was bound, under section 60 of the Trustee Act (R.S.B.C. 1911, Cap. 232), to convey to the plaintiff. The action is properly brought by the plaintiff in a representative capacity.

Argument

Mayers, for defendants: The action is entirely misconceived; it is in substance a pure creditor's action, and *Sandrey* v. *Michell* (1863), 3 B. & S. 405; 32 L.J., Q.B. 100, shews that an administrator's bond cannot be enforced in such an action: the bringing of the action by the plaintiff in a representative capacity will not help her if, in substance, the action is for an individual debt. The only way to enforce such a bond is to bring an administration action, and obtain leave in that action to enforce the bond: *Cope* v. *Bennett* (1911), 2 Ch. 488. The assignment of the bond to the plaintiff is not an affirmation that she is the right person to sue, as all defences are open to the defendants when the bond is put in suit: *Sandrey* v. *Michell,* (1862), 3 Sw. & Tr. 25. Moreover, the action for specific performance was defective for want of parties. Section 60 of the Trustee Act merely provides the machinery for carrying out a contract which has been properly established, and the heirs of the intestate were necessary parties to the action. It is not correct to say that a vendor is a trustee for the purchaser: *Howard* v. *Miller* (1915), A.C. 318. Even if the administrator were bound by the action, the sureties would not be so: *Ex parte Young. In re Kitchin* (1881), 17 Ch.D. 668.

Argument

27th October, 1916.

MURPHY, J.: Though the plaintiff states in the title of the action she is suing on behalf of herself and all others interested, the action is really for the recovery of her own particular debt. This is clearly shewn by the claim set up in paragraph 10 of the statement of claim and by the third section of paragraph 17 of the special case. *Sandrey* v. *Michell* (1863), 32 L.J., Q.B. 100, is authority for the proposition that this cannot be done. If the matter had come before the Court as an ordinary trial, possibly the difficulty could be solved by amendment, but coming as it does, by way of special case based on agreement of solicitors, I do not feel at liberty to alter it in any way. Since, in my view, by virtue of said third section of paragraph 17 of the special case the consequence of an answer in the affirmative would be in contravention of the principle of *Sandrey* v. *Michell, supra,* I must answer the question as submitted in the negative.

Judgment

Judgment for defendants.

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1916

June 14.

WESTHOLME LUMBER CO. v. CITY OF VICTORIA

THE WESTHOLME LUMBER COMPANY, LIMITED v. CORPORATION OF THE CITY OF VICTORIA *ET AL.*

Practice—Appeal—Trial—Assessors—Recommendations of—Admissibility on hearing of appeal.

Where a trial takes place before a judge, assisted by assessors, and the assessors have given their recommendations to the judge, parties appealing from the judge's decision are not entitled to the assessor's recommendations for use on the appeal.

Statement

INTERLOCUTORY APPEAL from an order of MURPHY, J., made at Chambers in Victoria on the 16th of May, 1916, dismissing the plaintiff's application that the recommendations of the assessors, made at the trial of the action, be filed, and that the appellants be at liberty to add said recommendations to the appeal book to be used on the hearing of the appeal.

The appeal was argued at Victoria on the 14th of June, 1916, before MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

Argument

W. J. Taylor, K.C., for appellant (plaintiff): The report of the assessors submitted to the trial judge was destroyed. An application to include same in the appeal book was refused. I submit it would be of assistance to the Court, and should be available: see *Hattersley and Sons (Limited)* v. *George Hodgson (Limited)* (1905), 21 T.L.R. 178; *The Beryl* (1884), 9 P.D. 137 at p. 141.

Ritchie, K.C., for respondent: The Court of Appeal are not concerned with what takes place between the assessors and the judge below. The point is decided in *The Banshee* (1887), 56 L.T. 725.

Taylor, in reply: The assessors should confine themselves to their view of the facts, and we should have their technical findings.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: We must assume that the learned trial

judge set forth in his reasons for judgment everything he thought was essential that he had learned from the assessors. What you are really attempting to do is to shew that the assessors did not advise the learned judge properly, that he was misled in some of his conclusions.

Apart from the assistance it might be to us, if it should turn out to be so, there is the other very important point to consider as to whether, contrary to the desire of the learned judge, we can go into his Chambers and ascertain what took place there. The assessors were there to advise the judge. What would happen if we made the order you desire? We should have to review the advice given by the assessors to the judge. It might be very useful in understanding the answers to questions by a jury if you could get at what took place in a jury box, but it cannot be done.

The function of the assessors is to advise the judge, and you have the result in these reasons—reasons for judgment.

I would dismiss this interlocutory appeal. The facts, as stated by counsel, are that it was suspected that the assessors who sat with the learned judge made a report to him. The appellants then applied to the judge for the report, that they might include it in the appeal book for use in this appeal. The learned judge thought fit to deny the application; he thought that it was not proper that the advice which had been given him should be put in the appeal book and used in the appeal.

MACDONALD, C.J.A.

Now we are asked to say that the document, which is not part of the appeal book, is not filed in Court, is something extraneous, something that may be considered as confidential between the assessors and the judge, shall, contrary to the express desire of the judge, be included in the appeal book and brought before this Court. Now, apart altogether from the question whether the report would assist this Court or not, I think it would be most improper to make the order.

The appeal will be dismissed.

MARTIN, J.A.: I am of the same opinion. In the ascertainment of the advice which the assessors, in discharge of their duty, gave to the judge, he may ask them to give that either verbally or in writing. There is no obligation on him to make

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public the written answers of the report or advice which the assessors made to him, whether it may or may not be accompanied by reasons. No authority at all, I am quite confident, can be cited in support of the contention that, in the absence of the learned judge himself having made the written report of the assessors public, either this or any other tribunal can compel him against his wish to make it public. The nearest case on the point is *Hattersley and Sons (Limited)* v. *George Hodgson (Limited)* (1905), 21 T.L.R. 178, and there it clearly appears that the report, accompanied by reasons, was made public by the judge himself, and sent up to the Court of Appeal by his direction.

GALLIHER, J.A.

GALLIHER, J.A.: I refuse the appeal.

Appeal dismissed.

Solicitors for appellant: *Eberts & Taylor.*
Solicitor for respondent: *R. W. Hannington.*

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POWIS v. THE CITY OF VANCOUVER.
RAMAGE v. THE CITY OF VANCOUVER.

Arbitration and award—Misconduct of arbitrator—Waiver—Estoppel—Vancouver Incorporation Act, B.C. Stats. 1900, Cap. 54—Arbitration Act, R.S.B.C. 1911, Cap. 11, Sec. 14.

On an application to set aside an award on the ground of misconduct by one of the arbitrators, it appeared that after the proceedings before the arbitrators were closed, counsel for the objecting party, with knowledge of the alleged misconduct, attended on an application and consented to an order extending the time for the arbitrators to make their award.

Held, on appeal, affirming the decision of MACDONALD, J. (MCPHILLIPS, J.A. dissenting), that the act of consent to extension of time, and recognition of the propriety of the arbitrators making the award, is of the nature of an estoppel, and precludes objection to the award on the ground of misconduct.

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Statement

APPEAL from the decision of MACDONALD, J. of the 11th of May, 1916, dismissing the application of the defendant Corporation to set aside an award on an arbitration under the Vancouver Incorporation Act, 1900. The City of Vancouver established a new grade on Clark Drive. The plaintiffs had property on the street and claimed damages as being injuriously affected. The parties went to arbitration under the Act. A majority award was delivered of $3,100 damages and a minority award of $1,700. The City applied to set aside the award on the ground of misconduct by one arbitrator, Mr. Gallagher: (1) that his conduct shewed bias—he acting practically as counsel for the plaintiff throughout the hearing; (2) an incident that occurred during the hearing, *i.e.*, handing a note secretly to Mr. *Duncan* (counsel for Mr. Powis); (3) an endeavour by him to have the award submitted to Mr. *Duncan* before its publication. The trial judge found that the City should have retired from the hearing, and by not doing so the City waived its right to have the award set aside on the ground of misconduct. The City appealed.

George Duncan, for claimants.
Harper, for City of Vancouver.

MACDONALD, J.

MACDONALD, J.: Powis and Ramage, in this matter, invoked the provision of the Vancouver Incorporation Act enabling them to obtain a board of arbitration to determine the damages to which they might be entitled with respect to the cutting down of the grade on Clark Drive, in the City. They appointed as their arbitrator William H. Gallagher, and on application to the Court, the City of Vancouver selected as its arbitrator W. E. Burns, these two arbitrators choosing as a third arbitrator J. W. McFarland. The arbitration proceeded, and it is quite apparent to me that during the course of the arbitration considerable hostility arose between the city solicitor and W. H. Gallagher, the arbitrator chosen by the applicants. Finally, during the course of the argument, after the evidence had all been adduced, an incident occurred of which two explanations have been offered before me for consideration. It

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is common ground, however, that W. H. Gallagher passed a note, or endeavoured to pass a note, to the counsel appearing on behalf of the applicants. Objection was taken to this course of proceedings by the city solicitor, and eventually the note was read publicly, and there is a dispute as to its contents. I will not deal with this phase of the matter, on account of the conclusion I have come to with another branch of the application.

The award was eventually made, and was unsatisfactory to the City; in fact, the award itself is only a majority award, as the arbitrator who had been chosen by the City, in his award, allowed a much less sum than that mentioned in the award of the chairman and W. H. Gallagher. The City of Vancouver is now taking steps to set aside this award, and the ground taken is that the arbitrator, W. H. Gallagher, was guilty of misconduct, that he was biased and prejudiced, and that, in other words, the Court constituted for the purpose of determining the damages to which these parties were entitled was not a fair Court, and the award on that ground should be set aside. This attack, if successful, would, to my mind, certainly warrant the setting aside of the award. I cannot shut my eyes to the fact that too many arbitrators chosen from either side entertain the opinion, and carry out that opinion by their acts, that they are not arbitrators or judges, but are advocates, or agents. Whether that applies to the present case or not it is not for me to say, in view of the conclusion I have arrived at in respect of another phase of the matter. I have this to say, however, that from the facts submitted on the argument, and in saying this I do not consider it as giving a final judgment, there certainly seemed to be ground for the City bringing the matter before the Court for consideration. Whether, on due consideration, and after a close perusal of the evidence and the record, a conclusion could be arrived at that W. H. Gallagher was thus biased and prejudiced, and that his award might reflect such bias and prejudice, I do not say. It might be contended that as the award was a majority award, that as a bias or prejudice of that kind existed with respect to one of the arbitrators, that it should not affect the award. I do not think this is the law, nor does it seem to me to appeal

to one's reason, because one cannot tell to what extent a biased or prejudiced arbitrator has been able to affect the judgment of the impartial or unbiased arbitrator who joined with him in making the award. I think it is the duty, speaking generally, of all arbitrators, when chosen to assess damages, either under this particular Act or under any authority, to bring to that Court to which they have been appointed a fair and impartial mind, to throw aside all prejudice and feeling they may have in the matter, and to act, as they really are, as judges, and not in any sense as advocates.

Until the point was pressed on me of waiver, I thought it would be my duty to go carefully through the transcript of evidence, and form a conclusion as to whether or no this accusation made against W. H. Gallagher, as arbitrator, had been proven to my satisfaction. The onus would rest with the City of satisfying the Court on that point. In that connection I could not and would not, of course, act upon suspicion, but the charge required to be driven home fully and effectively in order to come to such a determination. The applicants, however, contend that the course of procedure in this matter was such as to create a waiver of any objection being now made on the part of the City as against the award. I was not surprised to find that no case could be cited to me where similar facts had arisen as outlined in this arbitration. There are very few cases, probably, in which the attack is made more, than the standing or status of the member of a board of arbitrators. The attack very often arises more especially as to the production and taking of evidence in the absence of one of the arbitrators, or even of one of the parties, of failing to comply with some requirement of the statute under which the board may be constituted. Here, however, the position is not of that nature. The ground of complaint is as against one of the members of this board, and the question is, assuming for the moment that there could be such a charge proven, whether the City has not, by the course pursued, waived such objection. It appears that, as I have mentioned before, during the course of the arbitration considerable friction was evidenced between the counsel for the City and Mr. Gallagher as arbitrator. It appears from affidavits that this position was expected to occur as soon as it

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became evident that Mr. Gallagher had been selected as an arbitrator. The contention of the City is that this hostility, prejudice and bias on the part of Mr. Gallagher was evidenced repeatedly, and culminated in the incident to which I have referred. Whether that be the case or not, after the incident was over counsel representing the City stated, and that is sworn in affidavit, that such an incident, or such a passing of a note, or communication between an arbitrator and counsel, had the effect of voiding the award when made. He was aware at the time, apparently, that this contention, if proved, would result in setting aside the award. In the face of that knowledge, assuming for the moment that he was correct, he saw fit to attend the proceedings as far as the city was concerned. Considerable time elapsed with a view to considering whether a stated case should be granted or not on behalf of the City upon some other question which had arisen. This, it would appear, was not pursued, and eventually time becoming important, an order was applied for, and obtained on the 31st of January, 1916, extending the time for the making of the award. When I bear in mind the fact that the argument was concluded on the 22nd of December, 1915, this means that a considerable space of time had elapsed between the time when the City was aware of the conduct of the arbitrator of which it now complains, that the time was extended to allow the arbitrators to act further, and make their award during the extended period. The City, by this course, then determined to take its chance that the award might, even with its position perhaps still endangered as to the conduct of the arbitrator, be favourable; in other words, that the amount to be allowed would not be unsatisfactory. Apparently the amount of the award, as given by the majority of the board, is unsatisfactory, and it is only because the amount is thus in excess of the expectations of the City, or its adviser, that, in my opinion, this application was launched. I do not think that a party to an arbitration can pursue a course of this kind and expect then to have its objections utilized for the purpose of setting aside an award. It cannot, in other words, blow hot and cold, at one period of the arbitration satisfied to await the result, with a knowledge of all the objections that are not being urged being in existence,

and then afterwards, when the award is unsatisfactory, proceed to set it aside. I adopt the words of Chief Justice Tindal in *Bignall* v. *Gale* (1841), 2 Man. & G. 830 at p. 837:

"We cannot lose sight of this,—that for three weeks before the award was made, the defendant was aware of all the objections which he now urges to the Court. On the 17th and 18th of December the defendant was informed by Cochran that Woollacott had been recalled, and that the arbitrators had sought for and obtained information from other persons. What right has he to lie by, and allow the arbitrators to make their award, and, when he finds the award to be against him, to move to set it aside upon this objection?"

The matter is dealt with by other judges in the judgments in that case. It is contended that the City could not, through its counsel, have taken any other course than that pursued. I am free to confess it is a somewhat difficult point to determine what particular course should be followed. It does appear to me that objection could be made, and that the City could openly state that it did not in any way intend to abide by the result of an award made under the circumstances of which it now complains. In view of the conclusion I have arrived at on the question of waiver, it does not become necessary for me to consider the other point raised as to the arbitrator, Mr. Gallagher, being biased and prejudiced, and the result is that the application to set aside the award is refused, with costs.

I have given my reasons thus somewhat at length, and without delay, so that the City, if it is dissatisfied, will have ample opportunity of bringing the appeal on at as early a date as possible.

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The appeal was argued at Victoria on the 22nd of June, 1916, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

Harper, for appellant: The chairman and the claimants' arbitrator gave a majority award. We say the award should be set aside owing to the misconduct of W. H. Gallagher, the claimants' arbitrator. There are three grounds: (1) his general conduct was most unfair, he having shewed bias by practically acting as plaintiff's advocate; (2) he surreptitiously handed a note during the proceedings to the claimants' solicitor; and (3), he endeavoured to shew the award to claimants' soli-

Argument

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citor before it was delivered: *In re Haigh's Estate*: *Haigh* v. *Haigh* (1862), 31 L.J., Ch. 420; *Smith* v. *Sparrow* (1847), 16 L.J., Q.B. 139. It is a statutory enactment that the award can be set aside for misconduct by an arbitrator: see *Bignall* v. *Gale* (1841), 2 Man. & G. 830; *Wood* v. *Gold* (1894), 3 B.C. 281; *In re Arbitration between Brien and Brien* (1910), 2 I.R. 84.

George Duncan, for respondents: Gallagher was not guilty of misconduct within the meaning of the Act, and, in any event, the City's conduct was such as to constitute a waiver. They did not protest: see *In re Elliot, and The South Devon Railway Co.* (1848), 2 De G. & S. 17. They deliberately consented to an extension of time for delivery of the award, so they are estopped: see *Tullis* v. *Jacson* (1892), 3 Ch. 441.

Argument

Harper, in reply, on the question of waiver, referred to *Harvey* v. *Shelton* (1844), 13 L.J., Ch. 466; *Hamlyn* v. *Betteley* (1880), 6 Q.B.D. 63; and *In re Salkeld and Slater* (1840), 12 A. & E. 767; 54 R.R. 689.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think this appeal should be dismissed. I am not inquiring into the merits of the complaint of misconduct against the arbitrator, because this much is clear, that the appellant was aware of any misconduct, if there were misconduct, before the motion was made to extend the time for the arbitrators to make their award; that the appellant's counsel attended on that application and consented to the order, with the full knowledge that the appellant has today of the alleged misconduct. In other words, they were quite willing to allow the other party to the arbitration proceedings to proceed, as if there was no complaint pending at all; they were willing to stand by and withhold the objection, and thus induce the other party to go on as if no objection existed, and then, when they found the award was against them, when the other party had taken the award out and probably paid for it in the usual way, they come forward with this objection and ask to have the whole of the proceedings set aside.

I think the act of consent to extension of time and recognition of the propriety of the arbitrators making the award is of

the nature of an estoppel, and the appellant's objection ought not to be heard now.

GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.: I find myself in disagreement with my learned brothers in regard to this appeal.

I would allow the appeal. Legal misconduct took place. In my opinion, waiver and estoppel are not principles capable of being invoked where there is legal misconduct—that counsel continue to take part in the proceedings is not fatal (*Earl of Darnley* v. *Proprietors, &c. of London, Chatham, and Dover Railway* (1867), L.R. 2 H.L. 43), and with regard to the order that was made extending time, that was merely procedure which did not go to the root of the matter—the jurisdiction of the Court of Arbitration, its personnel, or anything of that character. I particularly rely upon the decision of the Privy Council in *Sheonath* v. *Ramnath* (1865), 35 L.J., P.C. 1, and the language of Sir J. W. Colville at p. 6. and, therefore, my view would be that the appeal should be allowed and the award set aside.

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Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellant: *E. F. Jones.*
Solicitor for respondents: *George Duncan.*

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Oct. 3.

LOGAN v. THE GRANBY CONSOLIDATED MINING, SMELTING AND POWER COMPANY, LIMITED.

Practice — Default in answering interrogatories — Defence struck out — Liberty to sign interlocutory judgment—Local judge of Supreme Court—Jurisdiction—Marginal rules 297, 299 and 363.

LOGAN v. GRANBY CONSOLIDATED MINING, &C., CO.

Where, in an action for pecuniary damages, the statement of defence is struck out by order of a local judge of the Supreme Court owing to the defendant's default in answering interrogatories, the plaintiff can, under marginal rule 297, enter interlocutory judgment without the order of a judge.

Where an order striking out the defence included the words "the plaintiff is at liberty to sign interlocutory judgment forthwith" (irrespective of whether the local judge exceeded his powers in inserting them), such words must be regarded as merely surplusage, and do not invalidate the order.

APPEAL from an order of HUNTER, C.J.B.C. of the 15th of November, 1915, whereby final judgment was entered for the plaintiff for $8,000 on assessment of damages after interlocutory judgment had been entered, the defence having been struck out through defendant's default in answering interrogatories. The action was for damages for injuries sustained by the plaintiff while in the employ of the defendant Company. The writ was issued on the 1st of December, 1914, and on the 9th of March following the plaintiff entered interlocutory judgment in default of filing defence. On the 10th of April the local judge made an order for a writ of inquiry and the plaintiff then pursued the English practice, obtaining a judgment before the sheriff and a jury. On the 6th of July the local judge made an order setting aside the interlocutory judgment and all proceedings subsequently to the delivery of the writ of inquiry. The defendant then entered a defence and the plaintiff forthwith delivered interrogatories. On the defendant being in default in answering the interrogatories the plaintiff applied for and obtained an order striking out the defence, and with liberty to sign interlocutory judgment. Judgment was signed and an order was made for the assessment of damages.

Statement

In pursuance thereof the learned Chief Justice assessed the damages at Nelson on the 12th of November, 1915. The defendant appealed, mainly on the ground that the order appealed from was based on an order of the local judge striking out the defence and giving the plaintiff liberty to sign interlocutory judgment, which he contended was made without jurisdiction.

The appeal was argued at Vancouver on the 7th of April, 1916, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Bodwell, K.C., for appellant, contended that the county judge had not the jurisdiction as a local judge of the Supreme Court to order that the plaintiff obtain interlocutory judgment. [He referred to Supreme Court Rules, 1912, p. 173; marginal rules 297 and 304; *Young* v. *Thomas* (1892), 2 Ch. 134; and *Re Land Registry Act. Lomis* v. *Abbott* (1915), 22 B.C. 330.] There can be no assessment of damages until there is a judgment, and there is no judgment.

Argument

A. Macneil, for respondent: We are entitled to interlocutory judgment under marginal rule 363, but in any case, when we obtain an order striking out the defence we are entitled to enter interlocutory judgment without any further order.

Bodwell, in reply: The basis on which plaintiff is entitled to damages has not been adjudicated upon. There is an alternative claim, and this must be adjudicated upon before damages are assessed: see *Smith* v. *Buchan* (1888), 58 L.T. 710; 36 W.R. 631.

Cur. adv. vult.

3rd October, 1916.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appeal turns on questions of practice and procedure. A local judge of the Supreme Court ordered the statement of defence struck out. It was within his powers as such local judge to do this. By the same order he gave the plaintiff liberty to sign interlocutory judgment. Whether the learned judge was within his powers in doing this is, I think, of no consequence in this appeal. It was merely surplusage. After the statement of defence had been struck

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out the defendant was in the position of being in default in delivering its statement of defence, and, by virtue of Order XXVII., r. 4, the plaintiff could enter interlocutory judgment without the order of a judge. Interlocutory judgment was in fact entered, and thereafter the plaintiff proceeded to assess damages before a judge presiding at the regular sittings of the Supreme Court.

I can find no ground for interference.

MARTIN, J.A.: In my opinion, the learned local judge had, in a case of this class, jurisdiction under r. 363 to make the order striking out the defence and giving liberty to sign interlocutory judgment: *Re Land Registry Act. Lomis* v. *Abbott* (1915), 22 B.C. 330; 9 W.W.R. 676, does not apply to this case. And further, I have no doubt that where, as here, the claim is for pecuniary damages only, the plaintiff may, under r. 299, "enter interlocutory judgment for . . . . the damages" (to be finally ascertained as directed by r. 297, and section 53 of Supreme Court Act) where default has been made in the delivery of a defence, and the position is the same under r. 363, where a defence has been struck out, as though it had never been duly delivered, and the defendant is, by that striking out, inevitably "placed in the same position as if he had not defended," and it is not necessary to insert a special direction in the order to obtain that result. The words in the rule—"the party interrogating may apply to the Court or a judge for an order to that effect"—are not easy to construe, and I can find no decision upon them in the English rule. But whatever state of circumstances they may apply to, they do not apply to these, so far as defining the defendant's "position" is concerned, after his defence has been struck out. In my opinion, the words in the order complained of, giving the plaintiff "liberty to sign interlocutory judgment forthwith," after directing the defence to be struck out, are in any event superfluous, because it was the right of the plaintiff to sign that judgment without any special direction immediately after the defence was got rid of. Other proceedings may have to be adopted in other kinds of actions, *e.g.*, under r. 304—*cf.* *Salomon* v. *Hole* (1905), 53

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W.R. 589; and *Young* v. *Thomas* (1892), 2 Ch. 134, but I am only now speaking of what is before me.

Once the validity of the judgment is established the appeal presents no difficulty, because no evidence could properly be given before the learned judge on the assessment of damages except on that head. Even in the case of motions to obtain judgment under said r. 304, Bowen, L.J. said in *Young* v. *Thomas, supra,* p. 137:

"There is no doubt that, in determining the rights of the parties in the action, the statement of claim alone is to be looked to, and the reason of this rule is obvious, namely, that the facts stated therein are taken to be admitted by the defendant; and, as has been decided by Lord Justice Kay in *Smith* v. *Buchan* (1888), 36 W.R. 631, no evidence can be admitted as to those facts."

The statement of claim herein disclosed two causes of action, one at common law and the other under the Employers' Liability Act, and the learned judge stated that he intended to assess the damages under the first cause, which was not only open to him to do, but was his duty, as judgment had been entered establishing that case, and the plaintiff had a right to have the damages assessed on the cause of action which would most adequately compensate him for the injuries he had sustained.

MARTIN, J.A.

Therefore, the appeal should be dismissed, with costs.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the same opinion as my brother MARTIN, and would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Mackay & Miller.*

Solicitors for respondent: *Macneïl & Banwell.*

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REX v. RILEY.

Criminal law—Club—Benevolent Societies Act, R.S.B.C. 1911, Cap. 19—Disorderly house — Common gaming house — Stated case — Criminal Code, Secs. 226 (a) and 1014.

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The accused was steward of a club (appointed by the directors by resolution set forth in the minute book) organized pursuant to the Benevolent Societies Act and having a constitution. The members who paid an entrance fee of $1, played draw poker and stud poker, admittedly mixed games of chance and skill. The steward who was in charge of the premises supplied cards, cigars and refreshments at fixed prices and received for the club a "rake-off" which was collected by one of the players who took from five cents to ten cents from each "pot." The "rake-off" in each case was in excess of the cost of cards, cigars and refreshments supplied. The only revenue to the club was the $1 entrance fee and the "rake-off." On a case reserved for the Court of Appeal by the magistrate, who convicted the accused under section 226 (*a*) of the Criminal Code:—

Held, on the facts stated, that the club was not a house kept for gain within the meaning of the section and the accused was wrongly convicted.

The Court of Appeal is confined to the facts set out in the case as stated.

Statement

RESERVED CASE from a conviction by the police magistrate at Vancouver. The accused was charged that he did unlawfully keep a disorderly house, to wit, a common gaming house, situate and being at 434 Pender Street West. The evidence disclosed that the premises were occupied and used by the "Pender Club," organized pursuant to the Benevolent Societies Act, and with a constitution. The accused was steward of the club, appointed by the directors by resolution set forth in the minute book, and appeared to be in charge of the premises. Members of the club played draw poker and stud poker, admitted to be games of mixed chance and skill. The steward, out of the stock kept by the club, supplied the players with cards and cigars and refreshments at fixed prices, and received therefor for the club, from the players, out of a "rake-off," sums of money in excess of the amount which the cards, cigars and refreshments actually cost. Out of nearly

every "pot" of money bet a sum of five cents or ten cents was taken by a player as "rake-off." The only revenue of the club was the entrance fee of $1 per member, amounting to $97, and the "rake-off," and the salaries and other running expenses of the club greatly exceeded the amount paid in by way of membership dues. The magistrate held that the charge by the club, through its steward, and the receipt by him for the club, of money for cards, cigars and refreshments constituted the premises a common gaming house, in that it was a house kept by a person for gain, to which persons resorted for the purpose of playing at a mixed game of chance and skill. He fined the accused $50. The question reserved was:

Statement

"Were the premises 434 Pender Street West, a house, room or place kept by a person for gain to which persons resorted for the purpose of playing at a mixed game of chance and skill?"

The appeal was argued at Victoria on the 26th of June, 1916, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Gordon M. Grant, for the accused: The accused is a servant of the club at a stated salary. The "rake-off" from the game was received for the club and not the accused: see *Rex* v. *Sam Jon* (1914), 20 B.C. 549; *Downes* v. *Johnson* (1895), 2 Q.B. 203. Section 226 of the Code distinguishes between the person who keeps and the person who plays. A person can play in his own house. In this case there is no question of visitors; they are all members, and gambling is only an offence in specified cases: see Halsbury's Laws of England, Vol. 4, p. 406, par. 862.

R. L. Maitland, for the Crown: The question is whether this was a *bona-fide* club. This place was kept solely for gambling. The only evidence of a common gaming house was a game of poker between the members. This is sufficient under the section: see *Rex* v. *James* (1903), 7 Can. Cr. Cas. 196 at p. 199. The members paid only the entrance fee of $1, and the "rake-off" was the only other revenue: see *Regina* v. *Brady* (1896), 10 Que. S.C. 539; Russell on Crimes, 7th Ed., 1900; *Jenks* v. *Turpin* (1884), 13 Q.B.D. 505. I contend that, on the facts, the place is kept for gain.

Argument

Grant, in reply.

Cur. adv. vult.

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MACDONALD, C.J.A.: The case reserved for the opinion of the Court is "whether the premises 434 Pender Street West, is a house, room or place kept by a person for gain to which persons resort for the purpose of playing at a mixed game of chance and skill." The question is not well framed, but I will assume that by "a person" is meant the accused.

The facts certified are that the premises, 434 Pender Street West, are kept and used by the "Pender Club," incorporated pursuant to the provisions of the Benevolent Societies Act. At the time in question it had a membership of 97 persons. The accused was the steward of the club, appointed to that office by the directors, and appeared to be a person assisting in the management of the club.

The game of poker, admittedly a mixed game of chance and skill, was frequently played there by some of the club's members, and a "rake-off" of five cents or ten cents was taken by the players from nearly every "pot" of money staked on the game and expended for refreshments for themselves, which the steward furnished from the club's stock at fixed prices, which were in excess of the first cost of the articles to the club. The annual revenue of the club was a small fee payable by each member, quite insufficient to defray the club's general expenses, and the money received in payment for the refreshments as aforesaid. It is not certified that the accused received any part of the rake-off for himself.

MACDONALD, C.J.A.

The magistrate found the accused guilty, under section 226 (*a*) of the Code, but reserved the question above set out for the opinion of the Court.

While the accused has been found guilty as keeper, I think, on the true meaning of the findings of fact above summarized, he was found to be the keeper as defined by section 228, subsection 2, which reads:

> "Any one who appears, acts or behaves as master or mistress, or as the person having the care, government or management of any disorderly house . . . . shall be deemed to be the keeper thereof."

The facts certified, I think, clearly shew that in the real sense of the word the club was the keeper, and if the object was the acquisition of gain, the gain would be the club's gain. The

accused could only be held liable to prosecution by virtue of said subsection 2 of section 228. It would have avoided any embarrassment if the magistrate had found specifically that the club was the keeper and the accused the manager, but I think that is in effect what his finding amounts to.

The place in question was furnished with a pool table, and there was a reading room and reading matter for use of the members, and some of the other equipment usually to be found in social clubs.

Eliminating the question of gain for the moment, on the facts stated, this was a social club. In Halsbury's Laws of England, Vol. 4, p. 406, a club is defined as

"A society of persons associated together for social intercourse, for the promotion of politics, sport, art, science or literature, or for any purposes except the acquisition of gain."

There is no finding that the Pender Club was not a *bona-fide* club; there is no suggestion that the accused conducted the house under the name of the Pender Club for personal gain, and apart from the finding as to the "rake-off," it is not suggested that the Pender Club was conducted by the members thereof for gain. The real question involved in the submission therefore turns on whether or not the receipt by the club of moneys for refreshments, in the manner above set out, proves a keeping of the club premises for gain.

MACDONALD, C.J.A.

The rake-off was not compulsory; that was merely the method adopted by the players of paying for their refreshments. Instead of each one paying for his own refreshments, or treating in turn, they took from their common store from time to time sufficient money to pay for all the refreshments which they consumed.

I see a very clear distinction between this case and *Rex* v. *James* (1903), 7 Can. Cr. Cas. 196, in which it was held that the sale by the keeper of a cigar store of cigars to his customers, who played a mixed game of chance and skill in a room on his premises, thus enhancing the profits of his business, was a contravention of the section in question here.

I think the section is aimed at the keeping of a house for gain to which persons come by invitation, express or implied. The members of a *bona-fide* club come as of right. This case

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is analogous to the case of *Downes* v. *Johnson* (1895), 2 Q.B. 203, where it was held that members of a *bona-fide* club were not to be considered persons who resorted to the club. On the facts stated, I am of opinion that the Pender Club was not a house kept for gain, and that, therefore, the accused was wrongly convicted.

MARTIN, J.A.: On the facts set out in the case, I am of the opinion that the question reserved should be answered in the negative, with the result that the appeal should be allowed.

It cannot properly be said, on such facts, that the house or place in question, conducted by the hundred members of the social club all equally interested (*cf.* Halsbury's Laws of England, Vol. 4, p. 406, par. 862) was "kept . . . . for gain" within the meaning of the section and as defined by *e.g., Rex* v. *James* (1903), 7 Can. Cr. Cas. 196. The nearest case against the accused is *Regina* v. *Brady* (1896), 10 Que. S.C. 539, but there the "rake-off" was distributed among four certain persons, who were, as I understand the judgment, deemed by the learned police magistrate to be in reality proprietors. I think the conviction could have been supported if it had been found that the club was a sham one, but while it appears from a stenographic report handed in after the argument that in his oral reasons, given at the time of conviction, his Worship stated that the club was "not a genuine social club," yet there is no finding of that kind in the case which he later stated for our opinion, and to which we are restricted—*Rex* v. *Fortier* (1903), 13 Que. K.B. 308 at p. 313; 7 Can. Cr. Cas. 417 at p. 423; *Rex* v. *Angelo* (1914), 19 B.C. 261. His Worship has found that this "benevolent" club is only enabled to be kept open because of the gambling that is admittedly going on there, its revenue being otherwise very insufficient, but the correction of such an evil is for the Legislature, and in the circumstances the Courts can do nothing to stop it.

MARTIN, J.A.

MCPHILLIPS, J.A.: I have arrived at the same conclusion as my brother MARTIN, and that the appeal should be allowed.

MCPHILLIPS, J.A.

Conviction quashed.

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REX v. SMITH

Criminal law—Keeping common gaming house—Conviction—Evidence—"Nickel-in-the-slot" machine—Game of chance—Element of certainty—Criminal Code, Sec. 226.

The defendant, a fruit and cigar vendor, kept in his shop a nickel-in-the-slot machine, described as a "gum vending machine." A depositor of a nickel knew before he deposited the coin that he was to receive a package of gum and a certain number of brass tokens (worth 5 cents in the purchase of goods in the shop) as shewn by an indicator on the machine. After depositing the coin the indicator would then shew the number of coins the next depositor of a nickel would receive. Each depositor could continue playing indefinitely.

Held, per MACDONALD, C.J.A. and GALLIHER, J.A., that the game was one of chance played in a place kept by the defendant for gain.

Rex v. *O'Meara* (1915), 34 O.L.R. 467 followed.

Per MARTIN and MCPHILLIPS, JJ.A., that the element of hazard which must be present before there can be a mixed game of chance and skill is entirely absent.

Rex v. *Stubbs* (1915), 24 Can. Cr. Cas. 303 followed.

The Court being equally divided the conviction was affirmed.

APPEAL by way of stated case from the conviction of one F. A. Smith by the police magistrate for the City of Vancouver on the charge of keeping a disorderly house, to wit, a common gaming house. The accused, a storekeeper, kept in his shop a machine described as a "gum vending machine." Anyone depositing a nickel in a slot in the machine would, on pulling the lever receive out of the machine a package of chewing gum and also so many (if any) brass tokens, called premium checks, as were indicated upon the machine before he deposited the coin. Each token entitled him to receive goods in the shop to the value of five cents. When the nickel was deposited the indicator would shew before such deposit that he would not receive any token, or it would shew that he would receive a definite number of tokens ranging from 2 to 20, inclusive. By pulling the lever after depositing the nickel, as above, certain wheels were set in motion, and the depositor would receive whatever had been previously indicated as above,

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and on stopping, a new combination would be shewn on the indicator, with its value in tokens to be received by the depositor of the next coin or token. What the next combination would be the previous depositor had no means of knowing beforehand. After the first operation, instead of a coin, one of the tokens might be deposited with the like result, except that no gum would be received. The depositor was not limited to one or any number of operations, one of the witnesses having purchased 50 cents' worth of nickels and played them all into the machine one after the other. The machine automatically receives the gum back again unless it is taken out by the depositor after each play. The magistrate concluded that people resorted to the premises for the purpose of playing the machine, and that the machine was kept for gain. A case was reserved on the question of whether or not there was any evidence that this was a game of chance or a mixed game of chance and skill under section 226 of the Criminal Code.

Statement

The appeal was argued at Vancouver on the 25th of May, 1916, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Sir C. H. Tupper, K.C. (*F. Lyons,* with him), for appellant: The accused is proprietor of a shop in which is the gum-vending machine in question. The charge is under section 226 of the Criminal Code. The question to be decided is whether it is "a game of chance or mixed game of chance and skill." The Alberta Court held the machine did not come under the statute. When anyone plays the machine it shews, and he knows what he is going to get: see *Rex* v. *Fortier* (1903), 7 Can. Cr. Cas. 417; *Rex* v. *Stubbs* (1915), 24 Can. Cr. Cas. 60 and 303; *Rex* v. *Langlois* (1914), 23 Can. Cr. Cas. 43; *Rex* v. *O'Meara* (1915), 34 O.L.R. 467. The Ontario case makes the owner responsible for the working of the player's mind, and there is no authority for this.

Argument

R. L. Maitland, for respondent: Witness for the Crown played 25 cents each time. People do not resort to the place to play five cents only. It is not a machine for the purpose of vending gum. *Rex* v. *O'Meara* (1915), 34 O.L.R. 467 at p. 470 points out the proper view to take of the machine. *Rex* v.

Fortier (1903), 7 Can. Cr. Cas. 417, does not apply, but *Rex* v. *Langlois* (1914), 23 Can. Cr. Cas. 43, may.

Tupper, in reply.

Cur. adv. vult.

3rd October, 1916.

MACDONALD, C.J.A.: This case is not, in my opinion, distinguishable from *Rex* v. *O'Meara* (1915), 34 O.L.R. 467. The gambling machines in question in these cases are of precisely the same type.

The facts certified by the magistrates are not materially different in the two cases. They are quite as specifically found in favour of the Crown in this case as in that, and I entirely agree with the unanimous decision of the Ontario Court of Appeal, and the reasons therefor of Magee, J.A. I would answer the questions submitted by saying that in my opinion the game complained of was a game of chance, played in a place kept by accused for gain, and hence the conviction ought to be affirmed.

MACDONALD, C.J.A.

MARTIN, J.A.: There is, unfortunately, a conflict of authority on the point raised for our decision, arising from the fact that the Ontario Court of Criminal Appeal, in the case of *Rex* v. *O'Meara* (1915), 34 O.L.R. 467, has refused to follow the decision on identical relevant facts of a Court of like jurisdiction in another Province, *viz.*: the Alberta Court of Criminal Appeal, in *Rex* v. *Stubbs* (1915), 9 Alta. L.R. 26; 24 Can. Cr. Cas. 303; 8 W.W.R. 902; 31 W.L.R. 567. This is contrary to the long-established practice of this Court of Criminal Appeal, as has been lately again pointed out in *Rex* v. *Sam Jon* (1914), 20 B.C. 549, wherein the weighty reasons, as they seemed to us to be, for making the criminal law uniform all over Canada are given. Moreover, the decision of the Alberta Court gives effect (p. 307) to the same interpretation of the law in Quebec, as shewn by *Rex* v. *Langlois* (1914), 23 Can. Cr. Cas. 43, and in Manitoba, in *Rex* v. *O'Connor,* unreported. The case at bar is on all fours with *Rex* v. *Stubbs,* and I see no good reason why that decision should not be followed. With all due respect to other views, and apart from the paramount

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consideration above mentioned, I feel that it contains a sound exposition of the law, and that a conviction based on the necessary element of chance can only be secured in this case by transforming what is in itself a detached, complete and certain play, game, or operation of the machine into a continuous series of plays, games or operations, something which is not warranted. The element of hazard, which must be present before there can be a mixed game of chance and skill, is entirely absent here—*Rex* v. *Fortier* (1903), 13 Que. K.B. 308, 313; 7 Can. Cr. Cas. 423; a decision of the Quebec Court of Criminal Appeal. The fact that there is an inducement to make a subsequent play or operation because the combination for the next play may be more favourable than the fixed and certain one about to be played does not introduce the element of hazard in the true sense. When the next combination is indicated for the next play it is just as fixed and definite in its indication and results as the preceding one. In each case the player knows exactly what he will get when he puts his money or token in the slot and pulls the lever. . If the rule of the proprietor of the machine provided that no one person should make two successive plays the matter would be too clear for argument. And the element of hazard cannot depend upon succession.

MARTIN, J.A.

There is an additional reason for our not giving effect to the decision of the Ontario Court of Appeal as applied to this case, and it is that it may be distinguished on the facts, because that Court bases its judgment upon its belief in the existence of certain facts in *Rex* v. *Stubbs* which are admittedly absent in the case at bar. At the conclusion of the judgment of the Court, delivered by Mr. Justice Magee, he gives his reason for refusing to follow the Alberta Court of Appeal thus:

> "With much respect, I am unable to agree with this conclusion, as I consider that the fact was overlooked that there was not the element of certainty, except as to the minimum to be received; there was no certainty as to the maximum, as, it seems clear to me, the statement of the working of the machine at once discloses. The reasoning of Harvey, C.J., and that of Stuart, J., appear to me to be much more consistent with the plain facts."

But in the case at bar that fact has not been and cannot be "overlooked," for there is no such element of certainty whatever

between the maximum and the minimum receipts, because the case stated, to the facts of which we are strictly confined (*Rex* v. *Riley,* decided by us this day [*ante* p. 192]), shews beyond all doubt that the machine indicated definitely in advance what the exact receipts would be from the result of each play or operation, and therefore the element of chance was entirely excluded, and the decision of the Ontario Court does not apply.

And in any event I feel constrained to add that, in my opinion, the brand of criminality, and the life long social stigma of a conviction under the Criminal Code, should not be placed upon any citizen where the law is in such a state that a reasonable doubt exists as to whether or no the accused has done an act which brings him within the four corners of a penal statute under which his conviction is sought. He is entitled to the benefit of any reasonable doubt as to the law from the hands of the Court just as much as he is entitled to it as to the facts from the hands of a jury. People ought not to be sent to gaol upon reasonable doubt, but upon reasonable certainty. In the celebrated trial of *Rex* v. *Robert Emmett,* in Dublin, 1803 (Wm. Ridgeway's Report, p. 76), before Lord Norbury, C.J.C.P., and Mr. Baron George and Mr. Baron Daly, it was said by Lord Norbury on behalf of the Court:

"We are counsel for the prisoner and are not to admit any evidence against him which is not strictly legal; if any question can arise it is our duty to give him the benefit of it. . . . ."

MARTIN, J.A.

The accused here, in my opinion, ought to go free, as others similarly accused have gone free in Quebec, Manitoba and Alberta. And in this connexion I entirely agree with the following opinion of Mr. Justice R. M. Meredith (in which three other judges concurred), taken from his judgment in the Ontario Court of Appeal in *Rex* v. *Lee Guey* (1907), 15 O.L.R. 235 at p. 240:

"The question arises under federal legislation applicable alike to all the Provinces of Canada: it obviously follows that the interpretation of such legislation should be the same in all parts of the Dominion. It would be unseemly, if not intolerable, that one view of it should be adopted in one Province, and the opposite view in another; that the same person, for the same offence, should, under the same law, be deprived of his right of trial by jury on one side of an imaginery inter-provincial line, and yet, on the other side of it, be accorded that right—not through any fault in legisla-

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tion, but solely by reason of a false interpretation of the enactment in one or other of the Provinces."

In the interests of justice I cannot refrain from expressing regret that this opinion (which sets out the principle this Court has hitherto been guided by, as above noted) was not brought to the attention of that same Court when *Rex* v. *O'Meara* and *Rex* v. *Stubbs* were under its consideration.

GALLIHER, J.A.

GALLIHER, J.A.: I am in accord with the judgment of the Court of Appeal in Ontario in *Rex* v. *O'Meara* (1915), 25 Can. Cr. Cas. 16, and would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am in entire agreement with my brother MARTIN.

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

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BANK OF TORONTO v. HARRELL

THE BANK OF TORONTO v. HARRELL AND HARRELL.

Contract—Fraud—Jury—General verdict—Answers to questions—Effect of on general verdict—Majority verdict—Stenographer's note of time jury was out—No objection taken—Not to be accepted as evidence.

The defendant made a promissory note, obtained through fraudulent representations of a local manager of the plaintiff Bank. After he had discovered the fraud, the defendant, on being promised by said local manager that he "would take care of the loan," was thereby induced to renew the note. In an action by the Bank to enforce payment of the renewal note the judge put certain questions, which the jury answered (with the exception of one, evidently overlooked, but not material), and also brought in a general verdict in the defendant's favour. The answer to a question as to the obtaining of the renewal note was that the defendant, after becoming aware that fraudulent representations were made on his signing the first note, was induced to renew by the local manager's statement that he would take care of the defendant's loan and would see that he was looked after.

Held, MACDONALD, C.J.A. and GALLIHER, J.A. (MCPHILLIPS, J.A. dissent-

ing), that there was evidence to support the general verdict; that the finding substantially was that the defendant would not be called upon to pay the note, and the fact that the jury gave some of their reasons in the form of answers to questions, none of which were inconsistent with the general verdict, cannot invalidate it.

Per MARTIN, J.A.: Where questions are submitted to a jury and at the same time they are instructed that according to law they need not answer them, but may bring in a general verdict, then if they bring in a general verdict and also answer the questions the latter must be disregarded as surplusage.

The jury brought in a majority verdict. The stenographer's notes shewed that the jury returned their verdict after an absence of nine minutes short of the required three hours.

Held (MCPHILLIPS, J.A. dissenting), that as no objection was raised on the hearing of the appeal, or in the Court below, and the stenographer having no official duty in this regard, in the absence of definite evidence on the point, judicial notice should not be taken of the stenographer's note.

APPEAL from the decision of MURPHY, J., of the 16th of February, 1916, in an action to set aside a conveyance made by the defendant M. M. Harrell to his wife Cecilia Harrell, on the ground that it was made for the purpose of defrauding his creditors, and against the said M. M. Harrell as maker of a promissory note of the 27th of August, 1915, for $6,448. The circumstances were that in February, 1914, the Rex Amusement Company, of which D. H. Wilkie (a member of the firm of Campbell & Wilkie, contractors) was a director and treasurer, was financially embarrassed by reason of a number of lien notes held by general creditors upon the furniture and effects of a theatre that the Company had recently built. The Rex Amusement Company and Messrs. Campbell & Wilkie, both had their accounts at the plaintiff Bank. Messrs. Campbell & Wilkie were indebted to the Bank, and on the 6th of March, 1914, one Vanstone, the manager of the Carrall Street branch of the plaintiff Bank in Vancouver, induced Harrell to make a note for $10,000, payable to the order of the Rex Amusement Company three months after date at said Bank. The arrangement was that $8,000 of this sum would relieve the pressure upon the Rex Amusement Company and pay the lien notes held against the Rex Amusement Company. Harrell was to receive a bonus of $1,200 for signing the note, and the whole $10,000 note was to be secured by a chattel mortgage on the furniture

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fixtures and effects of the Rex Amusement Company. The $10,000 note was to be paid off by the receipts from the theatre within twelve months. The note was discounted by the Bank, but instead of paying off the lien notes, the $10,000 was paid to the credit of Campbell & Wilkie, who gave a cheque for $10,000 to the Rex Amusement Company, and the Company gave a cheque back to Campbell & Wilkie for $5,000, which went in reduction of the indebtedness of Messrs. Campbell & Wilkie. A chattel mortgage was given in favour of Harrell on the furniture and effects of the Rex Amusement Company to further secure the note as arranged. The note was renewed from time to time by Harrell, and the Rex Amusement Company made certain payments in reduction of the amount due. In February, 1915, the receipts at the theatre were falling off, and the manager threatened to make an assignment. Harrell then learned that the lien notes that Vanstone had agreed to pay with the money borrowed on the note had not been paid. Vanstone then promised Harrell that if he would again renew the note and endeavour to prevent an assignment he would carry the note, and Harrell would not have to pay it. The parties interested came together, and Messrs. Wood-Vallance & Leggat, the landlords of the Rex Theatre agreed to reduce the rent of the theatre by one-half and take over the business, provided the small creditors would extend the time for payment for two years. This was arranged, and Harrell renewed the note. The theatre business did not improve, and in August Harrell had an interview with Vanstone and Mr. Ball, the new manager of the main office of the Bank in Vancouver (the branch office had in the meantime been closed) and Harrell, after telling Ball about the previous arrangements with Vanstone, was induced by Ball to sign a demand note for the balance still due on the original note. Then action was immediately brought on this note by the Bank. The trial was held at Vancouver on the 2nd of February, 1916, by MURPHY, J., with a common jury. Upon the conclusion of the trial the following questions and answers were handed in by the jury:

"1. Was the making of the note induced by any representations made by Vanstone to Harrell? Seven in favour; one opposed.

"2. If so, were such misrepresentations false to the knowledge of Vanstone and made with intent that Harrell should act on them? Six in favour; two opposed.

"3. If so, what were such representations? Give full particulars. That Vanstone intended to allow part of the money obtained by loan to be paid to Campbell & Wilkie after promising not to do so.

"3a. Did Harrell sign the note relying on such representations? [3a seems to have been overlooked. It has not been answered at all.]

"4. After Harrell became aware that such fraudulent misrepresentations had been made, was he induced to renew the note by any promises in reference to his liability made by Vanstone with the intention that Harrell should act upon them? Six for; two opposed.

"5. If so, give details of such promises made by Vanstone. By taking Harrell's evidence here and the straightforward manner in which it was given, and the architect's statement that Vanstone said to him that he (Vanstone) would take care of Harrell's loan and would see that he (Harrell) was looked after. That he had taken care of Harrell so far and would still do so.

"5a. Did Harrell act upon such promises? Six in favour; two opposed.

"6. Were Vanstone's promises fraudulent? Vanstone's promises were not intentionally fraudulent.

"7. Did Ball by words or conduct or both lead Harrell to believe that Harrell would incur no liability by signing the renewal note and thereby induced Harrell to sign the note? No.

"8. If 'Yes' did Ball, when causing Harrell to believe this, intend to hold Harrell if the Bank failed to get its money from the Rex Amusement Company? Answered by 7.

"9. Did Harrell act on such belief? Answered by 7."

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They also gave the following general verdict:

"We the undersigned jury find verdict in favour of the defendant."

The learned trial judge concluded that the specific facts found by the jury made the general verdict impossible in law, and he gave judgment for the plaintiff for the amount claimed. The defendant appealed.

Bird, and Miss *Paterson,* for plaintiff.

G. G. Duncan, for defendants.

16th February, 1916.

MURPHY, J.

MURPHY, J.: This action went to the jury on the issue of fraud. They found fraud in the original procuring of the note, and there was evidence on which such finding could be made. But the note had been repeatedly renewed after defendant admittedly knew all about the original fraud. As the onus was on him to prove he had repudiated the transaction within a reasonable time after he acquired this knowl-

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edge, and as, instead of doing so, he renewed the note, he must in some way vitiate this renewal if he is to succeed. The case went to the jury on the issue that there had been again fraud in obtaining these renewals. Possibly it might have been contended that there was, at the time of the renewal, an agreement not to enforce the note, but this line was not taken before the jury, entailing, as it would have, grave difficulties under the decisions relative to introducing parol evidence to vary the tenor of a promissory note. Whatever the reason, the case must now be decided on the issues as submitted to the jury. With regard to the renewal obtained by Vanstone, after Harrell had full knowledge of the fraud, the jury found that there was no intentional fraud on Vanstone's part in obtaining such renewal. I have carefully read the evidence, and, taking all of Harrell's evidence as accepted by the jury—which was the only direct evidence given by the defence on this issue—I think this means that all Vanstone did was to persuade Harrell to renew the note, urging that the Rex Amusement Company would ultimately work out its own salvation, and that he, Vanstone, was *bona fide* of that opinion. If so, there was no fraud whatever in obtaining this renewal and the jury have so found. If they did intend by these answers to impute fraud to Vanstone at this juncture, then I hold there is no evidence on which they could make such a finding. I charged them further that

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they must find fraud in Ball also when he obtained the renewal note herein sued upon. As an abstract proposition I doubt that I was correct, as both Hall and Vanstone are servants of plaintiff, and it may well be if there was nothing more on the record but the bald fact that the last renewal was given to Ball instead of to Vanstone, Vanstone's fraud in obtaining the former renewal—assuming the jury found such fraud—might vitiate the renewal note obtained by Ball. But here, according to Harrell, he explained the whole matter to Ball, and the jury have found that Ball in no way led Harrell to believe that he incurred no liability in signing the renewal, and when Harrell's account of the Ball interview is taken into account, I think my charge was correct.

The jury added to their answers to the questions a general verdict for the defendant, although I had expressly told them

they could not do so unless they answered all the questions in the affirmative.

In my opinion, the specific facts found by them makes such a verdict impossible in law.

There will be judgment for the plaintiff for the amount claimed and costs.

The appeal was argued at Vancouver on the 4th and 5th of May, 1916, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

A. H. MacNeill, K.C. (*G. G. Duncan,* with him), for appellant: The finding of the jury is in our favour. Harrell did renew after he knew of the fraud, but this was on an understanding with the bank manager that he would not be called upon to pay the note. The findings of the jury on the questions submitted are indefinite, and the general verdict must then prevail: see *Mayor and Burgesses of Devizes* v. *Clark* (1835), 3 A. & E. 506; *Harper* v. *Cameron* (1893), 2 B.C. 365 at p. 376; *Harris* v. *Dunsmuir* (1902), 9 B.C. 303 at p. 316; *Ellis* v. *B.C. Electric Ry. Co.* (1914), 20 B.C. 43; *Sheridan* v. *Pigeon* (1885), 10 Ont. 632; *Guthrie* v. *W. F. Huntting Lumber Co.* (1910), 15 B.C. 471; and *Clough* v. *London and North Western Railway Co.* (1871), L.R. 7 Ex. 26. Vanstone, the bank manager, acted fraudulently as to the distribution of the money obtained on Harrell's note and as to the effect of Harrell's signing the renewals after knowledge of the fraud they must shew he elected to be bound by the first note: see *Morrison* v. *The Universal Marine Insurance Co.* (1873), L.R. 8 Ex. 197; *Erlanger* v. *New Sombrero Phosphate Company* (1878), 3 App. Cas. 1218 at p. 1277. We say it was a new contract when he renewed under Vanstone's representation that he would not hold him liable, and it was an accommodation note: see *Aaron's Reefs* v. *Twiss* (1896), A.C. 273; *United Shoe Machinery Company of Canada* v. *Brunet* (1909), A.C. 330; *Tibbatts* v. *Boulter* (1895), 73 L.T. 534; *Foster* v. *The Mutual Reserve Fund Life Association* (1903), 19 T.L.R. 342; Chalmers on Bills of Exchange, 7th Ed., 248; *Southall* v. *Rigg* (1851), 11 C.B. 481. He was an accommo-

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dation maker: see Halsbury's Laws of England, Vol. 15, p. 479, par. 914; *Oriental Financial Corporation* v. *Overend Gurney, & Co.* (1871), 7 Chy. App. 142.

Bird, for respondent: A renewal of the note with knowledge of the fraud debars him of claiming fraud, and there must be a finding of fact by the jury to explain these renewals. They have not made such a finding: see *Law* v. *Law* (1905), 1 Ch. 140; *Selway* v. *Fogg* (1839), 5 M. & W. 83; *Vigers* v. *Pike* (1840), 8 Cl. & F. 562. On the question of election, see *Scarf* v. *Jardine* (1882), 7 App. Cas. 345; *Jones* v. *Carter* (1846), 15 M. & W. 718; *Goold* v. *Gillies* (1908), 40 S.C.R. 437 at p. 450. The question as to whether Harrell relied on the bank manager's representations was not answered, and we say they have to make such a finding before the general verdict can stand: see *Edgington* v. *Fitzmaurice* (1885), 29 Ch. D. 459; *Beattie* v. *Lord Ebury* (1872), 7 Chy. App. 777 at p. 804; *Ex parte Burrell. In re Robinson* (1876), 1 Ch. D. 537 at p. 552; *Maddison* v. *Alderson* (1883), 8 App. Cas. 467. Two questions are ambiguous and intentional fraud was not found, making the answers on the whole so incomplete that in any case we are entitled to a new trial: see *Nightingale* v. *Union Colliery Co.* (1901), 8 B.C. 134; *Hudson* v. *Smith's Falls Electric Power Co.* (1913), 24 O.W.R. 539; *Newton* v. *Gore District Mutual Fire Ins. Co.* (1872), 33 U.C.Q.B. 92.

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MacNeill, in reply.

Cur. adv. vult.

3rd October, 1916.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiff sues as holder of a promissory note made by defendant in favour of the Rex Amusement Company, originally for $10,000. The defendant says he was induced to make the note by the fraud of the plaintiff's manager, Vanstone, and the secretary of the said Rex Amusement Company, Wilkie. The transaction was really a loan by defendant to the Amusement Company. He was secured against the liability upon the note by a chattel mortgage on the personal effects of the Amusement Company.

The alleged fraud consisted in this: Vanstone and Wilkie represented that the proceeds of the note should be used to pay

off the Company's liabilities, including liens on the mortgaged chattels; whereas Vanstone, at the time these representations were made, intended to use the proceeds for another purpose, which other application of the moneys he afterwards made, and left the liens unsatisfied.

The jury found this issue in defendant's favour. After discovering the fraud the plaintiff renewed the note for a balance then unpaid.

It may be here stated that the Amusement Company had made payments from time to time on their original note. The defendant had paid nothing, as it appears to have been expected that the Amusement Company would continue to make payments to the Bank and discharge the note in full. The plaintiff's contention was that this renewal was a waiver of the fraud and election not to dispute his liability on that ground. On this count the pleadings are not very satisfactory, but the case went to the jury on the facts in evidence, and no point has been made before us in argument that the evidence was not kept strictly within the pleadings.

The defendants' answer at the trial to the contention that the renewal was an election to overlook fraud practised on him was that he signed the renewal note on the terms with Vanstone that he would not be called upon to pay the note.

The jury were asked the question:

"After Harrell became aware that such fraudulent misrepresentations had been made, was he induced to renew the note by any promises in reference to his liability made by Vanstone with the intention that Harrell should act upon them?"

Their answer was "Yes."

They were asked to give details of such promises, and their answer was:

"By taking Harrell's evidence here and the straightforward manner in which it was given, and the architect's statement that Vanstone said to him that he (Vanstone) would take care of Harrell's loan and would see that he (Harrell) was looked after. That he had taken care of Harrell so far and would still do so."

And in another answer the jury said that the defendant relied on these promises. They also said that the promises were fraudulent, but not intentionally so. They also found a general verdict.

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Some other questions were submitted, not important in my view of the case, except perhaps question 3a, which was: "Did Harrell sign the note relying on such representations?"—that is to say, the representations which the jury held to be fraudulent. This question was not answered.

The jury were allowed to hand their verdict to the sheriff, and were not present when it was received in Court. I am inclined to think their failure to answer this question was an oversight. To be consistent with the other answers, and their general verdict, they must have answered this question in the affirmative, and if anything turns upon it, I have no hesitation in inferring that fact from the evidence, as I am permitted to do under Order LVII., r. 4 of our Rules of Court.

The question is thus narrowed down to the effect which ought to be given to the verdict as a whole. The jury were entitled to find a general verdict and to leave the questions unanswered if they chose to do so. They chose to answer the questions except one, and find a general verdict besides.

The learned judge, after consideration, entered judgment for the plaintiff. He said:

"In my opinion the specific facts found by them [the jury] makes such a verdict [the general one] impossible in law."

MACDONALD, C.J.A.

He seems to have founded his judgment on the answer of the jury that the promises made on the renewal of the note were fraudulent, but not intentionally so. I think he was right in considering that that answer negatived fraud. The position then is this: a promissory note found to have been obtained through the fraud of Vanstone, the plaintiff's manager; discovery of the fraud by the defendant; a conference between him and Vanstone, at which Vanstone *bona fide* promised that he "would take care of Harrell's loan," namely, the note, by which promise defendant was induced to renew it; and finally, action brought by the party who had made that promise.

Now, I am not much concerned with the inherent probability or improbability of the defendant's story about this promise. The jury have taken care of that on evidence which supports their finding. They have not defined what Vanstone meant by "taking care of the loan," but I see no difficulty in that. It obviously could mean only one thing—the defendant

would not be called upon to pay the note. The plaintiff's interest was to keep the transaction, including the chattel mortgage, undisturbed by any action defendant might take after discovery of the fraud which had been practised upon him, trusting to the Amusement Company, the primary debtor, to eventually discharge the indebtedness. This view of the matter is fully enough covered by the jury's findings, special and general. But it is said you cannot give effect to the general verdict. I ask, why not? There is nothing in the special finding repugnant to the general verdict. If there were, a question would arise which does not arise now. The jury have said—and there is evidence which, if the general verdict stood alone, would, I think, amply support it—that the defendant is entitled to succeed. The fact that they have given their reasons, or some of their reasons, in the form of answers to questions, none of which are inconsistent with the verdict, cannot, in my opinion, invalidate it: *Newberry* v. *Bristol Tramway and Carriage Company (Limited)* (1912), 29 T.L.R. 177; *Ellis* v. *B.C. Electric Ry. Co.* (1914), 20 B.C. 43.

My brother MARTIN has called my attention to *Balfour* v. *Toronto R.W. Co.* (1901), 5 O.L.R. 735, affirmed by the Supreme Court of Canada (1902), 32 S.C.R. 239. The law in Ontario with respect to questions submitted to a jury is different from ours. It is the same here as in England. If what happened here had happened in an Ontario trial, I think the general verdict would have been regarded by the Court there as one not proper for the jury to bring in. There they could only properly deal with the questions. But the law is different here. Questions may be submitted to the jury which they are at liberty to answer or not, as they choose. If their answers, where they do answer questions and bring in a general verdict as well, are not inconsistent with the general verdict, then no difficulty arises. Here, in my opinion, the answers given are not inconsistent with the general verdict, and, hence, I do not find it necessary to decide what should be the practice in our Courts when answers or reasons are repugnant to the general verdict.

Since writing the above, one of my learned brothers has discovered that, according to the stenographer's note, the jury

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returned their verdict after an absence nine minutes short of three hours. No objection was taken here or below to the circumstances which this note purports to record. Whether or not the jury were out three hours is a question of fact. If they were not out the three hours, objection should have been taken at the time, when the matter could have been remedied. If objection had been taken then, or even in the grounds of appeal, evidence might have been adduced to shew that the jury were in fact out for three hours. The proof of the fact would be found in the clerk's record. The stenographer had no official duty in the premises, and the clerk's record is not before us. I think, therefore, we ought not to take judicial notice of the stenographer's note.

MACDONALD, C.J.A.

I would allow the appeal.

MARTIN, J.A.

MARTIN, J.A.: I have been not a little embarrassed by the form of the verdict herein, which has been urged upon us by the plaintiff as being a general verdict, and by the defendant as being a special one. It must be one or the other, for it cannot clearly be both, and if it becomes necessary to decide here the exact point, I am prepared to hold that it is a general verdict only, and that the questions should be disregarded as surplusage. The difficulty arises from the fact that the learned judge rightly told the jury that though he wished them to answer the questions, as being in the interests of the litigants, yet, at the request of counsel, he added that they need not do so, but could bring in a general verdict only. The opinion has already been more than once expressed by members of this Court, myself included, *e.g.*, in *Armishaw* v. *B.C. Electric Ry. Co.* (1913), 18 B.C. 152, that this is a request counsel ought not to make to a presiding judge once he has decided that he will put questions, because it has a tendency either to induce the jury to evade answering the questions *in toto*, or to confuse them, thereby resulting in a partial or incomplete answer to the questions, or an abandonment of some or all of them after difficulty is encountered, followed up by falling back on a general verdict, but often accompanying this verdict by the questions being returned to the Court more or less answered, as here. This is a very unsatisfactory and disturbing state of

affairs, and, in my opinion, the proper practice is that where a special verdict in answer to questions is sought, no mention should be made of a general verdict any more than it is proper to tell a jury in advance that after three hours' time they need not be unanimous, but the verdict of six out of eight of them only will be taken, which tends to discourage the most conscientious efforts to reach unanimity, based upon reason, and to encourage a reliance upon the power of a specified majority only. We have already held, in *Rayfield* v. *B.C. Electric Ry. Co.* (1909), 15 B.C. 361; and *Shearer* v. *Canadian Collieries (Dunsmuir), Limited* (1914), 19 B.C. 277, that where answers to questions are ambiguous, inconclusive, indefinite or otherwise unsatisfactory, it is the proper course for the trial judge to ask further questions to clear up the difficulty, if possible, and this is the practice in some other Provinces of Canada at least, *e.g.*, in Ontario, as noted in *Shearer's* case at p. 282, and in Quebec —*Jolicœur* v. *La Cie de Chemin de Fer du Grand Tronc* (1908), 34 Que. S.C. 457; as well as in England—*Arnold* v. *Jeffreys* (1914), 1 K.B. 512, a decision of the King's Bench Division. And that last case also holds that where a general verdict has been returned it is wrong for the judge to ask the jury a special question. This follows the decision of the Court of Exchequer in term in *Brown* v. *The Bristol and Exeter Railway Company* (1861), 4 L.T. 830, wherein it was held that Baron Martin was right in refusing the application of the defendant's counsel to ask the jury on what ground they had founded their verdict for the plaintiff. Bramwell, B., in giving the judgment of the Court (composed, I am entitled to assume, of Pollock, C.B., Martin, Bramwell and Channell, BB., as in the following case, though all the names are not given), said:

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"We all think that that is an application the learned judge very properly refused. No doubt, in one sense, it may always be said—If you leave a question to the jury, the jury have their reason for what they think, and there can be no real harm in asking for that reason, and what it is. If such a rule were laid down, I believe trial by jury would be positively impracticable. You leave the question to twelve men to exercise their judgment according to law; and, understanding it, they apply practical rules to it, and come to a decision somehow or other. It would be extremely difficult almost in every case to come to a decision, if the jury are to agree in the particular reasons on which they come to a

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decision. We think, therefore, that my brother Martin was right in refusing the application which he understands was made to him not to ascertain on what counts the plaintiff was entitled, but on what ground the jury had come to the conclusion they did."

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Before that in *Horner* v. *Watson* (1834), 6 Car. & P. 680, Baron Gurney refused to hear the reasons for the verdict of the jury, though they offered to give them.

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This, indeed, is only in accord with a very long-established practice, for it was held in *Clark* v. *Stevenson* (1772), 2 W. Bl. 803, that the subsequent declaration of a jury, in answer to the question of a judge, after their general verdict, should not be let in to explain it. So long ago as 1749, it was held on appeal from the Irish Court of Chancery that "though the jury state the particular evidence upon which they find the fact yet this is only surplusage and will not vitiate the verdict"—*Plunket* v. *Kingsland* (*Lord*) (1749), 7 Bro. P.C. 404. And long even before that, in 22 Car. 2, ten of the eleven judges of the Common Pleas agreed, in the celebrated *Bushell's Case* (1670), Vaugh. 135, 142, 150, that:

"The legal verdict of the jury to be recorded, is finding for the plaintiff or defendant, what they answer, if asked to questions concerning some particular fact, is not of their verdict essentially, nor are they bound to agree in such particulars; if they all agree to find their issue for the plaintiff or defendant, they may differ in the motives wherefore, as well as judges, in giving judgment for the plaintiff or defendant, may differ in the reasons wherefore they give that judgment, which is very ordinary."

MARTIN, J.A.

In *Tonkin* v. *Croker* (1703), 2 Raym. (Ld.) 860, the King's Bench unanimously held that when the jury had returned their verdict, "what was found afterwards was surplusage and idle"; and in *Walton* v. *Potter* (1841), 3 Man. & G. 411, Maule, J. at p. 444 says, after making observations upon questions:

"There is no rule that a verdict cannot be just unless each juryman arrives at the same conclusion, and by the same road."

My brother MCPHILLIPS drew our attention at the argument to the case of *Newberry* v. *Bristol Tramway and Carriage Company* (*Limited*) (1912), 29 T.L.R. 177, wherein the Court of Appeal took cognizance of the answer a jury gave after a general verdict to the question of Mr. Justice Channell as to the grounds thereof. But it is to be observed that no objection was raised to this being done by the Court of Appeal, and none of the authorities above cited was brought to its attention, there-

fore, I think the regular practice should be preferred to the course pursued by the Court of Appeal. I have not overlooked the *nisi prius* decision of Keating, J. in *Dimmock* v. *North Staffordshire Railway Company* (1866), 1 F. & F. 1058, 1065, wherein the learned judge did question the jury after a general verdict, but no objection was taken to the propriety of that course, and therefore the point now raised did not come up. I am confirmed in my opinion by two cases in Ontario—*Sheridan* v. *Pigeon* (1886), 10 Ont. 632, and *Balfour* v. *Toronto R.W. Co.* (1901), 5 O.L.R. 735, the latter a decision of the Court of Appeal of the King's Bench Division, which held that an "opinion" of a jury added to a general verdict should be regarded as surplusage, which also was the opinion of the Court of King's Bench, in Term, in Quebec in *The City of Montreal* v. *Enright* (1907), 16 Que. K.B. 353, where the jury added a "recommendation." The situation is different here from Ontario, because there, as also in New Brunswick (*cf. W. H. Thorne & Co., Ltd.* v. *Bustin* (1905), 37 N.B. 163, and *Sullivan* v. *Crane* (1910), 39 N.B. 438), and in Quebec (*cf. The City of Montreal's* case, *supra*), the practice, either by statute or rule, requires the jury to answer questions, so the parties cannot be put into such an unfortunate position as we find now before us, but *Balfour's* case is of special importance because the Supreme Court of Canada has refused to interfere with it—(1902), 32 S.C.R. 239, because the view of the Court below, that the verdict was a general one (despite the fact that in answer to the judge the jury gave two reasons for it), was a decision in a matter of practice or procedure. Chief Justice Armour, in delivering the main judgment, said, pp. 737-8:

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> "But the judge having in effect directed the jury to find a general verdict, he was not, in my opinion, entitled to ask them any question tending to shew how they arrived at it, their reason for it, or the grounds of it."

The result of all the many authorities is, in my opinion, that where questions are submitted to a jury and at the same time they are instructed that, according to law, they need not answer them, but may bring in a general verdict, then, if they do bring in a general verdict and also answer the questions, the latter must be disregarded as surplusage. Once the right to return a general verdict has been exercised, everything else in that rela-

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tion becomes immaterial, or, to adopt the language of Chief Justice Armour in *Balfour's* case, *supra,* 737, "the reasons given by them form no part of their verdict and are not to be treated as affecting it in any way," and I am of the opinion, after long consideration, that no addition to that verdict can legally be even considered, under our system, in regard to a new trial, whatever may be done in Ontario, as suggested only by Osler, J.A. in *Balfour's* case, at p. 740; the other judges, I note, do not adopt his view.

This case is very similar to *Rayfield* v. *B.C. Electric Ry. Co., supra,* in which certain questions only were answered and a verdict returned, which the Chief Justice and IRVING, J.A. were of the opinion the jury intended as a general one. I found it impossible to satisfy myself on that point, but in the case at bar I do not doubt, having regard to the very clear direction of the learned trial judge on the point, that the jury intended to exercise their right to return a general verdict, while at the same time, as a matter of courtesy and respect, complying with the request of the learned judge to answer the questions. In such circumstances, I think that we are confined to the general verdict and must reject the questions. I refer again to my repeated observations on this very important matter of questions to juries, as most recently collected in *Shearer's* case, *supra,* at p. 282, and am entirely in accord with the views of my brother MCPHILLIPS as to the desirability of the Legislature taking steps to put an end to the many cases that come before us wherein there has been a complete or partial failure of justice, or at least a grievous burden of unnecessary costs and delay, because of the most unsatisfactory state of the law on this point.

MARTIN, J.A.

But if in the alternative, contrary to my opinion, it should be deemed necessary or proper to consider said questions in regard to the granting of a new trial, I should agree in refusing it, because to do so would be to "drop into that loose practice of granting new trials" which is deprecated by Meredith, J.A. in *Brenner* v. *The Toronto R.W.* (1907), 15 O.L.R. 195 at p. 201. I cannot, with all due respect, agree with the later reasons of the learned trial judge, particularly when he says there was no evidence to go to the jury on the most impor-

tant question of Vanstone's fraud: in his prior charge to the jury he rightly told them that there was evidence for them to consider on this head. The effect of the charge of the learned judge, as a whole, was much in favour of the Bank's manager, Vanstone, but the jury were entitled to disbelieve it, as they did that of the general manager of the plaintiff bank in *Western Bank of Canada* v. *McGill* (1902), 32 S.C.R. 581, who was found guilty of procuring promissory notes through undue influence. The answers of the jury, if they are to be considered at all, should be read with the general verdict, and supplemented by it. It is the duty of the Court to give due effect to the real intention of the jury, and to harmonize their answers as far as possible, and I note that even where no answer was given to a question about which there was no doubt, the Court of Appeal in Alberta supplied the right one—*Waterous Engine Works Co.* v. *Keller* (1912), 4 Alta. L.R. 77.

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There seems some doubt, upon the face of the record, as to the time which the jury were out so as to entitle them to bring in a verdict of six only, but as that point was not raised before us, and no objection was taken below, it must be taken to have been waived by agreement, even if it ever existed, and in the absence of definite evidence that would not be assumed—*Midland Railway Co.* v. *McDougall* (1906), 39 N.S. 280; *Sullivan* v. *Crane, supra.*

The appeal, therefore, should be allowed.

GALLIHER, J.A.

GALLIHER, J.A.: The jury in this case brought in a general verdict as well as finding specific facts in answer to questions submitted, and the learned trial judge held that the facts found did not warrant, in law, the general verdict, and gave judgment for plaintiffs. From this judgment the defendant appeals.

The verdict was a majority verdict, which is permissible under our statute law after the jury have been in retirement for three hours. The jury have found that the making of the original note, of which the note sued on is a renewal, was induced by the representations of Vanstone, the Bank's manager, that such misrepresentations were false to the knowledge of Vanstone, and made with intent that Harrell should act upon them. They also gave particulars of the representations, but

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omitted to answer the question as to whether Harrell signed the note relying on these representations, but that, I take it, would be cured by the general verdict in Harrell's favour. I think there was evidence on which the jury could find as they did on these questions.

Then, certain other questions were put to the jury, and answered by them, as to what representations were made to Harrell at the time of the renewals of the note, after he had discovered the false representations made at the time the original note was signed. In the view I take of this case, these findings are not inconsistent with the general verdict rendered.

The note was an accommodation note, given, as the jury have found, on the representation that the money to be advanced upon it by the Bank was to be applied in a certain way, which was not done, and after Harrell discovered this he would have been entitled, when they called upon him to renew, to have refused to do so and to have elected to avoid the contract.

Taking the evidence of Harrell and the architect, which, apparently, the jury believed, as evidenced by their findings, I am of opinion that Harrell made no election either to confirm or avoid the contract at the time the renewal notes were given, and after discovery of the misrepresentations, and if this view is correct, then *Clough* v. *London and North Western Railway Co.* (1871), L.R. 7 Ex. 26, is authority for the proposition that where a party makes no election he retains the right to determine it either way, subject to certain qualifications which do not obtain here.

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If Harrell's story is correct, he was induced to sign the renewals on the assurance of the Bank's manager that he would not be called upon to pay, and that the note would be taken care of. This, surely, does not amount to an election to confirm the original contract after knowledge, nor does the jury's finding with regard to Ball amount to an election. I think, therefore, that the general verdict must govern, as there is nothing in the findings that is inconsistent therewith. The appeal should be allowed and judgment entered for the defendant.

My brother MCPHILLIPS has raised a point that the stenographer's notes shew that the jury were not out the full three hours so as to entitle them to bring in a majority verdict. This

point was not taken at the trial, when it could have been remedied, and, as it is a question of fact whether they were out three hours or not, evidence might have been adduced to shew that the stenographer might have been in error in his notation, but all parties, the trial judge included, treated the verdict as proper in that respect, and no mention was made of it before.

I think, under these circumstances, we should not now consider it.

McPHILLIPS, J.A.: In my opinion there must be a new trial. Questions were submitted to the jury, and answered, but a general verdict as well was found for the appellant. The learned trial judge, notwithstanding the general verdict, entered judgment for the respondent. The answers to the questions submitted and the general verdict were handed in before the expiration of three hours from the time when the jury retired to consider their verdict, the procedure being by the handing in of a sealed verdict to the sheriff at 7.46 p.m. It was consented to by counsel that the verdict could be handed in, the Court adjourning until the next day. The next day the verdict was looked at by the learned trial judge in the presence of counsel, no objection being taken, and later the arguments on motions made for judgment took place.

It is plain that the general verdict cannot be looked at as the unanimous verdict of the jury. The questions submitted and answers thereto shew that the jury were not unanimous, and the requisite time required by statute did not elapse; Jury Act, B.C. Stats. 1913, Cap. 34, Secs. 45 and 46. By section 66, Supreme Court Act, R.S.B.C. 1911, Cap. 58, the stenographer's notes "shall be deemed to be an accurate record of the proceedings." In *Midland Railway Co.* v. *McDougall* (1906), 39 N.S. 280, "The prothonotary read over the answers to the jury, without making any reference to whether the answers were unanimous or not, and asked the question, 'as you say one so say you all,' and, no one objecting, entered the verdict accordingly, and by reason thereof it was held that the effect was the giving of a unanimous verdict"; but here nothing of equal effect took place. The Court of Appeal, in my opinion, must take the point the Court was without jurisdiction to give effect to what the jury had done. It is true the learned trial judge does not

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adopt the general verdict, but can this Court adopt it? In my opinion, that cannot be done. In *Norwich Corporation* v. *Norwich Electric Tramways Co.* (1906), 75 L.J., K.B. 636 at p. 639, Vaughan Williams, L.J. said:

"In my judgment it is well established law that the Court may itself take the initiative if it is satisfied that it has no jurisdiction to try the case."

In my view, and with the greatest respect to my learned brothers who think otherwise, it is impossible, unless this Court thinks it a proper case to decide apart from what the jury have said (*Paquin, Limited* v. *Beauclerk* (1906), A.C. 148 at p. 161; also see *Skeate* v. *Slaters (Limited)* (1914), 30 T.L.R. 290 and *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43 at p. 53), to rely in any way upon what is not a verdict at all, *i.e.*, a nullity.

Further, there is variance between the general verdict and the answers of the jury to the questions submitted. This is not a case of a general verdict without explanation (*Newberry* v. *Bristol Tramway and Carriage Company (Limited)* (1912), 29 T.L.R. 177 at p. 179).

MCPHILLIPS, J.A.

Being of the opinion that the verdict is ineffective and cannot be looked at, and as the case is one that entitled the appellant to have the issues decided by a jury, there can be but one result of this appeal, and that is that a new trial be had.

I do not enter upon any detailed discussion of the facts for the obvious reason that, in my opinion, it is a proper case for a new trial.

The appellant sets up fraud, yet a long time elapses and new transactions take place, which the respondents claim are inconsistent with the contention of the appellant, and the respondents further claim that the appellant elected not to avoid the contract. The principle of law governing in such cases is to be found in *Clough* v. *The London and North Western Railway* (1871), 41 L.J., Ex. 17 at p. 23; and *United Shoe Machinery Company of Canada* v. *Brunet* (1909), 78 L.J., P.C. 101 at p. 104.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellants: *Duncan & Duncan.*

Solicitors for respondents: *Bird, Macdonald & Ross.*

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Municipal works—Sea-wall—Injury to adjoining owners—Right of access—Exercise of statutory powers by public body—Navigable Waters' Protection Act, R.S.C. 1906, Cap. 115—False Creek Terminals Act, B.C. Stats. 1913, Cap. 76—False Creek Reclamation Act, B.C. Stats. 1911, Cap. 56.

The City of Vancouver and the Canadian Northern Pacific Railway entered into an agreement, *inter alia*, for the erection of a sea-wall on the foreshore of False Creek, which was subsequently embodied by the local Legislature in the False Creek Terminals Act empowering the City to erect the sea-wall. The agreement provided that the City would indemnify the railway company (which was to construct the sea-wall) against all claims on account of any lands or rights in lands taken or injuriously affected by reason of the work, but there was nothing in the Act directing that the City should make compensation to those so injuriously affected.

Held, on appeal, reversing the decision of HUNTER, C.J.B.C. (MCPHILLIPS, J.A. dissenting), that the plaintiff was without remedy as there was no statute making payment of compensation a condition precedent to the defendant's right to proceed with the erection of the wall.

East Fremantle Corporation v. *Annois* (1902), A.C. 213 applied.

Per MACDONALD, C.J.A.: The order in council passed pursuant to the powers contained in the Navigable Waters' Protection Act cannot in any way govern or assist in the decision of this appeal. As the guardian of the public right of navigation the Governor-General in Council permits the erection of the wall, and so makes it lawful as against that right but it does not purport to authorize interference with the private rights of owners of land of access to their own properties.

APPEAL by defendants from the decision of HUNTER, C.J.B.C. in an action tried by him at Vancouver on the 7th, 8th, 9th, 14th and 20th of March, 1916, for a declaration that the plaintiffs are entitled to the unimpeded right of the use of the foreshore adjoining certain lots owned by them on False Creek, and that the defendants be restrained from interfering with such use by the erection of a sea-wall across the channel of False Creek. The facts are set out fully in the reasons for judgment of the learned trial judge.

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A. H. MacNeill, K.C., and *Bird,* for plaintiffs.

Cassidy, K.C., and *E. F. Jones,* for defendant City of Vancouver.

Armour, for defendant Railway Company.

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HUNTER, C.J.B.C.: Although it has taken some little time to uncover the facts in this case, I think they are not in dispute. The plaintiffs are the owners of four lots on the west of Main Street, which they have acquired through the medium of a Provincial Crown grant which was issued in 1865. The property in question is a wedge-shaped piece of land, some 40 feet in length on the northern boundary and tapering to a point, and bounded on the entire east side by Main Street.

In the year 1904 Armstrong & Morrison, who were the predecessors of the present plaintiffs in title, applied to the Governor-General in council for the approval of a wharf which they proposed to erect in connection with the said property. That application, apparently, has never either been allowed or definitely rejected. The full circumstances in conection with what consideration it underwent by any of the officials connected with the Government at Ottawa have not been disclosed, but, so far as the facts before me have presented themselves, the substance of the matter is that that application has never been either definitely allowed or rejected.

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Shortly after that application was made, Armstrong & Morrison proceeded to construct a wharf which is in area 300 feet by 200 feet—300 feet on the south side and 200 feet on the west side—and the present plaintiffs have used that wharf, so constructed, for the purpose of their business as wharfingers, and have continuously enjoyed the benefit of the same from the time it was erected until the event occurred which produced this litigation.

In 1903 a survey was made of the waters of False Creek by Mr. Keefer, who was resident engineer of the Dominion Government, and on the plan of that survey the wharf in question is shewn, besides other wharves in the same locality. In 1906 it appears that an inspection was made by the Dominion Government engineer on perhaps two or three different occasions. At all events there is no doubt that the existence of a wharf

on or within that area has been known to the Dominion Government engineers and to the officials of the various departments at Ottawa for a long period of time.

In 1908 Armstrong & Morrison obtained a Dominion Crown grant of the *solum* of False Creek adjoining their original upland lots. It is this *solum* that is covered by the wharf in question, and the Crown grant has a plan attached to it of the area which is granted, which shews that that area was intended to be covered by a wharf. So that, so far as that branch of the case is concerned, there can be no doubt whatever that the fact that these people intended to build that wharf, and were securing the *solum* of the creek for that purpose, has long been known to the Dominion Government. The original upland territory, which, as I say, is a small narrow wedge, would roughly amount to one-fifteenth of the total area of the property now occupied by the present plaintiffs, and, taken by themselves, the original upland lots would be of small commercial value. There would be no chance of anyone owning these lots ever increasing their area, for the simple reason that they abut on the western boundary of Main Street, which is one of the principal streets of the city. It is therefore apparent that the chief utility of those lots lies in the circumstance that the owners may have the right to erect a wharf abutting on them, which they can use for business purposes. These lots, as well as the wharf, were purchased by the present plaintiffs from Armstrong & Morrison for the sum of $300,000, on which, I understand, the sum of $225,000 has already been paid, so that they certainly have a very substantial interest in the property in question in this suit.

The City has obtained Dominion and Provincial Crown grants of the *solum* of the creek adjoining this wharf, and they have obtained the sanction of the Governor-General in council to erect a sea-wall and to fill in a tide flat to the rear of it, and it has been agreed with the other defendant, the Canadian Northern Pacific Railway Company, to divide the reclaimed land, and the scheme has been authorized by the Legislature. There is no question that, if that undertaking is carried out, the result will be to seriously injure the plaintiffs in the present

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enjoyment of their wharf and of their business as wharfingers, as it is the avowed intention of the defendants, unless interfered with by the action of the Court, to build up solidly against one-half of the longer side of that wharf—that is, 150 feet—and to leave only a narrow inset of water lying against the other 150 feet of that wharf. I think it is admitted, at least if it is not admitted I think I can safely say that there is no doubt about the result, that, if that work is carried on in the way intended, the proper enjoyment of that wharf will be very seriously interfered with.

The plaintiffs, by their solicitors, have complained on no less than four different occasions concerning the intended action of the defendants. Letters have been written by the plaintiffs' solicitors, and finally matters came to a head in December last, when, at the request of the City, the harbour commissioners interfered and forcibly removed a scow which was being unloaded at the plaintiffs' wharf, and hence the intervention of the Court is now asked.

Now, the plaintiffs' case, as I understand it, divides itself into two branches. The first branch of the case is as to the actual and intended interference with the enjoyment by the plaintiffs of that wharf in their business as wharfingers. The second branch of the case is with respect to the interference with the riparian rights which are incident to the original upland lots.

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As to the first branch of the case, it has been objected that no sanction has been given for the erection of this wharf, and that the plaintiffs are merely obstructors of the public right of navigation, or, at all events, their predecessors in title were obstructors of the public right of navigation, and the plaintiffs, being in no better position than they were, have no *locus standi* to complain of the interference with this erection, while, on the other hand, it is urged that the defendants have obtained the expressed approval of the Governor-General in council, and that the Governor-General in council not only approved of their particular scheme, but in so doing, the matter of the plaintiffs' rights was brought before the attention of the Governor-General in council and sanction was given to the

defendants to proceed, and the plaintiffs' complaint absolutely ignored on the ground, as appears from the memorandum, which has been produced in evidence, that they had not obtained any sanction for the erection of this wharf under section 7 of the Navigable Waters' Protection Act.

With regard to that, I think there has been a misconception by those concerned with the matter on the part of the Dominion Government as to the true legal situation that has been created. By section 4 of the Act it is provided that "no bridge, boom, dam or aboiteau shall be constructed so as to interfere with navigation unless the site thereof has been approved by the Governor in council, nor unless such bridge, boom, dam or aboiteau is built and maintained in accordance with plans approved by the Governor in council." It is to be observed that at the time of the passage of this Act there was no prohibition upon the building of wharves, and that this particular wharf was erected long before the Act of 1910, which was the first legislative interference with the right to build wharves, and reference has been made to section 7 of the same Act, that section providing that "the local authority, company or person proposing to construct any work in navigable waters, for which no sufficient sanction otherwise exists, may deposit the plans thereof and a description of the proposed site with the Minister of Public Works."

The result of the legislation, in my opinion, is that there was no express prohibition until the Act of 1910 upon the building of wharves, and that it left it to the Governmental authorities, if they saw fit, to interfere by suit in the Courts in any case where they considered that the particular wharf was obstructing the public navigation, so that, at the time of the erection of this wharf, the wharf was not prohibited and, consequently, not illegal. As far as that goes, we all know that wharves are not *per se* a public nuisance. They may or may not be a public benefit. They are certainly necessary to effectively carry on marine transportation. Those who constructed wharves at that time took the chance of having the Government interfere with their operations in the interests of the public for the reason that public navigation was being unduly interfered with. So that, at the time of the erection of this wharf, with the sole

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exception of the Attorney-General of Canada, representing the Crown in right of Canada, and possibly one or two adjoining riparian owners, there was no person who had any *locus standi* to come into Court and object to the erection of this wharf. It was only after the passage of this Act in 1910 that any wharf erected in the waters of the creek could be said to be of an illegal character, assuming that it exceeded the character specified in the amending Act.

With respect to this particular case I have had the advantage of a view, and, so far as I can see, there is no danger of any adverse action being brought by the Attorney-General of Canada. As I have stated, the facts have been long well known to the Government of Canada. The engineers of the Government have inspected the locality, and there have been no adverse reports, so far as the evidence shews, against the existence of this wharf. It is one of a row of wharves which all, more or less, conduce to the public benefit by reason of the business being carried on. It was erected before any statutory prohibition, and it is erected over shoal water. In fact, at certain stages of the tide the water under the entire wharf disappears. So that, so far as any obstruction is concerned, it is, as far as I can see, absolutely in no way detrimental to or obstructive of the public right of navigation.

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The case of *Attorney-General* v. *Terry* (1874), 9 Chy. App. 423, has been referred to by counsel for the City, but that is a case which, upon examination, shews a peculiar state of facts. It is a case where a small, narrow river was dealt with, where, at the point in question, the navigable waters were only some 50 feet wide, and where it was proposed by the proprietor of that particular wharf to add some three feet to his wharfage. It was held by the Courts that that was a serious obstruction to that particular stream which ought to be at once checked by the action of the Court, and, in fact, as the Lord Chancellor pointed out, it was an encroachment which ought at once to be challenged by those whose duty it was to watch the conservation of that stream. Here, on the other hand, we have a place where the available water in front of this particular wharf is at least 400 feet in width, that is to say, the distance between the wharf and the railway bridge, which is the only other

obstacle to navigation in that neighbourhood, is at least 400 feet. To be accurate, it seems to be 415 feet.

In the case of *Cunard* v. *The King* (1910), 43 S.C.R. 88, the right to apply for a licence to build a wharf was recognized as a legal right, and therefore the value had to be taken into account in expropriation proceedings. In that particular case, while the Court was apparently unanimous in that opinion, some of the judges differed as to what ought to be done. The majority of them apparently thought that the chance, or contingent right of obtaining a licence to build a wharf was in that particular case merely of nominal value. In fact, Anglin, J. goes to the extent of saying that it was an application which would, no doubt, not be granted if made. However, all the judges in that case go to the extent of saying that the right to apply for a licence to build a wharf is a right recognized by the law, and that it must be taken into account in compensation proceedings.

Here we are dealing with a case of much stronger character. In this particular case the situation is not that the plaintiffs are about to apply for a licence, but that they are in actual *de facto* possession of a wharf against which no reasonable ground can be urged leading to its removal, as I have already outlined. In fact, if any action were to be taken by the Attorney-General of Canada looking to the removal of this wharf, it would amount to an arbitrary act of confiscation. There would be no ground, in my opinion, for bringing such an action, and, that being so, I am of the opinion that the plaintiffs in this particular case have what amounts to a safe-holding title. In any event, assuming that that is not the sound view of the facts, by virtue of the legislation itself the plaintiffs would have the right to build a wharf in that locality not exceeding $1,000 in cost. So, whichever way the matter is looked at, the plaintiffs have a right vested in them with respect to wharfage which ought not to be and cannot be ignored.

The defendants, while admitting practically that injury will accrue to the plaintiffs, have contended that they are not called upon to indemnify them; that by reason of the legislation which has been referred to, and the fact that they have obtained the approval of the Governor-General in council, they can proceed

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in disregard of any rights held by the plaintiffs. But I understand it to be well settled that, in the absence of the clearest language, the Legislature, in these cases, is not taken to intend that the promoters of this class of undertaking shall proceed at the expense of their neighbours and with entire disregard to any injury which they may inflict upon the property or rights of others.

Some reference has been made to the Act which validates the agreement, but I find, after inspection of that Act, that that is only an authority to proceed with the undertaking, and in no sense is there any injunction or requirement in the Act to proceed with it. The Act merely gives permission, but does not make it imperative.

I have come to the conclusion, then, that the plaintiffs have established their right to the protection of the Court in respect to the major branch of their case. There is, as I have stated, another branch of the case; that is to say, as to the riparian rights which are incident to the original upland lots. In regard to that I am rather of the opinion that that branch of the case was put forward by the plaintiffs' counsel as a sort of *tabula in naufragio* in the event of the other ground not being sustained by the Court. As I have already stated, the original upland lots are of very small area, and, taken by themselves, are of small commercial value, but they are really valuable in the fact that they form the base for a wharf either of the existing character or of similar character.

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With regard to these riparian rights attached to the original upland lots, they seem to me to be put in abeyance by the acts of the plaintiffs themselves and their predecessors in title. Not only has the entire ground been covered by the wharf and access by water thereby absolutely cut off, but there are, as I understand it, artificial accretions deposited in front of the original shore line. Of course, we all know that accretions which occur by the act of nature, of a gradual and imperceptible character, in no way affect the riparian rights which inhere in such property. The original shore line has been obliterated by the artificial accretions that have been put in front of it, but I do not think that I am called upon to decide as to that branch of the case at the present time.

Neither do I think that the Court at the present time is called upon to consider whether or not the defendants, or either of them, have any powers of expropriation in respect of the plaintiffs' rights granted them by legislation.

They appear to have pursued the policy of ignoring the plaintiffs' rights from first to last, thereby forcing the plaintiffs to seek the protection of the Court.

I therefore think that they have made their title out to an injunction; and in so declaring, while I am not unmindful that it is important for the Court not to unduly interfere with the prosecution of public works such as that of the present type, I think it is still more important that private property shall not be interfered with or destroyed except in due course of law.

The appeal was argued at Vancouver on the 31st of May and the 1st of June, 1916, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

McCrossan, for appellant: We say we have Parliamentary authority to go on with the work, and the judgment appealed from is in direct defiance of the statute. Our authorization is the order in council, by authority of the Navigable Waters' Protection Act, to the City, and the False Creek Terminals Act, which ratifies the agreement between the City and the Railway. The work is a particular work, in a specified area, under a specified plan: see Kerr on Injunctions, 4th Ed., 128 and 131. We may injuriously affect 150 feet of their wharf, but there is no remedy, as the Act does not provide one: see *East Fremantle Corporation* v. *Annois* (1902), A.C. 213; *Hornby* v. *New Westminster Southern Railway Company* (1899), 6 B.C. 588; *Hammersmith, &c., Railway Co.* v. *Brand* (1869), L.R. 4 H.L. 171 at p. 199; *Geddis* v. *Proprietors of Bann Reservoir* (1878), 3 App. Cas. 430 at p. 448. Argument

A. H. MacNeill, K.C., for respondents: They openly admit they injure us but say they will not compensate. They deprive us of the right of law of access to the sea: see *Western Counties Railway Co.* v. *Windsor and Annapolis Railway Co.* (1882), 7 App. Cas. 178; *Commissioner of Public Works (Cape Colony)* v. *Logan* (1903), A.C. 355; *Metropolitan Asylum District* v.

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Hill (1881), 6 App. Cas. 193. In avoiding the plaintiff's protest the Privy Council assumed that the Courts would protect them, their riparian rights were recognized, and the order in council only dealt with the public rights, but not those of private individuals: see *Baldwin* v. *Chaplin* (1915), 34 O.L.R. 1. We have a good cause of action, and the right to sue: see *The King* v. *McArthur* (1904), 34 S.C.R. 570; *Whitby* v. *Grand Trunk Railway Co.* (1901), 1 O.L.R. 480; *Regina* v. *Port Perry, etc., R.W. Co.* (1876), 38 U.C.Q.B. 431; *In re Provincial Fisheries* (1895), 26 S.C.R. 444 at p. 475; *Booth* v. *Ratte* (1890), 15 App. Cas. 188; *Canadian Pacific Railway* v. *Roy* (1902), A.C. 220; *Corporation of Parkdale* v. *West* (1887), 12 App. Cas. 602; *Southwark and Vauxhall Water Company* v. *Wandsworth Board of Works* (1898), 2 Ch. 603; *Roberts* v. *Charing-Cross, Euston, and Hampstead Railway Company* (1903), 19 T.L.R. 160; *Ash* v. *The Great Northern, Piccadilly, and Brompton Railway Company, ib.* 639. Our land is not taken, but it is completely walled off: see *Jordeson* v. *Sutton, Southcoates and Drypool Gas Company* (1898), 2 Ch. 614; *Canadian Pacific Railway* v. *Parke* (1899), A.C. 535 at pp. 543-4; *Price's Patent Candle Company, Limited* v. *London County Council* (1908), 2 Ch. 526; *North Shore Railway Co.* v. *Pion* (1889), 14 App. Cas. 612. The filling in affects only ourselves, and our riparian rights are not affected by this. The Attorney-General only can interfere with our wharf: *Cunard* v. *The King* (1910), 43 S.C.R. 88; *Countess of Rothes* v. *Kirkcaldy Waterworks Commissioners* (1882), 7 App. Cas. 694 at p. 707.

Argument

Bird, on the same side: The Navigable Waters' Protection Act having no longer any application in Vancouver since the passing of the Harbour Commissioners Act (Can. Stats. 1913, Cap. 54), the order in council is, therefore, *ultra vires.*

McCrossan, in reply: The Harbour Commissioners Act does not apply to construction of public works. The close proximity of the works to the wharf is not actionable: see *Leighton* v. *B.C. Electric Ry. Co.* (1914), 20 B.C. 183. As to the City's liability see *Governor, &c., of Cast Plate Manufacturers* v. *Meredith* (1792), 4 Term Rep. 794; *Boulton* v. *Crowther*

(1824), 2 B. & C. 703; *Kirby* v. *School Board for Harrogate* (1896), 1 Ch. 437 at p. 453; *Attorney-General for British Columbia* v. *Canadian Pacific Railway* (1906), A.C. 204; *London and Brighton Railway Co.* v. *Truman* (1885), 11 App. Cas. 45 at p. 57; *Kearnes* v. *The Cordwainers' Co.* (1859), 6 C.B.N.S. 388 at p. 405. On the question of the order in council being *ultra vires* see *Bell Telephone Company* v. *Toronto* (1905), A.C. 52. On the question of the powers of the commissioners see *Rowbotham* v. *Wilson* (1860), 8 H.L. Cas. 348 at p. 363; *County of Haldimand* v. *Bell Telephone Co. of Canada* (1912), 25 O.L.R. 467. There must be an order in council to sanction their putting up a wharf: see *Wood* v. *Esson* (1883), 9 S.C.R. 239. As to riparian rights, they must be in daily contact with the water: see *Lyon* v. *Fishmongers' Company* (1876), 1 App. Cas. 662 at p. 683; Halsbury's Laws of England, Vol. 27, pp. 393 and 394, pars. 747-8.

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Argument

Cur. adv. vult.

3rd October, 1916.

MACDONALD, C.J.A.: By the judgment appealed from defendants were perpetually enjoined from constructing a sea-wall, a work which threatened to impede plaintiffs' access to their wharf on their own land. The defendants assert their right to build the wall under and by virtue of an order of the Governor-General in council, passed pursuant to powers contained in the Navigable Waters' Protection Act, R.S.C. 1906, Cap. 115, and an Act of the Provincial Legislature to which I shall presently refer.

I am of opinion that the order in council cannot in any way govern, or assist in the decision of this appeal. As the guardian of the public right of navigation, the Governor-General in council permits the erection of the wall, and so makes it lawful as against that right, but he does not purport to authorize interference with the private rights of owners of land of access to their own properties.

MACDONALD, C.J.A.

The injury which the plaintiffs apprehend from the erection of the wall is not to their rights as members of the public, but to their private rights, and I think it has been abundantly

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proved that such injury would be occasioned by the erection of the wall.

False Creek is in reality an arm of the sea, and for the purposes of this case counsel agreed that it is a public harbour within the meaning of that term as used in the British North America Act. Whether it is in fact such is of no importance except as explaining the plaintiffs' title to the foreshore on which their wharf is erected, and as defendants do not dispute their title to the land, this subject, as I view it, may be dismissed from consideration.

This brings me to the substantial question involved in this appeal. The Provincial statute referred to above is known as the False Creek Terminals Act, being Cap. 76 of the statutes of 1913. It confirmed an agreement entered into between the City of Vancouver and its co-defendant the Railway Company. The agreement is incorporated in and made part of the statute. Those sections and articles which relate to that part of False Creek east of Main Street are not in question in this appeal. They relate to the reclamation of the shores of the creek for the purposes of the Railway Company, and contain some provisions for the protection of the rights of private owners. This action has to do with that part of False Creek west of Main Street, and with works intended to be of benefit to the City of Vancouver.

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The City is the owner of the foreshore immediately to the south of plaintiffs' said land and wharf. The Act above referred to, *inter alia,* authorizes the City to construct reclamation works and to erect on their said foreshore a sea-wall, commencing at the southerly boundary of the plaintiffs' wharf, to be carried in a southerly direction to the City's market wharf. The effect of this erection would be to cut off plaintiffs' access to a portion of the southerly side of their wharf and would thereby lessen their enjoyment of it. Article 18 of the agreement referred to authorizes the City to erect the sea-wall in question on the site on which it is proposed to erect it.

No powers of expropriation are given by the said False Creek Terminals Act because, I presume, none were required, the City being owner of the land on which its wall is to be built, nor is it expressly enacted in said Act that compensation

shall be made to owners of lands injuriously affected by the erection of the wall. It is clear, however, from the language of said article 18 itself, that the Legislature had in mind the fact that injuries to others might be occasioned by the erection of the wall. By the last clause of that article the City agrees with the Railway Company, its contractor for the work, to indemnify the Railway Company against "all claims of any person on account of any lands or rights in lands taken or injuriously affected by reason of works referred to in this article." The Legislature, however, did not see fit to specifically enact that the City should make compensation to those so injuriously affected. I refer to this anomalous situation, not for the purpose of considering the effect of the clause just quoted in relation to a possible right in the plaintiffs to compensation (that question not being before us), but of distinguishing this case from *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193. There it was said that the Legislature indicated no intention that the powers given should be used to the injury of the rights of others. Here it appears on the face of the agreement ratified by the Legislature, and made part of the statute, that the property and rights of others might be injuriously affected by the execution of the works authorized to be done. There is another clear distinction between this case and *Hill's* case; there no specified site for the hospital was authorized, while here the site is fixed within narrow limits of deviation where *ex necessitate* it must cause the very mischief of which the plaintiffs complain.

If the statute were mandatory there could be no question of enjoining the defendants, but it is said that it is not mandatory, but merely permissive. Assuming this to be so, it is not, in my opinion, distinguishable from the statute in question in *East Fremantle Corporation* v. *Annois* (1902), A.C. 213. Each of these statutes grants powers to a public body to make municipal improvements. In each case the powers may be exercised or not, in the discretion of the governing body. In the case at bar the City Council, by the sanction of the ratepayers, as well as of the Legislature, undertook the precise thing which they have been enjoined from doing.

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It may be that the Legislature inadvertently omitted from the Act a compensation clause, or assumed that compensation could be claimed under the City's Act of incorporation. But it is needless to speculate, as no attempt was made by plaintiffs' counsel to shew that by the terms of any statute payment of compensation was made a condition precedent to the defendants' right to proceed with the erection of the wall.

In these circumstances I think the judgment cannot be supported, and that the appeal must be allowed and the action dismissed.

MARTIN, J.A.: I concur in allowing the appeal, which I think in principle comes within *East Fremantle Corporation* v. *Annois* (1902), A.C. 213, and see also the next case in the same volume, p. 220, *Canadian Pacific Railway* v. *Roy;* and *Hornby* v. *New Westminster Southern Railway Company* (1899), 6 B.C. 588; *Leighton* v. *B.C. Electric Ry. Co.* (1914), 20 B.C. 183; *Attorney-General for British Columbia* v. *Canadian Pacific Railway* (1906), A.C. 204; *The Laurentide Paper Co.* v. *The King* (1915), 15 Ex. C.R. 499; and *Hawthorn Corporation* v. *Kannuluik* (1906), A.C. 105, the last of which is an instructive illustration of the deferred negligent exercise of statutory authority by a municipality.

MARTIN, J.A.

GALLIHER, J.A.: The learned trial judge granted an injunction restraining the defendants from proceeding with certain works in the bed of False Creek in the City of Vancouver, which works, it was claimed by the plaintiffs (who are contractors, and owners of a certain wharf contiguous to said proposed works), would interfere with their right of access to said wharf, and brought their action for damages and for an injunction. The short point is, does such action lie?

GALLIHER, J.A.

The defendant, the City of Vancouver, has obtained Crown grants from both the Dominion and Provincial Governments of the *solum* of False Creek adjoining the plaintiffs' wharf, and they have obtained the sanction of the Governor-General in council to erect a sea-wall and fill in the tide flat to the rear of it and have entered into an agreement with the other defendants, the Canadian Northern Pacific Railway Company, to divide

and reclaim the land, and this agreement has been confirmed and ratified by an Act of the Legislature of British Columbia, being Cap. 76 of the statutes of 1913. The order in council is dated the 25th of August, 1914.

It is admitted for the purposes of this suit that False Creek is a part of the harbour of Vancouver. The harbour commissioners have given their assent to the work being carried out. The plaintiffs have from the outset opposed this work, as it will undoubtedly interfere with their free access to their wharf on the south side, entirely as to 150 feet in length, and as to the remaining 150 feet the City's plans are so drawn as to leave a space of water 100 x 150 feet as access, the access to the other sides of the wharf not being interfered with.

In so far as the order in council gives authority that order was granted in face of the plaintiffs' protest, and after examination and report by the Government engineers, and after due consideration, and was for the erection of specific works according to plans and specifications and covering a definite area. If the defendants can, as they urge, rely on this order in council as sufficient to entitle them to proceed with the work, then I think the order, on its face, is an answer to the plaintiffs' action. I think, however, this order in council, which is granted under the powers given by the Navigable Waters' Protection Act, R.S.C. 1906, Cap. 115, extends only to public rights of navigation, and is not applicable to any private rights of the plaintiffs that might be infringed.

We then turn to the Act of the local Legislature above referred to, confirming the agreement between the respective defendants, incorporating its terms, and giving to the respective parties thereto the power to enter into and carry out the proposed works. This Act contains no conditions precedent which, if not complied with, would entitle the plaintiffs to an injunction. Moreover the Act recognized that the doing of the work in the specified area in which it is authorized to be done is likely to cause injury to particular individuals, and provides for indemnity by the City to the Railway Company, and brings it within the principle referred to by Lord Blackburn in *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193 at p. 203:

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"I think that the case of *The Hammersmith Railway* v. *Brand* [(1869),] L.R. 4 H.L. 171 . . . . settles, beyond controversy, that where the Legislature directs that a thing shall at all events be done, the doing of which, if not authorized by the Legislature, would entitle anyone to an action, the right of action is taken away . . . . 'It is a *reductio ad absurdum*' to suppose it left in the power of the person who had the cause of complaint, to obtain an injunction, and so prevent the doing of that which the Legislature intended to be done at all events."

It may be that plaintiffs are entitled to relief in some other form if the work proceeds, upon which I express no opinion, as the only point before us is as to whether the injunction should have been granted, and in my opinion it should not.

The injunction should be set aside and the action dismissed, with costs.

MCPHILLIPS, J.A.: This is an appeal from a judgment of HUNTER, C.J.B.C. granting a perpetual injunction against the defendants (the City of Vancouver alone appeals) from executing or permitting any works to remain on the foreshore, or the doing of anything whereby the plaintiffs' (respondents) right of access to the waters of False Creek on the south side of their wharf, and the enjoyment thereof in the way of loading and mooring craft, etc., may be defeated, destroyed or prejudiced.

MCPHILLIPS, J.A.

False Creek is situate at the easterly end of English Bay, and subject to tidal influence, and is within the corporate limits of the City of Vancouver.

The respondents are the owners of lots 33 to 36, inclusive, in block 23, in subdivision of district lot 196, group 1, Vancouver District, the root of title being a Crown grant issued by the Colony of British Columbia previously to Confederation, *i.e.*, 1865. The evidence discloses that the respondents' predecessors in title constructed a wharf upon the foreshore in front of the lands, and access to the lands is over the wharf, and this wharf has been in use for many years. It would appear that an application was made to the Dominion Government for leave to construct a wharf sometime in 1903 or 1904, but the wharf was built without awaiting any express leave, and it is questionable, in fact it would look as if at the time the statute law did not require any leave to be first had

and obtained. It would also appear that in 1908 the respondents' predecessors in title obtained a Crown grant from the Government of the Dominion of Canada of the *solum* of False Creek adjoining the lands covered by the Provincial Crown grant, and the plan attached to the Dominion Crown grant shews thereon that the area so granted was to have erected thereon a wharf, which at the time, as a matter of fact, had been for some years already constructed, and it is the interference with access to this wharf, and the access to the lands of the respondents, and threatened further works that forms the subject-matter of the action.

Unquestionably the works contemplated by the appellant, and against which they have been enjoined, would irreparably interfere with the respondents' proper enjoyment of a very large portion of their wharf, to the extent of at least 150 feet of the frontage thereof, and also prejudicially, if not irreparably, affect the respondents in their enjoyment of riparian, littoral or other rights appertaining to their lands.

The City of Vancouver (the appellant) has obtained Crown grants from the Governments of the Dominion of Canada and the Province of British Columbia to the *solum* of False Creek adjoining the wharf, and have obtained the sanction of the Governor-General in council to the erection of a sea-wall and to fill in the tide flat to the rear of it, for the purpose of creating a terminal area for the Canadian Northern Pacific Railway Company (also defendants in the action but not appealing), the area so created to be conveyed to the Railway Company by the City of Vancouver, the scheme, and the agreement entered into between the appellant and the Railway Company being ratified and confirmed by the Legislature of the Province of British Columbia by the False Creek Terminals Act, Cap. 76, B.C. Stats. 1913.

It was strongly urged upon the Court below that the respondents' predecessors in title had unauthorizedly constructed the wharf; that although applying for leave, leave was not granted under section 7 of the Navigable Waters' Protection Act, R.S.C. 1906, Cap. 115. At the time of the construction of the wharf, however, the Act did not expressly refer to

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the construction of wharves. Section 4 thereof then read as follows:

"4. No bridge, boom, dam or aboiteau shall be constructed . . . ."

In 1910, by an amending Act, "wharf" was expressly referred to (Cap. 44, 9-10 Edw. VII., Sec. 1), with the following proviso appended thereto:

"The foregoing provisions of this section shall not apply to small wharfs not costing more than one thousand dollars, or groynes or other bank or beach protection works, or boat houses, which do not interfere with navigation."

It may be remarked that it is common public knowledge, and such as may be taken judicial notice of, that for many years, and even up to the present time, the Provincial Government constructed and maintained hundreds of wharves throughout the Province without leave being obtained, so also did the inhabitants of the country, as at many points by the utilization of wharves only could settlement be carried out and lands enjoyed, there being no transportation facilities by roads save to and from the wharves dotted along the hundreds of miles of coast line.

I am in agreement with the learned Chief Justice that the wharf cannot be said to have been illegally constructed. In fact, it may well be said that the wharf was authorized, if any authorization was necessary from the Crown, in that the Dominion Crown grant contemplated the erection of the wharf, and at that time the Navigable Waters' Protection Act did not require leave to be first had and obtained. Further, it has not been shewn that the wharf interferes in any way with navigation, or is a nuisance, and the Crown is not a party to these proceedings. In my opinion, it must be held that the respondents are rightly entitled to maintain the wharf and be protected in the enjoyment thereof.

MCPHILLIPS, J.A.

The facts are that the *solum* of the foreshore upon which the wharf is constructed is vested in the respondents and the *solum* in the bed of False Creek, upon which the sea-wall is to be constructed, is vested in the appellant, but the construction of the proposed works means, if not the total obstruction, a very considerable obstruction of access to the sea, and the respondents would suffer very considerable damage.

It is contended that as the proposed works have been author-

ized by the Governor-General in council, acting under the powers conferred by the Navigable Waters' Protection Act, the works being carried out without negligence, no compensation is payable and no damages may be allowed.

It is to be remembered that without statutory ratification and confirmation the agreement ratified and confirmed by the False Creek Terminals Act would be without the power of the City of Vancouver to enter into (Vancouver Incorporation Act, 1900), under which agreement the proposed works are to be carried out, and where the City of Vancouver, in the ordinary exercise of its powers, injuriously affects any lands, compensation is payable, and if not agreed upon, such compensation shall be determined by arbitration. The *modus operandi* by which the proposed works are to be carried out is by having the Railway Company do the work that is the contractual obligation entered into between the Railway Company and the appellant. This is clearly shewn by reference to article 18 (*a.*) and (*b.*) of the agreement, as set forth in the Schedule to the False Creek Terminals Act.

It will be readily seen why the Railway Company is not appealing when the last sentence of 18 (*b.*) is read:

"The City shall indemnify, protect, and save harmless the Railway Company from and against all claims by any person on account of any lands or rights in lands taken or injuriously affected by reason of the works referred to in this article."

If the Railway Company were the principals and were proposing to execute the works, compensation would be payable under the provisions of the British Columbia Railway Act, B.C. Stats. 1911, Cap. 44.

In coming to any conclusion as to the responsibility resting upon the appellant to make compensation it is necessary to examine the provisions of the False Creek Reclamation Act, B.C. Stats. 1911, Cap. 56, as it will be seen that the appellant was authorized to proceed under that Act to expropriate and pay compensation, and sections 3, 4 and 5 of that Act shew the procedure to be adopted, *viz.*: the service of notice for the acquisition or extinguishment of all riparian, littoral rights or interests, and failing an agreement as to the amount of compensation, then arbitration, and what is to be found upon the

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arbitration is the amount to be paid for, *inter alia,* "riparian, littoral, or foreshore rights, interests, or rights of access": section 5.

It may be said that the "foreshore rights, interests or rights of access" are rights and interests confined to the lands specifically mentioned, but when the False Creek Reclamation Act and the False Creek Terminals Act, and the agreement made a schedule thereto—the foundation upon which the appellant must rest in undertaking and executing the proposed works—are carefully read, there is the statutory requirement to make compensation, in my opinion, for all foreshore rights, riparian, littoral rights or rights of access affected by the carrying out of the undertaking. This is punctuated and clearly brought out by reference to the following words, to be found in section 2 of the False Creek Reclamation Act:

"and any rights, littoral, riparian interests, or rights of access to the waters of False Creek, or foreshore rights in, on, or contiguous or appertaining to the same."

If, however, I should be wrong in this, then the compensation would have to be arrived at by the necessary preliminary steps and the procedure as laid down in the Vancouver Incorporation Act, 1900. It cannot be that the works being merely approved under the provisions of the Navigable Waters' Protection Act means that no compensation is payable, especially when it is considered that the subject-matter is within the definition "Property and Civil rights in the Province": British North America Act, 1867, Sec. 92 (13).

MCPHILLIPS, J.A.

Hammersmith, &c. Railway Co. v. *Brand* (1869), 38 L.J., Q.B. 265, and the many cases following that decision are strongly relied upon by the appellant as absolving it from the requirement to pay compensation. It is to be observed, though, that that case—of the highest authority, of course—proceeded upon the provisions of the Lands Clauses Consolidation Act and the Railways Clauses Consolidation Act, and further, it was there held that it was not established that any lands were injuriously affected, no land was taken nor was the access to any land affected, the latter of which is the case here. At most, all that was occasioned was as set forth by Blackburn, J. at p. 274:

"No doubt it is often very difficult to say whether an interest in land is or is not injuriously affected. In the present case, however, I assent to the argument so neatly expressed in the reasons in the appellants' case, that the plaintiffs' house has 'become subject to a perpetual servitude,' and so their interest in it is injuriously affected."

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The house adjoined the railway but was not touched by it, and the complaint was against the vibration, noise and smoke. In the present case the proposed sea-wall not only touches the property of the respondents, but absolutely shuts out and obstructs the respondents from access to their lands and the enjoyment of the wharf along a very considerable frontage thereof. The case can readily be distinguished.

The case of *Leighton* v. *B.C. Electric Ry. Co.* (1914), 20 B.C. 183, may also be distinguished in that there also there was no physical interference with the lands of the plaintiff, or deprivation of access, and the works carried on were constructed and operated without negligence and within the express authority conferred by statute. Further, compensation was provided for by statute, but not for the injury complained of, and *London and Brighton Railway Co.* v. *Truman* (1885), 11 App. Cas. 45, was followed, *i.e.,* that there was statutory compulsion to supply electricity, and, in effect, the provisions of the Act were imperative in relation to the undertaking, and no negligence having been shewn, the injunction was refused and the action held not to be maintainable.

MCPHILLIPS, J.A.

The present case is one where the municipal authority is given statutory powers to execute certain works, but it still remains the same municipal authority with corporate existence under Provincial legislation, *viz.*: Vancouver Incorporation Act, 1900, and, in the exercise of powers of expropriation, must make compensation for real property taken or used or injuriously affected (see Cap. 54, B.C. Stats. 1900, Sec. 133 (5)), and it is plain that compensation must be payable, if not under the provisions of the False Creek Reclamation Act and False Creek Terminals Act, then under the Vancouver Incorporation Act, 1900. That the powers conferred by the former Acts must be considered wholly apart from the statutory obligations imposed under the Vancouver Incorporation Act, 1900, would not seem tenable when it is observed that the by-law approving of the

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agreement statutorily ratified and confirmed by the False Creek Terminals Act was voted upon by and received the assent of the electors of the City of Vancouver in conformity with, and in the manner provided by the provisions of the Vancouver Incorporation Act, 1900. Can it be reasonably said, in view of this, that the obligations in regard to compensation would not be applicable when lands will be injuriously affected in the carrying out of the works, as well as riparian, littoral or foreshore rights, interests or rights of access affected and interfered with?

In *Odlum* v. *City of Vancouver* (1916), 85 L.J., P.C. 95, the False Creek Reclamation Act was considered, and Lord Dunedin, in delivering the judgment of their Lordships of the Privy Council, at p. 97 said:

"It is here that their Lordships are constrained to come to the opinion that the arbitrator was wrong. The lots in question were bounded by the high-water mark. The owners of the lots had no right in the *solum* of the foreshore. They had the right of going over the foreshore, whether covered by water or not, and so obtaining access to the sea. If the arbitrator had only added something to the value of the land itself for that privilege, nothing could have been said—that was the principle on which allowance was made in the case of *Buccleuch* (*Duke*) v. *Metropolitan Board of Works* (1872), 41 L.J., Ex. 137; L.R. 5 H.L. 418."

MCPHILLIPS, J.A.

The respondents in the present case are not only entitled to the same right and privilege, but in their case they have the right in the *solum* of the bed and foreshore of False Creek adjoining their lands and upon which the wharf is situate, a grant from the Dominion of Canada, in point of time anterior to the grant made to the appellant, and described to be, by the plan attached, a site for a wharf.

The sea-wall—the proposed works—admittedly will affect the respondents in obtaining access to the sea, and is an injurious affection and deprivation of that privilege referred to by Lord Dunedin, and takes away value from the land apart from the very grave damage occasioned to the respondents in the enjoyment of their wharf, and the shipping privileges connected therewith. Lord Dunedin refers to the necessity for the approval of the Crown where works are to be constructed in navigable waters. At p. 97 he says:

"The allowance by the Crown to construct *opera manufacta* is rendered necessary, apart from the common law, by the provisions of the Navigable Waters' Protection Act. In respect of these provisions the Department of

Public Works has issued regulations dealing with applications for permission to erect such works. One of the regulations is as follows: 'The applicants must furnish proof that they own or have a sufficient interest in the land or land covered with water upon which the works are to be constructed. It is not sufficient to hold the riparian interests alone, if the work extends beyond the limits of the shore, but a sufficient portion of the harbour, river or lake must also be held by the applicants. The statute has reference to the erection of structures on lands owned by the applicants, and is designed to provide for due protection to navigation. It cannot be used as a means of acquiring title to lands upon which the structure is to be erected.'"

It is evident, therefore, that the approval by the Crown of the proposed works of the appellant confers no title in the lands, and it is clear that the appellant is not possessed of the riparian interests in the lands of the respondents to be affected by the works, those interests admittedly being in the respondents. It would follow that it cannot, with any hope of success, be claimed that the effect of the allowance by the Crown to construct the sea-wall operates to exclude all right to compensation, or that the respondents have not the right to have an injunction restraining the appellant from so constructing the works as to prevent their obtaining access to the sea from their lands, or any part thereof, and the enjoyment of the wharf and shipping facilities over the same.

Turning to the case of *Buccleuch (Duke)* v. *Metropolitan Board of Works, supra,* it will be found that the decision of the House of Lords was (and it is peculiarly applicable to the present case) that when lands are injuriously affected by the construction of works authorized by an Act of Parliament the owner is entitled to compensation if an easement appurtenant to the lands is taken, just as he would be if part of the lands was taken.

Corporation of Parkdale v. *West* (1887), 56 L.J., P.C. 66, was a case where it was held by their Lordships of the Privy Council that, notwithstanding the order of the Railway Committee, the railway company was not enabled to take land, or interfere with private rights, without complying with the provisions of the Railway Act, and that all provisions of the Act were applicable to compensation for land injuriously affected, and that the company was bound to make compensation under the Act before interfering with the respondents' rights. In

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that case, as in the present case, no notice was given to the respondents, nor was any compensation offered, although based upon different statute law than that at present under consideration, yet, in my opinion, we have equally forceful legislation, and the principle laid down in the case is applicable here. Lord Macnaghten, in the *Parkdale* case, at p. 72 said:

"If a person whose rights are injuriously affected is refused compensation, he may be compelled to bring an action for an injunction. But even in that case the Court would probably not interfere with the construction of the works by an interlocutory injunction, if the railway company acted reasonably, and were willing to put the matter in train for the assessment of compensation. As Lord Romilly pointed out in *Wood* v. *The Charing Cross Railway Company* (1863), 33 Beav. 290, the granting an injunction which stops the works of a railway company, is not merely a question between the plaintiff and the company. The public have an interest in the matter. As a general rule it would only be right to grant an injunction where the company were acting in a high handed and oppressive manner, or guilty of some other misconduct."

In the present case, in my opinion, it was a proper case for the granting of an injunction.

The *Parkdale* case was followed in the Privy Council by *Saunby* v. *City of London Water Commissioners and City of London* (1905), 75 L.J., P.C. 25, it there being held that—

"A public body with compulsory powers of appropriating a person's land or water rights or of acquiring some easement over his property cannot take land or interfere with the free use by the owner of his property without giving to the landowner notice to treat for some definite subject-matter. On failure by such body to comply with statutory directions a landowner whose property has been injuriously affected retains his ordinary right of action for trespass, and where the damages are of a substantial character is entitled to an injunction. In such a case there is no discretion in the Court to award damages only in lieu of an injunction."

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Being of the opinion that the appellant is under a statutory obligation to pay compensation, the *Saunby* case is also peculiarly applicable, and the language of Lord Davey at p. 27, who delivered the judgment of their Lordships of the Privy Council, is exceedingly apt and fitting to the present case.

It is perhaps unnecessary to state that no preliminary steps, as required under the provisions of any of the Acts, were taken leading to compensation by the appellant, and, therefore, from the point of view that the works could only be undertaken after first complying therewith, the present case is one in which the appellant was properly enjoined.

Should I be wrong in my opinion that the appellant is, by reason of the Provincial legislation, compellable to pay compensation, and compellable to take the steps and have the compensation fixed before proceeding therewith, but that the appellant, in the construction of the proposed works, is entitled to construct the same subject only to the allowance by the Crown under the Navigable Waters' Protection Act, which imposes no compensation, then my opinion is that the Navigable Waters' Protection Act being permissive only in its terms, not imperative, the appellant is liable to the respondents, and cannot evade that liability by pleading the order in council granted in pursuance of the Navigable Waters' Protection Act, and this liability will exist even if the works were to be executed, without negligence, and where injury is shewn, or will admittedly ensue, if the works are constructed, the proper remedy is an injunction restraining the construction of the works. That this is the law it is only necessary to refer to *Canadian Pacific Railway* v. *Parke* (1899), 68 L.J., P.C. 89. And see *per* Lord Watson at p. 93.

The judgment of Lord Watson in its entirety is very instructive, and is a clear demonstration of the law that where the legislation is permissive as clearly as the Navigable Waters' Protection Act is, the right granted to the appellant to construct the sea-wall is conditional upon it being done without injury to other lands and the rights appertaining thereto, which in the present case is, at the very least, the right as defined by Lord Dunedin in *Odlum* v. *City of Vancouver, supra,* at p. 97, "the right of going over the foreshore, whether covered by water or not, and so obtaining access to the sea." But in my opinion, upon the special facts of this case, the respondents have other and greater rights to the enjoyment of which they are entitled, and they are all those rights and shipping privileges that are attendant upon the ownership of the wharf and the right to maintain the same, and the free access to the same from the fairway, and that the appellant is rightly entitled to the injunction granted by the Chief Justice of British Columbia at the trial, *viz.*: an injunction restraining the appellant, its servants, agents, and workmen from so constructing

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the sea-wall, and the works generally, as to interfere with the respondents' rights of access to the sea from all or any portion of the lands held by them, and the right of access to the sea over the whole frontage of the wharf, and shipping facilities over the same, and restraining the appellant generally from any act to the injury of the respondents' rights and privileges.

I am, therefore, of the opinion that the judgment of the Court below should be affirmed and the appeal dismissed.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellant: *E. F. Jones.*

Solicitors for respondents: *Bird, Macdonald & Ross.*

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BROWN v. PIKE

BROWN AND MATTHEWS v. PIKE.

Mortgage—Covenant of mortgagor—Enforcement—Dealings between mortgagee and assignee of equity of redemption.

The relationship subsisting between mortgagee, mortgagor, and an assignee of the equity of redemption who has covenanted to pay the mortgage debt, is not that of creditor, surety and principal debtor.

ACTION tried by LAMPMAN, Co. J. at Victoria on the 16th of October, 1916.

Statement

The facts are as set out in the judgment, except that by the agreement of the 5th of January, 1914, between Matthews and Wright, Wright expressly covenanted with Matthews to pay the mortgage debt and the increased rate of interest. The summons in this action was issued on the 23rd of August, 1916.

Argument

Mayers, for plaintiffs: This case is decided by the reasoning in *Forster* v. *Ivey* (1900), 32 Ont. 175; affirmed on appeal in (1901), 2 O.L.R. 480. Both the cases cited for the defendant

are considered in *Forster* v. *Ivey,* and *Mathers* v. *Helliwell* is disapproved by Moss, J.A. on page 488 of the latter report. Moreover, any suggested analogy between the case of principal and surety on the one hand, and the case of mortgagor and assignee on the other, is entirely fallacious; the mortgagor has never ceased to be the principal debtor. All that has happened is that the mortgagee has secured a new primary debtor. How can a debtor be surety for his own debt? In order to affect the original relationship, there would have to be a novation, whereby the original mortgagor was discharged and the assignee accepted instead. No such thing has happened here. The agreement between the mortgagee and the assignee did not touch the original debt of the mortgagor; the only covenant is to pay the amount of the mortgage debt and an increased rate of interest, creating an entirely new obligation.

Argument

W. J. Taylor, K.C., for defendant: As soon as the defendant had assigned the equity of redemption he ceased to be the principal debtor and became a surety for the assignee. The mortgagee has entered into a direct relation with the assignee, extending the time for payment and imposing more onerous terms, *viz.*: an increased rate of interest. *Aldous* v. *Hicks* (1891), 21 Ont. 95, and *Mathers* v. *Helliwell* (1863), 10 Gr. 172, shew that such dealings with the assignee discharge the mortgagor. [He cited also *The Earl of Oxford* v. *Lady Rodney* (1807-8), 14 Ves. 417 and *Canada Permanent L. and S. Co.* v. *Ball* (1899), 30 Ont. 557 at p. 568.]

17th November, 1916.

Judgment

LAMPMAN, Co. J.: By indenture, dated the 13th of January, 1911, the defendant mortgaged to the plaintiff Brown, lot 14, block 2, part of section 5, map 282, Victoria City, to secure the repayment of $600 with interest at 7 per cent. on the 13th of January, 1912, the interest to be paid quarterly in April, July, October and January. On the 24th of January, 1911, the plaintiff Brown assigned the mortgage to Matthews, who is one of the plaintiffs. The defendant Pike sold his equity of redemption to one Wright, and by agreement in writing, dated the 5th of January, 1914, Matthews and Wright stipulated that the $600 mortgage money should be repayable on the 13th of

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January, 1915, with interest from the 13th of January, 1914, at 8 per cent. The agreement contained the following clause: "Provided that nothing herein contained shall affect or prejudice the rights of the party of the first part as against any subsequent encumbrancer or any person interested in the said land, which rights are herewith reserved."

Default has been made in the payment of interest since the 13th of April last, and the plaintiffs now sue for both the principal and interest. By reason of the extension of time for payment granted to Wright, the defendant now contends that he was released from liability. I think the law as laid down in Ontario in *Forster* v. *Ivey* (1900), 32 Ont. 175, and (1901), 2 O.L.R. 480, is entirely applicable to this case, and that the plaintiffs are entitled to recover.

Judgment

Judgment for plaintiffs.

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AMAR SINGH v. MITCHELL.

Vendor and purchaser—Covenant for right to convey—Absence of title—Admissibility of parol evidence to explain written instrument—Real Property Conveyance Act, R.S.B.C. 1911, Cap. 47.

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A limited covenant for the right to convey in pursuance of the Real Property Conveyance Act does not constitute a warranty of title; it only operates as to the vendor's own acts. If the vendor has no title at all to the property conveyed, there would be no breach of such covenant.

APPEAL from the decision of MACDONALD, J., of the 25th of February, 1916, in an action for damages for breach of covenant for title in a deed of land. The plaintiff and the defendant had entered into an arrangement for the exchange of certain properties, and the defendant conveyed to the plaintiff four lots on the Gorge Road, in the district of Victoria, for which in exchange the plaintiff conveyed to the defendant a house and lot in the City of Victoria. The parties went into

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possession of the exchanged properties and are still in possession. The defendant pleaded that the conveyance was delivered to the plaintiff upon a special agreement that delay would ensue before the title could be completed, that the plaintiff was aware of the condition of the title and was willing to wait until it could be perfected. The title was in the name of one McAllister, who had lived in Edmonton, the defendant having previously purchased from him under an agreement for sale. The defendant made every endeavour to locate McAllister and obtain a deed to the property, but was unable to do so, McAllister having in the meantime left Edmonton and could not be located. When he found he could not obtain title from McAllister, he endeavoured to arrange a re-transfer of the properties with the plaintiff or to convey to him other properties of equal value, but the plaintiff would not accede to either proposal. The deed is expressed to be made "in pursuance of the Real Property Conveyance Act," and contains, *inter alia,* the following statutory covenants:

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"The said grantor covenants with the said grantee that he has the right to convey the said lands to the said grantee notwithstanding any act of the said grantor, and the said grantee shall have quiet possession of the said lands, free from all encumbrances. And the said grantor covenants with the said grantee that he will execute such further assurances of the said lands as may be requisite. And the said grantor covenants with the said grantee that he has done no acts to encumber the said lands."

The learned trial judge found that the covenants were operative, that there was a breach thereof by the defendant for which he was liable, and fixed the damages at $3,000. The defendant appealed.

The appeal was argued at Vancouver on the 9th of April, 1916, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Argument

Stacpoole, K.C. (*Brandon,* with him), for appellant: The conveyance is under the Real Property Conveyance Act. The parties agreed to an exchange of properties, and in the preliminary negotiations it was explained and understood that the defendant was not in a position to give a deed the plaintiff could register. Deeds were exchanged, but it was agreed they

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were not to be acted upon until the defendant could perfect his title. We say, first, the deed was given conditionally, and evidence of this should be allowed. Secondly, granted there is a delivery of a deed, there is no covenant under the Real Property Conveyance Act to enable the plaintiff to maintain this action. On the first point, the delivery being practically a delivery in escrow, the evidence should therefore be allowed, and in fact it was allowed by the trial judge but not considered: see Phipson on Evidence, 5th Ed., 552; *Johnson* v. *Baker* (1821), 4 B. & Ald. 440; *Murray* v. *Earl of Stair* (1823), 2 B. & C. 82; *London Freehold and Leasehold Property Company* v. *Baron Suffield* (1897), 2 Ch. 608; *Watkins* v. *Nash* (1875), L.R. 20 Eq. 262; *Foundling Hospital (Governors and Guardians)* v. *Crane* (1911), 2 K.B. 367; *Wallis* v. *Littell* (1861), 11 C.B.N.S. 369. Both parties are in possession of the properties exchanged. The deed was to come into force only on its return from Edmonton. On the admissibility of evidence as to this see *Rogers* v. *Hadley* (1863), 32 L.J., Ex. 241 at p. 253; *Equitable Fire and Accident Office, Limited* v. *The Ching Wo Hong* (1906), 76 L.J., P.C. 31; (1907), A.C. 96. The terms of a conveyance cannot be altered by an antecedent one: see *Millbourn* v. *Lyons* (1914), 83 L.J., Ch. 737. As to his remedy upon the covenant for title see *Clare* v. *Lamb* (1875), L.R. 10 C.P. 334. Covenants apply only to the vendor's own act: see Armour on Titles, 3rd Ed., 165; *Harry* v. *Anderson* (1863), 13 U.C.C.P. 476; *Brown* v. *O'Dwyer* (1874), 35 U.C.Q.B. 354.

Argument

D. S. Tait, for respondent: A covenant for the right to convey is equivalent to a covenant for seisin. As to how far a covenant for title extends see Williams on Real Property, 22nd Ed., 607; Sugden on Vendors and Purchasers, 14th Ed., 165; *David* v. *Sabin* (1893), 1 Ch. 523; *Page* v. *Midland Railway Company* (1894), 1 Ch. 11; *Re Buck, Peck* v. *Buck* (1873), 6 Pr. 98. This is a defect in the chain of title and we should succeed. It is a case of the vendor selling before he has a title to the property. As to the alleged condition under which the deed was delivered, they never pleaded there was a condition of delivery. When the deed is actually delivered it cannot be set

up that there was an escrow: see *Thoroughgood's Case* (1611), 5 Co. Rep. 241; 77 E.R. 925; *Whyddon's Case* (1596), 1 Croke 520; and Halsbury's Laws of England, Vol. 10, p. 388, note (*g*).

Stacpoole, in reply.

3rd October, 1916.

MACDONALD, C.J.A.: The parties to this action agreed to exchange lands. At the time of the agreement the plaintiff was in a position to give a deed, but the defendant was not in a like position, he being a purchaser merely under an agreement with his vendor. The plaintiff was informed of this fact, but nevertheless deeds were delivered by each to the other. The defendant has not succeeded, after a long delay, in getting a deed from his vendor, and the plaintiff brings this action for breach of the covenants of right to convey and for further assurances. The deed upon which the plaintiff relies is in the statutory short form. The covenant for further assurances has, in my opinion, no application to the facts of this case.

Evidence was adduced by defendant and objected to by plaintiff to the effect that the deeds were delivered conditionally; that defendant should withhold the deed he received from registration; and that neither party should deal with the lands in question until defendant should have obtained title from his vendor. The learned judge admitted the evidence tentatively, but in his reasons for judgment gave it as his opinion that that evidence was not admissible on the ground that it contradicted the deed.

MACDONALD, C.J.A.

If the parol evidence aforesaid was inadmissible, then this is the situation: the plaintiff has accepted a deed containing a limited covenant, only, for title to land in which the grantor had only an equitable interest, and which at best operates only as an assignment of that interest. If the defect in the title is attributable to the grantor's own act, the action will lie, but in this case the defect was, in my opinion, not brought about by "any act, deed, matter, or thing by the said covenantor so executed, committed, or knowingly or wilfully permitted or suffered to the contrary." As Erle, C.J. said in *Thackeray* v.

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Wood (1865), 6 B. & S. 766 at p. 773, "If the vendor had no title at all to the property conveyed, there would be no breach of such a covenant."

On the whole evidence I have come to the conclusion that the deeds were delivered as that term is understood in law.

I would understand from what the witnesses say that no difficulty was apprehended in getting the deed from MacAllister to the defendant Mitchell, and hence no precautions were taken against the event which afterwards happened—failure without fault on defendant's part to obtain the deed.

Now, whatever may be the plaintiff's remedy for the unfortunate position in which he finds himself by reason of what passed between himself and the defendant verbally at the time of the delivery of the deeds, this much appears to me to be true in law, that what was then said or agreed upon cannot be imported into the covenants in the deed, and as this action is for breach of those covenants, I am concerned with that only.

MACDONALD, C.J.A.

The defendant has acted honestly, as the learned judge has found; he has offered to make a re-exchange, or to give other lots of equal or greater value, he says, to which he has good title, in lieu of the ones to which his title has failed.

The appeal should be allowed.

MARTIN, J.A.: In my opinion this appeal should be allowed. The difference between the qualified statutory covenant in the deed under consideration and an absolute covenant, and the obligations they import, is so well pointed out in Williams on Vendor and Purchaser, 2nd Ed., at pp. 647, 652-3, 1136-7, where the leading authorities are collected in the notes, and the vendor's remedies set out at pp. 1034 and 1050, that it would be superfluous to repeat them here. A recent illustration of the length to which an absolute covenant "upon payment of the purchase price in full to give a good title in fee simple free from encumbrances" will go is *Greig and Thirlaway* v. *Franco-Canadian Mtge. Co. Ltd.* (1916), 10 W.W.R. 1139, 1146: it was there held that in such case the purchaser not only need not search the title but could rely upon the covenants to protect him from known defects. In *Howard* v. *Maitland* (1883), 11 Q.B.D. 695, a covenant against the acts of the vendor's "ancestors or

MARTIN, J.A.

predecessors in title," as well as his own, did not cover a general right of common over the land declared, after conveyance and possession taken, by a decree in Chancery to exist, which was not shewn to be occasioned by said predecessors or ancestors.

MCPHILLIPS, J.A.: I would allow this appeal. The learned judge though, in my opinion, was right in holding that no escrow was established. The conveyance must be deemed to have been delivered upon the facts as disclosed at the trial.

Foundling Hospital (Governors) v. *Crane* (1911), 80 L.J., K.B., 853, is a case in which the Court of Appeal recently passed upon the rules relating to escrows.

It is with regret that I find myself fettered by binding authority in the present case, but it has been the law for years that the limited covenant for the right to convey, *i.e.*, implied covenant in pursuance of the Real Property Conveyance Act (Cap. 47, R.S.B.C. 1911), in no way constitutes a warranty of title—it is only operative as to the vendor's own acts. The leading case upon the point is *Thackeray* v. *Wood* (1865), 6 B. & S. 766 (141 R.R. 607). The judgment of the Court—Exchequer Chamber—was delivered by Erle, C.J. and concurred in by Willes, Keating and Smith, JJ., and Channell and Pigott, BB. At p. 773, Erle, C.J. said:

MCPHILLIPS, J.A.

"The operation of a qualified covenant for title is well known, and has been established by a series of cases, and I do not feel myself justified in departing from the construction established by those decisions. Upon a sale of real property it is for the purchaser to ascertain what the title of the vendor is, and to satisfy himself that he has a good title. The vendor then makes a conveyance, and usually covenants that he has done no act to affect or derogate from his title. If the vendor had no title at all to the property conveyed, there would be no breach of such a covenant."

This case makes it very clear that in all conveyancing work a solicitor should be called in, as the non-professional man may be deluded into the belief that the vendor has warranted the title when such proves not to be the case. The words "notwithstanding any act, deed, matter, or thing by the said covenantor done, executed, committed, or knowingly or wilfully permitted or suffered to the contrary" which are contained in the implied covenant, have the effect, according to the decided cases, to read out and render nugatory the later language "the said

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covenantor now hath in himself good right, full power and absolute authority to convey," so that without title the vendor may execute a conveyance in the statutory form, and escape liability if it turn out that the vendor is absolutely without title (this is, of course, leaving out of consideration any right of action for fraudulent concealment and misrepresentation if any facts support such a case: *Thackeray* v. *Wood, supra,* at p. 773). The acceptance of a conveyance by the purchaser executed by the vendor under the provisions of the Real Property Conveyance Act without the interposition of a solicitor to examine the title before the acceptance thereof, is fraught with great danger and a statutory pitfall for the unwary. A cursory reading of the covenant would not lead the non-professional person to so limit the meaning of the language used.

If the matter was *res integra* I would have been strongly impelled to so read the covenant as to impose liability upon the appellant upon the facts of the present case, where no title of any nature or kind is shewn in the lands, but constrained and fettered as I am by authority, full effect must be given to the decided cases; it is a case of *stare decisis.*

MCPHILLIPS, J.A.

I have carefully examined *David* v. *Sabin* (1893), 1 Ch. 523; *Page* v. *Midland Railway Co.* (1894), 1 Ch. 11; *Turner* v. *Moon* (1901), 2 Ch. 825; *Great Western Railway* v. *Fisher* (1905), 1 Ch. 316; *Stait* v. *Fenner* (1912), 2 Ch. 504; and *Eastwood* v. *Ashton* (1915), A.C. 900, but all these cases can be readily distinguished, and it would not appear that *Thackeray* v. *Wood, supra,* has been in any way disturbed, and it is still good law.

Appeal allowed.

Solicitor for appellant: *J. S. Brandon.*
Solicitor for respondent: *D. S. Tait.*

IN RE WAR RELIEF ACT AND LAND REGISTRY ACT.

MORRISON, J.

1916

July 29.

IN RE WAR RELIEF ACT

Moratorium—Foreclosure—Order absolute—War Relief Act, B.C. Stats. 1916, Cap. 74, Sec. 2—Land Registry Act, R.S.B.C. 1911, Cap. 127, Sec. 134; B.C. Stats. 1914, Cap. 43, Sec. 63.

On the 19th of April, 1916, an order absolute of foreclosure was made in an action in which one of the defendants was a volunteer for active service. On the 28th of April following an application was made to register the plaintiff as owner in fee by virtue of the order absolute, when the registrar of titles required that the plaintiff give 30 days' notice under section 134 of the Land Registry Act to all persons interested. The notice was duly given. On the 29th of May, 1916, the War Relief Act came into force, being after the date of the order absolute and the application to register but before the expiry of the aforesaid 30 days. In the meantime the district registrar of titles notified the plaintiff under section 63 of the Land Registry Act Amendment Act, 1914, declining to register the plaintiff as owner in fee on the ground that "no proof is filed here that the defendants in the foreclosure action are not protected by section 2 of the War Relief Act." On an application to compel the registration of the foreclosure order absolute:—

Held, that the plaintiff's application should be accepted by the registrar.

APPLICATION to compel the district registrar of titles at Vancouver to register a foreclosure order absolute, heard by MORRISON, J. at Chambers in Vancouver on the 19th of July, 1916. The facts are set out fully in the head-note and reasons for judgment.

Statement

Bourne, for the application.

Gwynne, for the Registrar, *contra*.

29th July, 1916.

MORRISON, J.: On the 19th of April, 1916, an order absolute of foreclosure was made in an action in which one of the defendants, who had an interest in the lands in question before the date of the order absolute, is a volunteer for active service. On the 28th of April, 1916, an application was made in Form A provided by the Land Registry Act, to register the plaintiff as the owner in fee of the said lands by virtue of the said order

Judgment

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absolute, thereupon the district registrar of titles required that the plaintiff give 30 days' notice under section 134 of the Land Registry Act to all persons appearing in the land registry to have an interest in the land in question. This notice was duly given. On the 29th of May, 1916 (being a date after that of the order absolute and the application to register and before the date of expiry of the aforesaid 30 days), the War Relief Act came into force. In the meantime the district registrar of titles served on the plaintiff's solicitors notice under section 63 of the Land Registry Act Amendment Act, 1914, declining to register the plaintiff as owner in fee on the ground that "no proof is filed here that the defendants in the foreclosure action are not protected by section 2 of the War Relief Act.

The plaintiff now, by way of petition, prays that the registrar be ordered to complete registration of the said order absolute. On the hearing of the petition, Mr. *Gwynne,* who appeared as counsel for the district registrar, requested that other questions which have arisen or may likely arise as to the construction of the Act, be ruled upon at the same time.

Judgment

As to the question arising out of the petition based on the peculiar facts before me I have, notwithstanding Mr. *Gwynne's* very strong argument, little doubt. I think that the plaintiff should have his application accepted by the registrar. As to the other questions submitted, they are of such importance that I hesitate to deal with them without full argument.

Application granted.

LUCAS v. THE MINISTERIAL UNION OF THE LOWER MAINLAND OF BRITISH COLUMBIA *ET AL.*

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LUCAS v. MINISTERIAL UNION

Libel — Publication — Evidence of — New trial—Conduct of trial—Jury— Judge's charge.

Where remarks of the judge during the trial and his charge to the jury are calculated to prejudice a fair trial of the action a new trial will be granted.

A defendant permitted proofs of a pamphlet in the course of preparation, which contained libellous words, to fall into the hands of co-defendants:—

Held, to be evidence of publication of a libel.

APPEAL from the judgment of MORRISON, J. and the verdict of a jury awarding the plaintiff damages for $200 in an action for libel, tried by him at Vancouver on the 23rd, 24th and 25th of November, 1915.

The defendant Union, a body composed of a number of ministers of the Gospel of the Lower Mainland of British Columbia, resolved to publish a pamphlet as to the Government's action generally with regard to lands, coal lands and timber lands within the Province, and appointed from amongst its members a committee composed of the defendants N. A. Harkness, A. E. Cooke, R. F. Stillman, J. S. Henderson, W. S. A. Crux and A. M. O'Donnell, to draft and publish the pamphlet. The pamphlet was prepared very largely from information received from notes loaned by the defendant Cotsworth, who had previously acted as chairman of a public service commission appointed by the local Government to investigate and report on the public service generally, the commission travelling throughout the Province in order to gather the necessary information. After the commission had completed its work, Cotsworth proceeded to prepare a pamphlet for his own use, from the information he had obtained while so employed, and when it was nearly completed, he loaned it to the committee with knowledge of the purposes for which it was intended to be

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used. In April, 1915, the defendant Union published its pamphlet under the name of "The Crisis in B. C.," which included the following paragraph:

"In this particular instance there can be no excuse for such a report from the Commission since Commissioner Alex. Lucas, M.L.A., was formerly provincial assessor for the Nelson District until compelled to resign by the civil service commission in December, 1909, on account of neglect of his duties and a 'timber deal' by which he pocketed about $10,000. He had left his post and journeyed to Vancouver in spite of repeated refusals of leave of absence to put through the deal."

The pamphlet dealt fully with the system of granting lands, coal lands, and timber, and commented severely on the amount of "land grabbing" that was allowed by the Government. The defendants appealed on the grounds that the trial was not fairly conducted by the learned trial judge, and that the unfairness of the judge's charge to the jury justified the granting of a new trial.

Statement

The appeal was argued at Vancouver on the 11th, 12th and 15th of May, 1916, before MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

S. S. Taylor, K.C., for appellants other than Harkness: There has been a mistrial. Cotsworth should have been dismissed from the action; he did not write or publish "Crisis." The libel is that "You actually did publish." A person who supplies material knowing that it is to be published is not liable; the person who issues the article is liable and no one else. As to the conduct of the trial, the report of the civil service commission should not have been excluded. The jury have no power to stop a cross-examination and the judge should not have said they had. The chief objection is the treatment counsel for the defence received from the judge in the presence of the jury. As to charging the jury see *Bridges* v. *Directors, &c. of North London Railway Co.* (1874), L.R. 7 H.L. 213 at p. 234. Irrelevant comment in the charge, tending to affect the jury, is ground for a new trial: see *Dallimore* v. *Williams and Jesson* (1914), 58 Sol. Jo. 470 at p. 471; *Bray* v. *Ford* (1896), A.C. 44 at p. 48. As to outbursts of passion and prejudice by the judge see *Bustin* v. *W. H. Thorne & Co.* (1906), 37 S.C.R. 532. The judge had no right to instruct the jury

Argument

that they must find the charge was true: see King's Law of Defamation, 582 and 586; and Hughes's Instructions to Juries, par. 48. [He also referred to *Harle* v. *Catherall* (1866), 14 L.T. 801; *Wason* v. *Walter* (1868), L.R. 4 Q.B. 73 at p. 94; and Halsbury's Laws of England, Vol. 18, pars. 1235 and 1315.]

J. A. Russell, on the same side: Counsel for the plaintiff waived malice at the trial; all he claimed was that what was done was done intentionally. Malice is of the substance of the action, and if waived, there is no case: see *Hoste* v. *Victoria Times Publishing Co.* (1889), 1 B.C. (Pt. 2) 365; *Thomas* v. *Bradbury, Agnew & Co., Limited* (1906), 2 K.B. 627 at p. 638; *Ward* v. *McBride* (1911), 24 O.L.R. 555 at p. 564; *Green* v. *Miller* (1903), 33 S.C.R. 193 at pp. 217-8; and *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741. As to Cotsworth's liability, *i.e.,* the giving out of data for the purpose of being published, see *Parkes* v. *Prescott* (1869), L.R. 4 Ex. 169 at pp. 180-1 and 186; *Maitland* v. *Goldney* (1802), 2 East 426 at p. 434. Such an action must be brought in respect of some office he is still holding: see Halsbury's Laws of England, Vol. 18, par. 1150. The burden is on the plaintiff to prove what the words complained of meant. There is merely innuendo and there must be evidence to support the innuendo: see *Ruel* v. *Tatnell* (1880), 43 L.T. 507; Halsbury's Laws of England, Vol. 18, pars. 1212-3; *Nevill* v. *Fine Art and General Insurance Company* (1896), A.C. 68 at pp. 73 and 76. All that is said in this case is in relation to neglect of duty and that is not libellous: see *Mulligan* v. *Cole* (1875), L.R. 10 Q.B. 549; *Frost* v. *London Joint Stock Bank (Limited)* (1906), 22 T.L.R. 760. On the question of damages, special damage must be proven: see *McLean* v. *Campbell* (1905), 37 N.S. 356; *Ashdown* v. *The Manitoba Free Press Company* (1891), 20 S.C.R. 43 at p. 50. The paragraph complained of is a comment on a previous statement. On the question of fair comment see Halsbury's Laws of England, Vol. 18, par. 1282; *Hunt* v. *Star Newspaper Company, Limited* (1908), 2 K.B. 309 at pp. 316-9; *Dakhyl* v. *Labouchere, ib.* 325; *Australian Newspaper Company* v. *Bennett* (1894), A.C. 284 at p. 288;

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Thomas v. *Bradbury, Agnew & Co., Limited* (1906), 2 K.B. 627 at p. 638. As to whether the paragraph contains a libel at all see *Sydney Post Publishing Co.* v. *Kendall* (1910), 43 S.C.R. 463; *Hay* v. *Bingham* (1905), 11 O.L.R. 148; *Major* v. *McGregor* (1903), 6 O.L.R. 528.

Woodworth, for appellant Harkness: The evidence shews that the treatment of counsel by the trial judge was alone sufficient to justify a new trial. Counsel was held up to ridicule and contempt in such a manner as to have a powerful influence on the jury.

Davis, K.C. (*E. A. Lucas,* with him), for respondent: There is no foundation for the statement complained of. In a case of libel it is not necessary to prove special damages: see Halsbury's Laws of England, Vol. 18, par. 1150. *Ashdown* v. *The Manitoba Free Press* (1891), 20 S.C.R. 43, can be distinguished as it is founded on a particular statute. It is not necessary that a man should hold the office to which the statements made applies when the libel is made: see Odgers on Libel and Slander, 5th Ed., 25; *Boydell* v. *Jones* (1838), 4 M. & W. 446 at p. 450; Halsbury's Laws of England, Vol. 18, par. 1189. Even if these people believed in the truth of the statement complained of, that does not excuse them: *Campbell* v. *Spottiswoode* (1863), 2 B. & S. 769. On the question of malice being a necessary ingredient see Odger's on Libel and Slander, 5th Ed., 341. Cotsworth's application to be dismissed from the action cannot stand; any one who is in any way responsible for the libel, or does any part of the work in connection with it, is liable in an action; he is a party to the publication. As to the complaint that the judge was biased, a judge can express his opinion on the evidence: see *Dougherty* v. *Williams et al.* (1872), 32 U.C.Q.B. 215; *Hickey* v. *Fitzgerald* (1877), 41 U.C.Q.B. 303 at p. 306. Malice is not in issue here as long as what was done was done intentionally. Assuming there was misdirection, particularly with relation to the grading commission, it was not such misdirection as to justify a new trial. If there is sufficient evidence outside of the evidence objected to, a new trial will not be granted. The only conflict in the evidence is as to the grading commission dealing with the Lucas

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case. Cotsworth's evidence should not be relied on, and the jury did not place credence in his evidence because (1) the commission had no power to deal with Lucas's resignation; (2) the Government did not want him to resign; (3) the evidence is that Lucas had already agreed to resign; (4) as to what took place at Nelson both Mara and Lucas disagree with Cotsworth; and (5) Cotsworth is contradicted by McKilligan, McBride and Sampson. Where improper remarks are made by the judge or counsel at the trial, objection must be then taken or the Court will not interfere on the appeal: see *Sornberger* v. *Canadian Pacific R. W. Co.* (1897), 24 A.R. 263; *W. H. Thorne & Co. Ltd.* v. *Bustin* (1905), 37 N.B. 163. As to damages, we do not claim substantial damages, only sufficient to pay the costs of the action.

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Taylor, in reply: The jury cannot estimate damages on a basis of solicitor and client costs: see *Quartz Hill Gold Mining Company* v. *Eyre* (1883), 11 Q.B.D. 674; *Dickinson* v. *The World Printing & Publishing Co.* (1912), 17 B.C. 401; 5 D.L.R. 148; *Carty* v. *B.C. Electric Ry. Co.* (1911), 16 B.C. 3; 16 W.L.R. 224; (1912), 19 W.L.R. 905. The pamphlet was written on questions of great public concern, and the writers believed that what was said was true and was justified: see *Wason* v. *Walter* (1868), L.R. 4 Q.B. 73 at p. 94.

Cur. adv. vult.

3rd October, 1916.

MACDONALD, C.J.A.: I think there has been a mistrial. Some remarks of the learned trial judge during the progress of the trial and in his charge to the jury were, in my opinion, calculated to prejudice a fair trial of the action.

MACDONALD, C.J.A.

This, however, does not necessarily dispose of the appeal of the defendant Cotsworth, which goes beyond that of the other defendants in this, that he says he ought to have been dismissed from the action at the close of the plaintiff's case. His contention is that there is no evidence to shew that he was responsible for the publication complained of. It appears that he permitted the proofs of a pamphlet which he himself was preparing on the same subject to fall into the hands of his

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co-defendants, and it is sought to connect him with the alleged libel by shewing that it was from these proofs that his co-defendants extracted the words complained of, or the substance of them. In his evidence on discovery Cotsworth admits that the words in his said proofs and those complained of in this action are substantially the same. I therefore think that he is in no better position than his co-defendants.

I would allow the appeal and order a new trial.

MARTIN, J.A.: It is not without much careful reflection that I am forced to the conclusion that the best interests of justice require the granting of a new trial herein, on the ground that there has been a mistrial, in the proper sense of that word, as defined in *Airey* v. *Empire Stevedoring Co.* (1914), 20 B.C. 130 at p. 135. Nothing is better established than that in the exercise of our grave discretion in the granting of a new trial on the ground of misdirection or non-direction, the charge of a learned judge must be read as a whole to weigh its effect upon the jury, and that isolated or detached expressions must not be fastened upon to set aside their verdict. At the same time, however, it is just as essential to bear in mind that a succession of expressions, none of which taken by itself is vital, may cumulatively result in creating such a forensic atmosphere that one of the litigants has been unfortunately, though unwittingly, prejudiced to such an extent that he has not in the fullest sense been accorded that fair trial which is his right. In order to arrive at a proper conception of the situation in the case at bar, I have endeavoured to put myself, so far as is possible, mentally, in the position of one of the jury, and I can only reach the conclusion that as a juror I would have become so affected, even if unconsciously, by certain observations in the charge and during the course of the trial that I should have been unable properly to discharge my duty, however much I desired to do so. The principal reason for my long hesitation above mentioned is that, happily, the setting aside of a verdict for said cause (*i.e.*, the cumulative result of judicial expressions) has been a very rare occurrence in this Province, this being the first case of that exact nature wherein that course has been taken which has come

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to my attention in the course of my judicial experience of over eighteen years. And I realize that the case was far from an easy one for the learned judge to try.

There is, however, one additional matter which particularly deserves notice, *viz.*: the fact that though Mr. *Davis*, the leading counsel for the plaintiff, stated in the course of the trial that his client did not come into Court "asking for any substantial sum of damages at all," and formally withdrew from the record the charge of malice, yet the jury did award him the substantial, though not large, damages of $200 after the learned judge had in his charge referred indefinitely and inadequately (if I may say so with the greatest respect) to such a serious matter, when it should have been made clear and precise. In my opinion, if a statement of that nature is made it must be understood literally as meaning an abandonment in open Court of any damages other than nominal, and to the same extent as though in a case tried before a judge alone to recover, *e.g.*, $250 on a promissory note, the plaintiff's counsel had stated that he would be satisfied with $200, in which case it would be as improper for the Court to allow as it would be out of place for the litigant to expect judgment for a larger sum. No trifling with justice of that description, after statements made of such solemnity, should be for a moment permitted, and the effect of them upon a jury, in a case of this description where political animosities are aroused, could not fail to be unusually insidious. Anything which bears the complexion of the offer of a bargain to the jury to give the plaintiff a verdict upon any terms whatever should be inflexibly discountenanced, for it is impossible to tell the harm that may be instantly done by the proposal of it. But in any event, once the statement is made it must be adhered to, therefore the verdict herein for substantial damages, after what I regard in effect as an abandonment in open Court of anything beyond nominal damages, cannot stand. In view of the new trial that is to be had, I shall make no further remarks upon the conduct of the proceedings, or the other points raised, adding only in regard to the defendant Cotsworth that he has not made out a good case for the dismissal of the action against himself.

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There should be a new trial, the costs of the former one to abide the result thereof. The statute gives the costs of this appeal to the successful appellants.

GALLIHER, J.A.: I would grant a new trial. After a careful perusal of the learned trial judge's charge to the jury, I can come to no other conclusion than that the appellants were prejudiced in a fair trial of the issues.

Appeal allowed and new trial ordered.

Solicitor for appellants: *C. M. Woodworth.*
Solicitors for respondent: *Lucas & Lucas.*

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GAULEY v. BANK OF MONTREAL

Banks and banking—Conveyance—Pressure—Mortgage on eve of insolvency — Presumption — Fraudulent Conveyance Act, R.S.B.C. 1911, Cap. 93.

A company, acting under pressure from its bank, authorized the giving of a mortgage by resolution to secure its indebtedness to the bank, but owing to delay in settling questions of title and registration, the mortgage was not actually given until six months later. Six months after the mortgage was delivered, an order was made winding up the Company.

Held, that the presumption created by the statute against transactions of this nature does not arise, as in the circumstances it cannot be said that the bank took the mortgage in contemplation of the insolvency of the mortgagor and with intent of obtaining an unjust preference over his other creditors.

Statement

ACTION by the liquidator of the Prince Rupert Sash and Door Factory, Limited, against the defendant Bank, to set aside a mortgage given by said Company to the Bank, as null and void under the Fraudulent Conveyance Act. Tried by

MORRISON, J. at Vancouver on the 5th of June, 1916. The facts are set out fully in the judgment.

C. W. Craig, for plaintiff.
Wilson, K.C., for defendant.

20th June, 1916.

MORRISON, J.: The plaintiff is the liquidator of the Prince Rupert Sash and Door Factory, Limited. This company during the year 1914 and for some short time previously was affected by the prevailing money stringency. It had been receiving substantial aid from the defendant Bank, as well as from the late Mr. C. D. Rand. In January, 1914, the company by resolution agreed to give the Bank the mortgage which was subsequently given, namely, in July following, and the company was to be given further time and credit. The reason it was not executed immediately appears to be that there were questions as to title and registration, which caused the delay which arose. I gather from the evidence that had there been no hitch at the time in consummating the subject-matter of the said resolution, there would have been no trouble.

The defendant made further advances and upon the death of Mr. Rand, which ended his financial aid, the Bank pressed again for a settlement, whereupon the mortgage was duly executed pursuant to the aforesaid resolution, and on the 11th of January, 1915, an order was made winding up the company.

From the evidence I am of the opinion that the Bank exercised legitimate pressure upon the company, and it was on that account that they took the various steps complained of: *Stephens* v. *McArthur* (1891), 19 S.C.R. 446. Having regard to the substantial advances made by the Bank and its treatment of the company, I do not find any trace of dealings that properly may be termed "unjust" within the meaning of the Act.

The main point arising in this case is whether the mortgage in question was taken in contemplation of the insolvency of the mortgagors, and with the intent of obtaining an unjust preference over the other creditors. I do not think that the presumption created by the statute against transactions of this nature arises, having regard to all the circumstances, so that

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the burden lies on the plaintiff who attacks the mortgage to prove that it was fraudulent, which has not been discharged to my satisfaction. It seems to me that if ordinary banking transactions such as this was, being void of all suspicion and inadequacy of consideration, furnishing necessary financial assistance, free from any underhand or secret methods either on the part of the Bank or the company, were to be thus impeached, there would be an end to the carrying on of trade and commerce on credit. I do not think that the statute strikes at transactions of this kind.

"The statute does not provide that every security given by a debtor, when in circumstances of pecuniary embarrassment, shall be void, even though those embarrassments afterwards culminate in insolvency":

Per Strong, J. in *McCrae* v. *White* (1883), 9 S.C.R. 22 at pp. 27-8.

As to the antecedent arrangement made in January, whereby the company determined to give the defendant the mortgage, I cannot do better than quote from the judgment of Jessel, M.R. in *Ex parte Wilkinson. In re Berry* (1883), 22 Ch. D. 788 at p. 795 referring to an agreement by the mortgagees to make further advances:

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"It appears to me that, if it is a *bona fide* promise, made not for the mere purpose of securing the existing debt, but to enable the debtor to carry on his business as before, if it is a *bona fide* arrangement on both sides, the mere fact that there is not a technically binding contract to make further advances is not sufficient to lay the arrangement open to the objection that it was made to defeat or delay creditors, and therefore fraudulent and void as an act of bankruptcy."

The action is dismissed with costs.

Action dismissed.

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PACIFIC COAST COAL MINES *v.* ARBUTHNOT

Company law — Shareholders' meeting — Agreement of reconstruction between shareholders—Act sanctioning agreement subject to ratification at shareholders' meeting—Notice of meeting—Sufficiency of—Ratification by acquiescence—Knowledge of transaction by shareholders —B.C. Stats. 1911, Cap. 72.

Pleadings—Amendment of at trial—Should be settled forthwith.

Notice calling a meeting of shareholders of a company for the purpose of confirming an agreement between certain shareholders for reconstruction of the Company and held in compliance with the terms of an Act of Parliament ratifying said agreement subject to its being adopted at the meeting, contained the following information: (1) description of the parties to the agreement; (2) its date; (3) that it was deposited with the Registrar of Joint-stock Companies at Victoria and could be seen at the meeting; (4) that resolutions would be passed reducing the capital stock of the Company by $1,000,000, authorizing the issue of debentures, and ratifying said agreement. At the meeting, which was attended by shareholders either in person or by proxy representing 97 per cent. of the capital, the resolutions were passed unanimously. At the next general meeting of the Company a statement disclosing the terms of the agreement was read, copies of which were sent to all the shareholders. At the three annual general meetings of the Company following, no objections to the agreement were raised.

Held (*per* MACDONALD, C.J.A. and GALLIHER, J.A. reversing the judgment of CLEMENT, J.), that the question of sufficiency of notice is one of fact which must be governed by the circumstances of the particular case, but assuming the resolutions were of no effect by reason of the insufficiency of the notice (a) the shareholders' actions at the subsequent general meetings shew they had full knowledge of the agreement and recognized it as binding, thereby ratifying the agreement by acquiescence; and (b), a defective notice contravened a directory clause in the articles patent on the face of the notice, of which the shareholders must be presumed to have knowledge. When in the face of such knowledge they made no complaint in respect of the resolutions as passed, a Court of Equity would not rescind the agreement.

Per MARTIN, J.A.: The notice of the meeting is sufficient, viewing it in the light of all the surrounding circumstances, and substantially put the shareholders in a position to know what they were voting about.

Per MACDONALD, C.J.A.: Parties wishing to amend their pleadings at the trial should submit their amendment and settle the matter forthwith.

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It should not be left to be dealt with at some future time during the trial.

APPEAL by defendants from the decision of CLEMENT, J., in an action tried by him at Victoria on the 13th to the 22nd of October, and the 9th to the 15th of November, 1915, to set aside a certain debenture issue of the plaintiff Company which had been made in pursuance of an agreement of the 11th of February, 1911, under the terms of which one section of the shareholders of the Company arranged to buy out the holdings of another section of the shareholders, payment therefor being made by cancelling the shares held by the selling group and reducing the capital stock of the Company to that extent and by issuing in their place to the selling group debentures for the par value of the shares, and also for an amount of money which was sufficient to liquidate a debt which the Company owed to the defendant Arbuthnot. A private Act of the Legislature was passed on the 1st of March, 1911, sanctioning the reduction of the capital necessary to accomplish the terms of the agreement, sanctioning the issue of the debentures which were to be delivered to the vendors in the place of the shares which they formerly held, and validating all the terms of the agreement, subject to the same being adopted by a resolution passed by 75 per cent. of the shareholders at a meeting called for that purpose. On the same day that the Act was passed an extraordinary general meeting of the shareholders was held, in pursuance of notice thereof given two weeks previously, ratifying and adopting the agreement in question, authorizing the issue of the bonds and their distribution as expressed in the agreement, and authorizing the reduction of the capital stock of the Company as aforesaid. The shareholders present represented 97 per cent. of the shares issued, but there was conflict of evidence as to whether 75 per cent. of the shareholders were actually present. The Company's affairs then passed into the hands of the purchasing section of shareholders, who remained in control. The facts are set out fully in the judgment of the learned trial judge.

Statement

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

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CLEMENT, J.: The plaintiff Company's claim in this action is fourfold. In the first place an attack is made upon a certain debenture issue of March, 1911, some of the defendants being the recipients and holders of the debentures. The scheme of re-organization, of which this debenture issue was one feature, was validated by an Act of the Legislative Assembly of this Province (B.C. Stats. 1911, Cap. 72), subject, to put it shortly, to the approval of 75 per cent. of the Company's shareholders; and, if that approval has been properly given, the statute not only validates the debenture issue but also operates as an act of indemnity and oblivion in regard to all the actions of the defendants in connection with the creation of the plaintiff Company and the management of its affairs down to and including the debenture issue referred to. Manifestly, therefore, if the plaintiff Company is to be allowed to challenge the earlier actions of the defendants, it must be by reason of the failure of those concerned to see to it that the conditions attached to the statute were duly fulfilled. The plaintiff Company says there was that failure. That is the inquiry that lies at the threshold. For one thing, the plaintiff Company says that no notice was given to its shareholders properly "specifying the general nature of the business" to be transacted at the meeting called under the statute to consider resolutions ratifying the agreement, which embodied the scheme of which the debenture issue formed part. This contention necessitates a careful consideration of the proposed scheme—what it was that the shareholders were asked to sanction—and that again involves a rather full statement of this Company's previous history.

The plaintiff Company was incorporated on the 21st of March, 1908, with a capital of $3,000,000, divided into 30,000 shares of $100 each. Its object was to acquire and work coal properties. It was brought into being at the instance of the defendants Arbuthnot, Savage, McGavin, Moran, Reynolds, Wishard and Hodgson. The property which it was formed to take over and which, at once upon its incorporation, it did take over was the property of its creators; and they were named its directors, a position which, without any real alteration, they

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continued to occupy until the date of the debenture issue in March, 1911.

A word as to these gentlemen and their business relations. The defendant Arbuthnot lived in Victoria and was described as a lumber merchant. He had lived in Winnipeg, where he still had financial interests. The defendant Savage was brother-in-law to the defendant Arbuthnot, and was in partnership with the defendant McGavin in Winnipeg, dealing in lands, timber, etc. The defendant Wishard was of New York, and had been associated in business enterprises, real-estate speculations and the like, with the defendants Savage and McGavin. He was also interested with the defendant Arbuthnot in timber lands in British Columbia. In short, these defendants were closely in touch with each other and were ready to embark together upon any enterprise which appealed to them as likely to prove lucrative. The defendant Moran was a Winnipeg barrister, and came into the coal enterprise in question here through the defendants Savage and McGavin. He looked to them to protect his interests and took very little part himself in the affairs of the plaintiff Company. The defendant Reynolds was an engineer in the employ of the defendant Arbuthnot. The defendant Hodgson is described as a gentleman, and seems to have been a mining engineer and prospector for coal.

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The property with which—for a consideration—the plaintiff Company was endowed at its creation consisted of five distinct items. One of these, spoken of in the evidence as the Oyster Bay stakings, is a negligible item; but the other four items call for separate mention. Each has a history of its own, involving distinct issues of fact and law, as will appear.

First, there were the Crown-granted lands spoken of in the evidence as the Suquash or Garesche-Green lands; but because the term Suquash property is sometimes used to cover both the Crown-granted lands and the staked lands adjoining (parcel No. 2), I will call parcel No. 1 the Garesche-Green lands. These were purchased in February, 1907, more than a year before the incorporation of the plaintiff Company, and were the property in equal fourths of the defendants Arbuthnot,

Wishard, Savage and McGavin. That, I think the evidence shews, was the position at the time when the formation of the plaintiff Company was first mooted early in 1908. The original purchase from the Garesche-Green Estate was of some 5,475 acres for $35,000, of which $8,750 was paid down, the balance being payable in two equal annual instalments in February, 1908, and February, 1909. Of this acreage only some 2,798 acres, a trifle over one half, were transferred, as being coal lands, to the plaintiff Company upon its incorporation.

Secondly—quoting from the plaintiff Company's prospectus —there were "23 coal prospecting licences issued by the Government of the Province of British Columbia" and "17 applications to the Government of the Province of British Columbia for coal prospecting licences under the provisions of the Coal Mines Act over lands staked in the names of" 17 named applicants. The areas covered by these licences and applications practically adjoined the lands purchased from the Garesche-Green Estate.

The nature and extent of the rights acquired by staking Crown land under the Coal Mines Act will appear from a perusal of the Act itself. To put it very shortly, the first staker gets for $100 a licence to prospect for coal over the staked area, which must not exceed 640 acres in one rectangular block. This licence is for one year, but on certain conditions may run for three years at $100 per annum. Then it must either be abandoned, or, upon certain conditions, turned into a lease for five years at an annual rental of 15 cents per acre; and that, upon certain further conditions, may ripen into a Crown grant of the land itself "including the coal and petroleum thereunder" for a cash payment to the Crown of $20 per acre. A first staking, therefore, may in the end prove to be a very valuable asset.

There is some confusion in the evidence about this second parcel. It is spoken of as the Malcolm Island stakings, although some of the staked areas are not on that island but on the mainland opposite. It is admitted that they were all staked by the defendant Ephraim Hodgson, and therefore I

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will refer to this parcel No. 2 as "the Hodgson stakings." The story of their acquisition may be shortly given. It begins with an agreement dated the 19th of February, 1907, between the defendant Hodgson of the one part and the defendants Arbuthnot, Savage, McGavin and Wishard of the other. It recites that Hodgson

"is possessed of certain information which he claims will prove that there is approximately some 19,000 acres of coal-bearing lands situate on Malcolm Island in the Province of British Columbia commercially situated and capable of being commercially operated and mined at a profit."

Hodgson was to do the staking at his own expense and to superintend contemplated boring operations. The other four were to pay the licence fees and the cost of boring. The properties to be thus acquired were to be owned in equal fifth shares. At the date of the incorporation of the plaintiff Company 23 licences had been secured at a cost in fees of $2,300, and 17 more applications were before the Government. It was, however, a term of the transfer of these 17 applications to the plaintiff Company that the Company and not the vendors should pay the licence fees. Before the plaintiff Company was formed the defendant Moran had acquired an interest in these Hodgson stakings under some arrangement with the defendants Savage, Wishard and McGavin, each of these gentlemen transferring to the defendant Moran a one-sixth interest in his one-fifth share. The result was that when the plaintiff Company was formed the Hodgson stakings were owned, one-fifth by Arbuthnot, one-fifth by Hodgson, one-sixth by Savage, one-sixth by McGavin, one-sixth by Wishard, and one-tenth by Moran. It should, perhaps, be mentioned that the two parcels so far described are situate near the north end of Vancouver Island, about 200 miles north of the well known Nanaimo coal field, in or adjoining which the two parcels still to be described are situate.

The agreement to transfer to the plaintiff Company both of the parcels so far described, *i.e.*, the Garesche-Green lands and the Hodgson stakings, was made by the Vancouver Island Timber Company, which, for brevity, I will speak of as the Timber Company. This company admittedly held these properties as trustee for the defendants Arbuthnot, Savage.

McGavin, Wishard, Hodgson and Moran, with varying interests as already indicated. In stating the consideration to be paid by the plaintiff Company for these properties there was no apportionment as between the two parcels. The price for the two was $75,000 "cash" (as distinguished, I suppose, from shares) and $1,320,000 in shares of the plaintiff Company. But the evidence is conclusive, to my mind, that the "cash" payment of $75,000 was to go—and, so far as it has been paid, has gone to the defendants Arbuthnot, Savage, McGavin and Wishard in equal one-fourths in payment for the Garesche-Green lands, while the price in shares ($1,320,000) was to go, and did go, to the defendants Arbuthnot, Savage, McGavin, Wishard, Hodgson and Moran—in the proportions above set out—in payment for the Hodgson stakings. The pooling agreement to be referred to later shews this, I think, beyond question. Not a great deal, perhaps, turns upon this feature so far as the plaintiff Company's attack upon the debenture issue is concerned; but it may be material upon other aspects of this litigation.

Thirdly, there was the Fiddick property. The defendant Hodgson, on the 30th of September, 1907, procured a 3-year mining lease of this property, some 160 acres, from Mrs. Fiddick for an expressed consideration of $10,000 cash and a royalty of 25 cents a ton upon the coal mined during the life of the lease; with an option to purchase at any time during the term for $125,000 payable one-fifth in cash and the balance as set forth. On the same day Hodgson assigned this lease and option to purchase to the defendant Arbuthnot for an expressed consideration of $1. The $10,000 was paid to Mrs. Fiddick by the defendant Arbuthnot, who at once proceeded to form a company to take over the property. This was the South Wellington Coal Mines, Limited, incorporated on the 22nd of October, 1907, at the sole instance of the defendant Arbuthnot, the signatories to the memorandum of association being the defendant Arbuthnot and nominees of his. Its capital was $200,000, divided into 8,000 shares of $25 each. For brevity I will refer to it as the South Wellington. It was admittedly, at this stage, a "one man company," the sole con-

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trol being with the defendant Arbuthnot. To this company the Fiddick lease was transferred for a consideration of $120,000, payable as to $10,000 in cash and as to $115,000 in 4,600 shares of the company. At the time when the plaintiff Company was incorporated, the share holdings of the defendant Arbuthnot in the South Wellington had been reduced to $85,000 or 3,800 shares. The defendant Reynolds, who was mine manager or engineer in charge, held 200 shares. In addition to these 4,000 shares, there had been issued (I take this from the plaintiff Company's prospectus) shares to the extent of $53,275. Of these about $25,000 had been subscribed for by the public, and the balance would be shares originally allotted to the defendant Arbuthnot and by him transferred to others. The plaintiff Company upon its incorporation acquired the 3,800 shares held by the defendant Arbuthnot and the 200 shares held by the defendant Reynolds. What the defendant Arbuthnot got for his 3,800 shares will appear when I reach the story of the fourth parcel. The defendant Reynolds for his 200 shares in the South Wellington of a par value of $5,000, got 250 shares in the plaintiff Company of a par value of $25,000, a transaction which would indicate either that South Wellington shares had increased in value fivefold between October, 1907, and March 21st, 1908, or that the plaintiff Company's shares were issued at a great discount, or (and this, I think, is nearer the truth) that the shares in both companies were handed about in large blocks with little or no regard to their money value.

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Fourthly, there was the Richardson lease. One Richardson had owned the land. He had died and his executors had applied to this Court under the Settled Estates Act for leave to grant a mining lease. The defendant Arbuthnot, when tenders were called for, put in no less than four tenders, none of them in his own name. Why these underhand methods were thought expedient, I do not know; I can imagine no other reason than this, that it was intended to mislead the Court in some more or less important particular. At all events an order was pronounced by Mr. Justice IRVING on the 30th of November, 1907, sanctioning a 20-year lease to one Griffith, one of

those who had tendered for the defendant Arbuthnot, of some 320 acres of coal-bearing land at a rental of $2,000 a year at least. Certain royalties were to be paid as set out in the lease and if and when paid were to be credited on the fixed minimum of $2,000. The defendant Arbuthnot paid $500 into Court, and this satisfied the first quarter's rental, which, under the lease, would not fall due until April, 1908.

Upon the incorporation of the plaintiff Company the defendant Arbuthnot transferred to it his 3,800 shares in the South Wellington and the Richardson lease for a money consideration of $350,000. How this sum was apportioned as between the South Wellington shares and the Richardson lease is not stated in the agreement.

We have here, then, in the creation and endowment of the plaintiff Company, a promoter-vendor-director combination in its clearest, most undisguised form. The newly-born legal person, the plaintiff Company, had no voice in determining what it should do. Its articles, framed by the seven promoter-vendors, commanded it to enter into three several agreements, one with the Timber Company, one with the defendant Arbuthnot, and a third with the defendant Reynolds—all drafted and ready for execution before it was born—for the acquisition of the properties above described at prices fixed by the vendors. The promoter-vendors in their new role of directors were to see to it that the Company's seal was duly affixed to these agreements. There was not a dollar in sight for the Company. To adopt the language of Lindley, M.R. in *In re Olympia, Limited* (1898), 67 L.J., Ch. 433 at p. 442, it had been saddled *nolens volens* with the properties mentioned, and had been made to assume a debt upon them of at least $425,000, carrying interest at 6 per cent. payable to vendor-promoters, whose total cash outlay to that date would not exceed, if indeed it approached, $50,000. The plaintiff Company's capital was fixed at $3,000,000, and of this amount the promoter-vendor-directors had helped themselves to $1,320,000 worth, a total for the four properties of $1,745,000. The only possible source of revenue would be dividends on the 4,000 shares in the South Wellington, which was then in the very early stage of development.

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Manifestly, to quote the language of Collins, L.J. in the case last cited, at p. 445:

"the very pith and marrow of the whole adventure is that cash . . . . . shall be subscribed by the public for the benefit of the promoters."

This was all planned before ever the plaintiff Company saw the light of day. The defendant Wishard, to whose skill in procuring capital all these gentlemen bear testimony, brought to Victoria the defendant Michener; the plan of campaign was discussed and settled; and the Wishard-Michener Company was formed to solicit subscriptions from their offices in the City of New York on the other side of the continent. The result was that by the spring of 1910, some $650,000 worth of shares in the plaintiff Company had been sold. Some large buyers were found in New York, and some of these larger holders kept to some extent in touch with the defendants Wishard and Michener. But there was a large number of shareholders, procured by these same gentlemen, scattered all through the United States, whose knowledge of the plaintiff Company's operations would necessarily be very meagre, for a perusal of the minutes of the shareholders' meetings and of directors' meetings discloses that nothing was done to inform shareholders how the Company's business was being carried on. The articles of the Company provided for giving notice to shareholders non-resident in British Columbia by posting up such notice in the Company's office in Victoria. It is hardly to be wondered at that shareholders who were not of the directorate were conspicuously absent at shareholders' meetings.

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The promoter-vendor-directors, then, conducted the business of the plaintiff Company as they saw fit. But a rift developed in the lute. A group of the New York shareholders became dissatisfied. No dividends were forthcoming. What little was made from the sale of coal bought from the South Wellington and the funds paid in by the public were spent in "betterments" or lent to the directors to the tune of $5,000 each—$35,000 in all. In the early part of 1909 the defendant Michener took his place at the board in place of the defendant McGavin, and, later on, in May, 1910, the defendant Kimball was elected a director in place of the defendant Hodgson. The defendant Michener moved to Victoria early in 1909, and

became sales-agent for the Company's coal. The defendant Kimball, practically the only member of the directorate who had paid cash for his shares, lived in New York and did not attend board meetings. Friction, however, developed and an antagonism between what may be called the Victoria group, represented on the board by the defendants Arbuthnot and Savage (for Moran, though a director, did not attend in person), and the New York group, represented by the defendants Wishard, Michener and Kimball. Of the New York group, however, the defendant Michener was the only one on the ground, so to speak, and he could exercise little influence. His investments in the Company were out of commissions on the sale of the Company's stock.

The situation was aggravated by the fact that contemporaneously with the incorporation of the plaintiff Company the original promoter-vendor-directors had entered into an agreement to pool their shares. The defendant Wishard says the idea was to keep control in the promoter-vendors as against the subscribing public; the defendants Arbuthnot and Savage say it was to keep the defendants Wishard and Hodgson from putting their shares on the market in competition with "treasury" shares. I think both are right, but, however this may be, the pooled shares to the extent of $1,137,500 worth had been transferred by the Timber Company to a holding company, incorporated by the defendant Arbuthnot in the Province of Manitoba. This company, the Pacific Securities Company, Ltd., gave its proxy to its president, the defendant Arbuthnot, so that the Victoria group had a firm grip upon the plaintiff Company's helm. The directorate of the South Wellington was practically composed of their nominees. And of the Victoria group the leading spirit was undoubtedly the defendant Arbuthnot. The plaintiff Company still owed him over $300,000, and when there was a falling off, early in 1910, in the receipts from share subscribers he demanded payment from the Company of what was due him. This he says was not intended seriously; he merely wanted to stir up the New Yorkers to further effort to sell the Company's shares. Besides this sword of Damocles, he had practically the absolute control

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of the Company's only source of supply—the South Wellington —for the Suquash properties were still in the early stages of development. The 3,800 shares in the South Wellington which the plaintiff Company was to get from the defendant Arbuthnot still stood in his name.

At this point the defendant Hodgson comes prominently into the story. He was apparently needy and wished to sell his shares. He was no longer on the directorate. But his shares were safely locked up in the vaults of the Pacific Securities Company in Winnipeg, and so long as that company continued to give its proxy to the defendant Arbuthnot no shareholders' meeting would be of any avail to weaken his control of the plaintiff Company or to bring about a transfer to Hodgson of Hodgson's shares. Hodgson, therefore, on the 28th of June, 1910, launched an action in this Court to break the pool. It is freely charged by the Victoria group that the New York group was behind this Hodgson suit. At all events, if the pool were broken and the shares of the defendants Wishard and Hodgson released so that those two gentlemen could themselves vote their own shares, it might be possible, with the aid of the shareholders who had paid cash for their shares, that is the New York group and the scattered shareholders, to dethrone the Arbuthnot faction and so get control of the plaintiff Company. With this end in view the defendant Wishard began a campaign to get shareholders' proxies.

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The statement of claim in the Hodgson suit was delivered on the 22nd of September, 1910, and was followed by the delivery of particulars on the 11th of October, 1910, and further particulars on the 17th of November. The defendants to that action were the Pacific Securities Company, the Timber Company, the plaintiff Company and the original promoter-vendors of the plaintiff Company, other than the defendant Reynolds who was not a party to the pooling agreement and whose part in the creation of the plaintiff Company was, as already explained, a very minor one. The charges made, particularly against the defendant Arbuthnot, were of the gravest character. The truth of those charges is not in question so far as this branch of the plaintiff Company's claim is concerned; the

material matter here is that very explicit charges were made, fortified by alleged extracts from letters alleged to have been written by the defendant Arbuthnot and by other exhibited documentary evidence. Much of the statement of claim is taken up with allegations of fraud practised on the plaintiff Hodgson by all the defendants to that action in connection with the pooling arrangements, and with those we are not specially concerned. But some of the allegations related to the promotion of the plaintiff Company, to the actions of the defendant Arbuthnot in connection with the formation of the South Wellington Company and the acquisition of the Richardson lease; in all of which matters the shareholders of the plaintiff Company would, of course, be much interested. Putting it as shortly as possible: Hodgson charged that he (Hodgson) had procured the Fiddick lease and option on his own initiative; that the defendant Arbuthnot and one Norman Plass, a mining engineer, became interested; that it was agreed that a company, the South Wellington, should be formed by the defendant Arbuthnot to take over the lease and option; that Plass was to "go east" to sell shares to get working capital; and that in the venture Hodgson was to have the same interest as in the Hodgson stakings, namely, one-fifth. The procurement by the defendant Arbuthnot of the agreement by which the South Wellington acquired the Fiddick property for a consideration payable to Arbuthnot of $10,000 cash or $115,000 in shares, was charged as a fraud upon Hodgson, who only received $10,000 in shares out of the shares which the defendant Arbuthnot had allotted to himself.

Hodgson also charged that from the beginning of this venture into the Nanaimo coal field it was in contemplation to get for the proposed company a lease of the Richardson property, which adjoined the Fiddick property; that to that end he (Hodgson) entered into negotiations with the solicitor for the Richardson Estate, had a pending sale re-opened, and in the end, through Arbuthnot's assistance, procured the Richardson lease; that the $500 paid into Court was moneys procured from Plass, who had busied himself to get $2,000 from his sales of South Wellington stock in response to a telegram from the defendant

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Arbuthnot telling him that he had succeeded in getting the Richardson property and wanted the money to apply on that purchase. If there were any truth in all this story, it might follow that the defendant Arbuthnot was a trustee in the strict sense for the South Wellington in the acquisition of the Fiddick and Richardson properties, and that, therefore, the $350,000 debt to him should be very largely, if not entirely, struck out of the Company's books. If there were a debt at all it should be, in practical effect, to the South Wellington shareholders, of whom the plaintiff Company itself was the largest—a somewhat intricate problem to work out.

This, then, was the situation in the autumn of 1910. Two rival factions faced each other in the board room of the plaintiff Company. The dominant Victoria group was threatened with possible dethronement. The original promoter-vendors, who still were in control, were charged with serious wrong-doing in connection with the formation of the Company. The finances of the Company were in a bad way in this sense, that the operating profits were quite inadequate to meet the Company's financial needs. The debts to the defendant Arbuthnot and the Timber Company (trustees for the defendants Arbuthnot, Savage, McGavin and Wishard) of $350,000 and $75,000, respectively, had been but slightly reduced. The Company owed its bankers over $250,000. Shares in the Company were not sought after. In these circumstances the defendant Savage, secretary-treasurer of the Company, was sent east about Christmas, 1910, to raise money, the idea being to create and sell to the public debentures to an amount sufficient to take up or care for all the existing debts and to provide additional working capital.

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Meanwhile, about the 1st of December, 1910, a suggestion had been made in New York to the defendants Wishard and McGavin, who had met there on other business, that the friction in the plaintiff Company might be removed by one group "selling out" to the other. The idea fell on good soil. The defendant Savage heard of it in Winnipeg or Toronto, and forthwith abandoned his plan for a bond or debenture issue to the public. The defendants Wishard and Kimball authorized

the defendant Hartman, an attorney practising in Seattle, Wash., to act for them in conjunction with the defendant Michener in Victoria in negotiating an agreement along the lines which had been suggested in the east, namely, that the New York group should buy out the Victoria group by giving them, not their own cash or promises, but mortgage debentures of the plaintiff Company for their shares in, and the debts due them by, the Company. An additional amount of debentures was to be issued as collateral security for the debt due the Company's bankers in respect of which the directors of both groups were liable as guarantors. The defendant McGavin came from Winnipeg to Victoria to act as mediator between the defendants Arbuthnot and Savage, on the one side, and the defendants Hartman and Michener, on the other. In the end an agreement was arrived at which calls for rather extended notice; for this reason, particularly, that it is "validated, ratified and confirmed" by the Legislature of this Province, subject only to its approval by 75 per cent. of the plaintiff Company's shareholders, at a meeting called for that purpose. The agreement itself provides that such legislation should be procured in lieu of the usual procedure prescribed by the law as it existed at the time when the agreement was made. All the more reason, therefore, why such a disclosure of the contents of this agreement should have been made to the plaintiff Company's shareholders as would enable them quickly and finally to come to an intelligent conclusion as to the stand they should take in reference to it. To use a popular slang phrase, it was to be a case of "sudden death."

The agreement bears date the 11th of February, 1911. The parties to it are: the defendants Arbuthnot, Savage, McGavin and the Timber Company, of the first part; the defendants Hartman and Michener, of the second part; the plaintiff Company, of the third part; the defendant Hodgson and one Spencer—plaintiffs in what I have called the Hodgson suit—of the fourth part; and the defendant Reynolds, of the fifth part. It recites, *inter alia,* that the debt to the Timber Company of $75,000 in respect of the purchase by the plaintiff Company of the Garesche-Green lands had been reduced to

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$43,000; that the debt to the defendant Arbuthnot of $350,000 in respect of the purchase by the plaintiff Company of the shares in the South Wellington and of the Richardson lease now stood at $312,000; that the debt of the plaintiff Company to its bankers, the Merchants Bank of Canada—the amount not being stated—had been guaranteed by the defendants Arbuthnot, Savage, Moran, Michener, Kimball, Wishard, Hodgson, and Reynolds, and in addition by Mrs. Kimball and Mrs. Wishard; that the Hodgson suit had been brought (stating merely the names of the parties plaintiffs and defendants), and that the statement of claim and particulars thereof had been delivered; that the defendants Hartman and Michener, parties of the second part, represented 6,850 shares of the capital stock of the plaintiff Company, and were also agents of and represented one Locke and one Bogue, shareholders in the plaintiff Company; that the defendant Hartman was also agent of and represented the defendant Wishard, Mrs. Wishard and the defendant Kimball, and entered into the agreement for them; and, finally, that the defendant Reynolds was a shareholder in the plaintiff Company, the extent of his holdings not being stated. The agreement then provides (omitting minor matters):

1. The Hodgson suit was to be dismissed by consent, without costs. 2. The pool was to be broken. The Pacific Securities was to transfer the plaintiff Company's shares held by it to the parties entitled, as follows: To defendant Arbuthnot, 2,275 shares; to defendant Hodgson, 2,250 shares; to Mrs. Wishard, wife of defendant Wishard, 1,895 shares; to defendant McGavin, 1,895 shares; to defendant Savage, 1,896 shares; to defendant Moran, 1,138 shares; to defendant Heisterman, 25 shares—11,374 shares. 3. The plaintiff Company was to create and issue "6 per cent. first mortgage debentures" secured by a trust deed (to be framed as set forth in a schedule) to the extent of $1,500,000 and to deliver them as follows: To defendant Arbuthnot, debentures to cover his entire shareholdings and the $312,000 due him. (It may here be mentioned that this defendant held in his own name 1,051 shares in addition to the 2,275 shares which he was to get out of the pool—

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a total of 3,326 shares, for which he received $333,000 in debentures). To defendants Savage, McGavin, Moran, Reynolds, Heisterman and Rant debentures to cover their respective shareholdings. To defendant Savage (in addition) debentures "to an amount equal to the par value of his shares in the South Wellington." To the Timber Company (trustee, as I have said, for the defendants Arbuthnot, Savage, McGavin and Wishard in equal fourths) debentures for $43,000. To the Merchants Bank of Canada "the balance of the debentures to be created and issued." 4. The assets of the South Wellington were to be transferred to the plaintiff Company, and all the outstanding shares in the South Wellington not already owned by the plaintiff Company were to be got in by the parties of the first part (Arbuthnot *et al.*) and transferred to nominees of the defendants Hartman and Michener. 5. The defendants Arbuthnot, Savage, McGavin and the Timber Company were to hand over or cause to be handed over for cancellation all the shares for which debentures were to be issued; subject to an order being obtained, if necessary, to sanction this reduction of capital. . . . . 8. The capital of the plaintiff Company should be reduced to $2,000,000, a process requiring the cancellation of some 1,436 shares of its unsubscribed capital in addition to the surrendered shares. 9. The necessary meeting or meetings of shareholders should be called to ratify and adopt the agreement in all its terms "and also for the purpose of ratifying and adopting all acts of the Timber Company, John Arbuthnot, Luther D. Wishard, James M. Savage, John C. McGavin, and William J. Moran in and about the promotion, formation and flotation of the Coal Company." And then in the most ample terms of renunciation the plaintiff Company purported to release "on behalf of itself and all its shareholders" the persons named from all liability in respect of such promotion, formation and flotation. 10. All agreed to vote the shares by them respectively owned or represented by proxy, to carry the agreement into effect. 11. The plaintiff Company was to apply to the Provincial Legislature for an Act to authorize the proposed reduction of capital, the cancellation of the shares, the issue of the debentures, the execution of the

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"trust deed," and to validate, ratify and confirm this agreement in all "its terms." 12. The plaintiff Company was to pay off its debt to the bank in $25,000 payments in 6, 12, 18, 24 and 30 months, and the balance in 36 months; and was to keep the interest paid monthly. 13. The debentures delivered to the bank should stand as collateral security for the payment of the indebtedness to the bank, and when the bank was paid those debentures were to be cancelled and not re-issued. . . . . 17. Within one year the plaintiff Company was to commence development work on certain of its properties more recently acquired, so that at the expiration of two years those properties should be so developed and equipped with the necessary plant as to produce an output of at least 500 tons a day. . . . . 22. The plaintiff Company was to carry on its development and mining operations at Suquash in a miner-like manner and should spend thereon at least $1,500 a month until the debentures were paid off. 23. The debentures were to be for $1,000 each, 1,500 in all, and were to be paid in instalments as set out, at the Merchants Bank, Winnipeg. Interest at 6 per cent., payable half yearly. 24. The trust deed was to form a first charge on the plaintiff Company's properties and undertaking. . . . . 27. The defendants Arbuthnot, Savage, Moran and Reynolds were to resign their offices and retire from the directorate of the plaintiff Company when the defendants should be duly delivered.

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The Provincial Legislature was then in session at Victoria, and on the 14th of February, 1911, three days after the agreement was signed, a petition was presented praying that an Act should be passed as indicated in the agreement; and on the 1st of March, 1911, the Act became law. Those who had the matter in hand were evidently quite sure that the plaintiff Company's petition would find favour in the eyes of Parliament; for on the 20th of February, 1911, notices were sent out from the plaintiff Company's offices calling a meeting of shareholders for the 1st of March, 1911, the shortest notice the articles permitted. The necessity for legislative assistance is not very apparent, unless indeed it was deemed unsafe to delay the drawing of the veil even for the few weeks which

two meetings and an application to the Court would have consumed. But if an Act were to be procured, "then 'twere well it were done quickly," for the Assembly was about ready for prorogation.

But, while the conduct of those who procured this Act to be passed, and their proceedings taken, or assumed to be taken, under it may be legitimately criticized, it is not for this or any Court to criticize the legislation itself. If an Act of Parliament works injustice, only an Act of Parliament can apply the remedy. As Lord Chief Justice Holt said more than 200 years ago:

"An Act of Parliament can do no wrong, though it may do several things that look pretty odd":

The City of London v. *Wood* (1701), 12 Mod. 669 at p. 687. Jurisdiction conceded—and no question of legislative competence is here raised—the will of the Legislature is omnipotent.

"It cannot be too strongly put that with the wisdom or expediency or policy of an Act, lawfully passed, no Court has a word to say":

per Earl Loreburn, L.C. in *Attorney-General for Ontario* v. *Attorney-General for Canada* (1912), A.C. 571 at p. 583. Nor can the Court listen to a suggestion that Parliament has been misled or has acted under sinister influence or from improper motives: see judgment of Duff, J. in *In re Companies* (1913), 48 S.C.R. 331 at p. 423; *Lee* v. *Bude and Torrington Junction Ry. Co.* (1871), 40 L.J., C.P. 285, *per* Willes, J. My duty is plain and simple, to give effect to this Act according to its tenor.

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The agreement above set out embodies one scheme, worked out by means of many interlocking provisions, which cannot, in my opinion, be treated as severable. The Act stands in the same position; its tenor being that if 75 per cent. of the shareholders adopt the agreement, that is to say, the whole agreement, at a meeting called for that purpose, then that agreement is to stand legislatively validated, including all that is involved in it; not merely the reduction of capital and the debenture issue, but the curtain of oblivion upon the past and the fulfilment by the plaintiff Company of the onerous terms of the agreement and trust deed for the future.

It was not, and I think could not be, contended that the shareholders' meeting contemplated by the statute could be

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called in any other way than by a notice to all the shareholders —in terms of the Company's articles—"specifying in case of special business the general nature of such business." What this involves has been considered in several cases: *e.g., Kaye* v. *Croydon Tramways Co.* (1898), 67 L.J., Ch. 222; *Tiessen* v. *Henderson* (1899), 68 L.J., Ch. 353; *Normandy* v. *Ind, Coope & Co.* (1907), 77 L.J., Ch. 82; *Baillie* v. *Oriental Telephone and Electric Company, Limited* (1914), 84 L.J., Ch. 409; (1915), 1 Ch. 503. These cases, I think, affirm that each shareholder is entitled to a notice which in itself will put him in possession of all he ought to know in order to come to an intelligent decision as to what attitude he should take upon the questions involved in such special business. Constructive notice by reference to a document by its date and a bare recital of the parties to it is, I think, clearly insufficient. What Lindley, M.R. said in the *Olympia* case, *supra,* at p. 441, of a company's prospectus is, to my mind, equally applicable to a notice of a special meeting of shareholders:

> "Refined equitable doctrines of constructive notice have little, if any, application to such matters as are now being dealt with. To inform a person of a fact is one thing; to give him the means of finding it out, if he will take trouble enough, is another thing."

And in the same case (p. 448) Collins, L.J. quotes the emphatic language of Lord Watson in *Aaron's Reefs* v. *Twiss* (1896), A.C. 273; 65 L.J., P.C. 54, that a plea that a general reference to contracts is notice of their contents is "one of the most audacious pleas that ever was put forward."

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If the notice sent out by the directors is "tricky" or intentionally misleading, so much the worse; but it seems clear that deliberate wrongdoing is not at all an essential element. If the notice does not specify the general nature of the special business to be brought before the meeting it is not the notice required by law, no matter how unintentional the failure to so specify may be on the part of the directors. As put in the *Oriental Telephone Co.* case, *supra,* a "satisfactory" notice is necessary, giving, with reasonably sufficient fullness, the facts which the shareholder should know if he is to come to an intelligent judgment upon what is proposed. What is a reasonably full statement or specification of the business to be transacted

is a question to be decided on the facts of each particular case as it arises. The circumstances here called, in my opinion, for much explanation.

This was the notice sent out:

"NOTICE IS HEREBY GIVEN that an extraordinary general meeting of the shareholders of the Company will be held at the registered office of the Company on Wednesday the 1st day of March, 1911, at the hour of 3.30 o'clock in the afternoon, when the resolutions following will be proposed:

"1. ON MOTION BE IT RESOLVED that the Company hereby ratifies and adopts that certain agreement produced to this meeting, dated the 11th day of February, 1911 (which said agreement is filed with the Registrar of Joint-Stock Companies at Victoria, B.C.), and made between John Arbuthnot, James M. Savage, John C. McGavin, and the Vancouver Island Timber Company, Limited, of the first part, and John P. Hartman, and Charles Cook Michener, of the second part, and the Pacific Coast Coal Mines, Limited (Non-Personal Liability), of the third part, and Ephraim Hodgson and David Spencer, of the fourth part, and Samuel Henry Reynolds, of the fifth part, and BE IT FURTHER RESOLVED that the directors of the Company be and they are hereby authorized on behalf of the Company to carry the said agreement into effect and to affix the Company's seal to all such necessary documents and instruments as may be necessary so to do.

"AND BE IT FURTHER RESOLVED that the directors of the Company be authorized and empowered to do and execute on behalf of the Company all things, documents and instruments the Company is authorized or empowered to do and execute under or by virtue of the Pacific Coast Coal Mines, Limited (Non-Personal Liability), Debenture Act, 1911.

"2. ON MOTION BE IT RESOLVED that the Company create an issue of debentures to the extent of $1,500,000 of $1,000 each and numbered 1 to 1,500 inclusive and that the same be secured by the execution of a trust deed, the said debentures and trust deed to be in the form submitted to this meeting.

"AND BE IT FURTHER RESOLVED that the seal of the Company be affixed to the said debentures and trust deed and that the directors issue such debentures to the persons and corporations mentioned in clause 2 of said trust deed in the manner therein mentioned.

"3. ON MOTION BE IT RESOLVED that the capital of the Company be reduced from $3,000,000 to $2,000,000 and that such reduction be effected by cancelling the 8,564 shares in its capital surrendered or transferred to it by the persons or companies following, namely: John Arbuthnot, James M. Savage, John C. McGavin, William J. Moran, Samuel Henry Reynolds, Henry G. S. Heisterman and Evelyn I. O. Rant, and by cancelling 1,436 shares of its unsubscribed capital.

"Dated this 20th day of February, 1911.

"By order,

"J. M. SAVAGE,

"[SEAL.] "Secretary."

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Applying the above principles, consider what was involved in the agreement which the shareholders were to be asked to adopt and then look at the notice. The carrying out of the agreement involved: (1) a complete revolution in the administration of the Company's affairs; the abdication, forced or voluntary, of the Arbuthnot dynasty, and the handing over of the reins of power to a body of men in whose business ability to manage the Company the retiring directors frankly say they had no confidence. The appointment of directors lies, normally, with the shareholders in general meeting; the directors can fill up "casual" vacancies only. This agreement involved a complete not a casual alteration in the directorate; as already remarked, a complete revolution. What is there in the notice to indicate this to a shareholder outside the narrow circle of those who negotiated this change of government? I think I am not unfair in saying scarcely a hint. The agreement further involved (2) complete statutory oblivion for the past for the promoter-vendor-directors. And there is not a word in the notice about the serious charges made in the Hodgson suit; and yet the dismissal of that suit and the "whitewashing" clause were formal and insisted-on terms of the bargain. In this connection it should be pointed out that if the reference in the notice to the agreement which the shareholders were to be asked to adopt were to be held constructive notice of its contents, a rule of constructive notice upon constructive notice would have to be applied here, because the agreement itself discloses nothing as to the nature of the Hodgson suit, and the inquisitive shareholder reading the agreement would find himself referred to the Court records. And a perusal of the agreement discloses many other references to other documents which would have to be looked up if reasonably full information were sought as to what all this meant to the Company and its shareholders. (3) The agreement involved a radical departure from the law regarding the reduction of capital. Two meetings, followed by an application to the Court for a confirmatory order, was the normal procedure. It was part and parcel of the agreement, of which the reduction of capital was one item only, that legislative aid should be sought. And the

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only knowledge of this proposed closure which a shareholder would get from the notice of the meeting would be that conveyed by a casual reference—by its proposed title—to an Act of Parliament which was non-existent when the notices were sent out, and which, in fact, became law just about the hour the meeting was held. The directors, I imagine, would have had difficulty in explaining to a shareholder not behind the scenes the necessity for such unseemly haste; and yet it seems to me that some explanation of this extraordinary feature of the bargain was due to each shareholder. (4) Under the agreement the South Wellington Company was to be virtually wound up, its assets taken over by the plaintiff Company, and its outstanding shares, not owned by the plaintiff Company, got in by the retiring directors and transferred to the defendants Hartman and Michener, in trust, presumably, for the plaintiff Company. What this meant to the plaintiff Company and its shareholders I do not pretend to fathom, but on its face it was a radical change, as the Company would acquire the Fiddick lease and option, with all its benefits and burdens, instead of being shareholders merely in a company which owned the property. Not a word about this in the notice calling the shareholders together to sanction this step. (5) That the bargain was one conferring large benefits on all the negotiating parties is clear. Notably, the defendant Arbuthnot was to step out with $645,000 as the earnings in four years upon an investment of a few thousand, and this in spite of the charges made in the Hodgson suit. The incoming board, in view of the emoluments of office, might ignore these charges. It did not follow that the unenlightened shareholders scattered from New York to California would, if told of them, treat them so lightly. But of all this not a hint in the notice. (6) Under the agreement the defendant Savage was to get debentures to cover his share holdings in the South Wellington at par. What these were in amount does not appear in the agreement. It may be worked out arithmetically from the agreement plus the trust deed; but of this peculiar benefit to one of the directors there is no suggestion in the notice calling the shareholders' meeting. (7) Under the agreement the financial arrange-

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ments were rather startling. The defendant Reynolds, for example, was to get $25,000 worth of debentures, as one may discover by reading the trust deed. And the amount due the Merchants Bank, for which they were to get an uncertain "balance" of debentures as collateral security, nowhere appears even in the agreement beyond this, that it was something over $125,000 (5 times $25,000). It was, in fact, quite double that sum. The notice is entirely silent as to this debt. The notice, indeed, gave little or no information as to the plaintiff Company's financial position or as to the distribution to be made of the debentures, over and above the fact that some 857 of them would cover surrendered shares. These totalled $856,400—a "leak" of $600, nowhere explained. What else was covered by the remaining $643,000 could be gleaned only from a careful perusal of the agreement and the trust deed. *Non constat* but that "the persons and corporations mentioned in clause 2 of the trust deed"—I quote from the notice, resolution 2—included some purchaser of debentures whose purchase-money might put the plaintiff Company in funds for carrying on its operations. The Arbuthnot debt ($312,000), the Timber Company debt ($43,000), the bank debt ($250,000 or more) —the notice tells one nothing of these. On all these matters it seems only fair that the shareholders should have been given somewhat full and detailed information as to the actual financial position of the Company. The scheme was, in fact, not going to put a dollar into the empty treasury. A shareholder told this, would naturally ask: "Where is money coming from to run this business? How do you expect the Company to meet the onerous financial obligations with which you, the retiring directors, propose to saddle it?" And the answer would be: "Oh, these new directors, in whose business ability, to tell you the truth, we haven't the least confidence, think they can go into the market and get the money by selling more stock. True there will be a 6 per cent. first mortgage debenture debt of a million and a half against the Company's undertaking and assets; but they think they can manage it. At all events, we'll step out with our interest-bearing debentures and you can take your chances."

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It seems idle to pursue the topic further. The notice given for this shareholders' meeting was, in my opinion, hopelessly unsatisfactory. The plaintiff Company is entitled to a declaration that no meeting was ever held as the Act prescribed. One must regret if those defendants of the New York group who at the time were eager for the scheme but who—as Mr. *Davis* put it in his cross-examination of the defendant Hartman—have since experienced a change of heart, should reap any benefit from the judgment which I must pronounce.

There having been, as I must hold, no meeting held as the Act prescribes, the whole agreement falls to the ground. The debenture issue, depending, as it did, on a reduction of capital which has never been legally accomplished, must be declared void. The giving effect to the agreement, unadopted, was, in my opinion, an *ultra vires* proceeding, which could not be ratified by acquiescence or made unassailable by estoppel. As put by Lord Cozens-Hardy, M.R., in *Baillie* v. *Oriental Telephone and Electric Company, Limited, supra,* at p. 414, it would be "in the teeth of the Act" to say that an ordinary resolution can take the place of a special resolution, where a special resolution is required by law to compass a particular end; a principle which appears to me to apply *a fortiori* in denial of the sufficiency of acquiescence or estoppel to take the place of the required resolution passed by 75 per cent. of this Company's shareholders at a meeting called for that purpose. I take leave, in passing, to doubt that a properly enlightened body of shareholders in this Company would, even in 1911, have adopted this scheme by the required majority. As settled by *Trevor* v. *Whitworth* (1887), 57 L.J., Ch. 28, reduction of capital can be effected only in the mode prescribed by the Companies Act. All the provisions of a company's memorandum of association —as to capital as well as to objects—are unalterable, unless, indeed, power to alter is given by statute; and this in the interest of shareholders and outsiders alike. This, indeed, is what the Companies Act, 1910, of this Province distinctly provides in section 17:

"A company may not alter the conditions contained in its memorandum, except in the cases and in the mode and to the extent for which express provision is made in this Act."

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The private Act of 1911, upon which the defendants rely, must be read in the light of the general Act. As a condition precedent to the acquisition by the plaintiff Company of power to reduce its capital, there must have been the resolution prescribed. And, in my opinion, there has never to this day been such a resolution passed.

Were it not for the phrase "after the 14th day of February, 1911," in section 3 of the Act, I would, as at present advised, have little hesitation in holding that no meeting could be called under the Act until the Act became law—I mean no step to that end could be legally taken, such as sending out notices. But as to the effect of that clause and as to the other matters urged I express no opinion. It would be *obiter,* and I distrust *obiters,* particularly my own. I should, perhaps, say this, that the voting of the proxies at the meeting of March 1st was, to the knowledge of all those behind the scenes, an act of agency of very doubtful honesty in view of the radical change in the position of affairs brought about by the agreement of the 11th of February, 1911, long after most of the proxies had been obtained.

There must, therefore, be judgment declaring that the agreement of the 11th of February, 1911, has never been legally adopted and is not binding upon the plaintiff Company; that all proceedings taken to give it effect were and are as against the plaintiff Company void, and particularly the debenture issue, the trust deed, and the attempted cancellation of shares and reduction of capital. The defendants must deliver up to the plaintiff Company for cancellation, and must repay to the Company all moneys paid on account of, the debentures issued, whether for principal or interest, with interest at 5 per cent. upon all such moneys from the date of payment; and the defendants must indemnify the plaintiff Company from all liability in respect of debentures which for any reason they are unable to deliver up to the plaintiff Company. If necessary there will be a reference to inquire and report as to the dealings of the defendants with the debentures. All this will apply to the Trust Company, which must repay to the plaintiff Company all moneys received from it; but the Trust Company should, I think, be indemnified in that regard by the other

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defendants to whom debentures issued, who should also pay the Trust Company's costs. The working out of details, in case of difference between the parties, can be spoken to on settling the minutes. Subject to what appears later in this judgment, the cancelled shares must be reissued to the proper parties, who, if my judgment be sound, have never ceased to be shareholders.

I now come to the second branch of the plaintiff Company's claim, which is against six of the defendants, namely, Arbuthnot, Savage, McGavin, Moran, Wishard and Hodgson. These gentlemen being still shareholders, as I have held, the plaintiff Company says that a large part of their shareholdings represents a secret or undisclosed profit made by them upon the sale to the plaintiff Company of the Malcolm stakings. All six of these defendants are here concerned. The plaintiff Company makes the same allegation in respect of the Garesche-Green lands, in which, if I am right upon the facts, only four of these six defendants are concerned, namely, Arbuthnot, Savage, McGavin and Wishard. They were to be paid $75,000 for these lands, and on the 11th of February, 1911, had been paid on account some $32,000 (and interest, I presume), leaving due a sum of $43,000, for which they received the debentures which I have held void. That the profit (if any) which the purchase price of these two properties gave these promoter-vendor-directors was undisclosed is clear. All the Company was ever told was the price at which these gentlemen sold to the Company. Assuming that there was such a profit, it is unnecessary to go behind *In re Olympia, Limited* (1898), 67 L.J., Ch. 433 (affirmed in the House of Lords *sub nom., Gluckstein* v. *Barnes* (1900), 69 L.J., Ch. 385) for the proposition that that profit must go to the plaintiff Company. It is true that in that case stress is laid upon the fact that not only was there a secret profit but that there was also a false statement to the public that there was no such secret profit. But the law seems clear that, fraud or no fraud, a secret profit made by a vendor-director cannot be retained by him but must be handed over to the company. Perhaps it should be put this way, that non-disclosure by one filling that dual role, coupled with the inten-

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tion to put into his own pocket the secret profit, is a fraud upon the company and all future allottees of shares in it. As Lindley, M.R. said in the *Olympia* case, *supra,* and Lord Halsbury in the House of Lords says the Master of the Rolls was "absolutely right" in his statement: "One of such duties was not to make a profit of it"—*i.e.,* the company—"without informing it of the fact and giving the company an opportunity of declining to allow such profit to be made at its expense. These duties are imposed by the plainest dictates of common honesty as well as by well-settled principles of company law."

I so far agree with the contention of Mr. *Bodwell* that on the facts here I would hold that the Garesche-Green lands and the Hodgson stakings were not acquired by these gentlemen as trustees for the plaintiff Company. And they became promoters of the plaintiff Company early in 1908, that is to say, they were not promoters when they acquired the properties. In this respect the case differs from *Gluckstein* v. *Barnes.* But this is a question as to vendor-directors and promotion proper may be left out. The real question is what is meant by "profit?" Is it the difference between what the property cost the vendor and the price at which he turns it in to the company? or is it the difference between the value of the property at the time when the vendor assumed the character of promoter-vendor and the price at which as vendor-director he turns it in? A consideration of the facts of this case shews how material the distinction is. The properties were acquired, it is true, as coal lands. The Hodgson agreement of the 19th of February, 1907, and the letter from the defendant Savage to the defendant Wishard of the 28th of February, 1907, make this manifest. But during the year which intervened, prospecting had been active upon the properties, and the diamond drill—so the prospectus states—had pierced two seams of coal (2 and 5 feet, respectively, in thickness), and it is only reasonable to suppose that these properties would be more valuable in a marketable sense than they had been when first acquired. On the other hand, if the actual cost to the vendors up to the time when they became promoter-vendors early in 1908 is the sum to be considered, it was a mere bagatelle as compared with the

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price which the director-vendors saw fit to exact from the Company. The Company got these properties as they stood on the 21st of March, 1908, and if the plaintiff Company's claim is to be treated as one for damages suffered by reason of a breach of duty on the part of these gentlemen (the defendant Reynolds would in that respect be equally liable with the other 6 above named; a joint and several liability as *Gluckstein* v. *Barnes* shews), the damage would clearly be the difference between the actual value of these properties at the date of their acquisition by the Company and the price exacted by the vendor-directors. Is the extent of the remedy to which the plaintiff Company is entitled to be one sum in an action for damages and a different and greater sum if the claim is for illicit profit? I think not. I think the "profit" in the one case and the "damages" in the other are one and the same thing—such sum as will put the plaintiff Company in the position it would have been in if the directors had done their duty. Their duty here was to tell the Company what they had paid for the properties and what there was to justify an advance upon that sum, so that the Company could form an independent and intelligent judgment on the proposed bargain. Here there was failure upon the first point, but not upon the second; for the prospectus does tell something of the boring operations during the year preceding the formation of the plaintiff Company. To put it in another way, the illicit profit—illicit only because not disclosed—was in fact the difference between the value of these properties on the 21st of March, 1908, and the price which the plaintiff Company was made to pay for them.

This leads to the question, were these properties worth the price exacted? The fiduciary position of these defendants as promoter-vendor-directors being clear, the burden rests upon them to establish the affirmative, subject, perhaps, to a *prima facie* case of excessive price being made out where rescission is not and could not be asked. The evidence is conclusive, to my mind, that the price of these properties to the Company was excessive, and was not, in fact, fixed with any honest regard to their values, even after allowing a generous increased value for what the diamond drill had disclosed. In one of its features

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this case has a superficial resemblance to *In re Cape Breton Company* (1885), 54 L.J., Ch. 822 (affirmed in the House of Lords *sub nom. Cavendish-Bentinck* v. *Fenn* (1887), 57 L.J., Ch. 552) in this, that the vendors were amalgamating into one company several properties in which the vendors had different interests. In the *Cape Breton* case there was an amalgamation of three independent companies and an addition to their holdings of the property in which Fenn was interested; and it was a large determining factor in Fenn's favour that the value of the property in which he was interested (his interest, it was alleged, had not been disclosed) had been arrived at by *bona fide* negotiation with three independent parties. In this case the amalgamation was of three concerns owned by (1) the defendant Arbuthnot, owner of the Richardson lease and of 3,800 shares in the South Wellington Company, which owned the Fiddick property; (2) the defendants Arbuthnot, Savage, McGavin and Wishard, who owned (through their trustee, the Timber Company) the Garesche-Green property; and (3) the defendants Arbuthnot, Savage, McGavin, Wishard, Hodgson and Moran, who owned (through the Timber Company also) the Hodgson stakings. There was really a fourth, namely, Reynolds in respect of his 200 shares in the South Wellington; but he does not bulk large in the negotiations. The Richardson and Fiddick properties, in which, practically, Arbuthnot was alone, were in the well known Nanaimo coal field; the other two properties were in a comparatively new and unproved field. One would naturally expect to find that there was some discussion and negotiation to fix values as between the properties in these two fields respectively. There was apparently nothing of the sort. The defendant Arbuthnot fixed his price at $350,000 cash, and that was the end of it. Assuming for the moment that that was a fair price, what is one to think of $1,395,000 for the two Suquash properties? Of course the area at Suquash was very much greater; 20,000 acres as against 480 near Nanaimo; but the latter was looked on as "not a prospect but a working mine" which would pay from the start, while the Suquash properties, even with what the drill had disclosed, were still very speculative, with many months, if not

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years of costly development work ahead before returns could be expected. The impression on my mind at the conclusion of a long trial, confirmed by a careful perusal since of the evidence —not on this point at all voluminous—was this, that if the Suquash properties should fulfil the hopes of those who owned them they would become, in time, very valuable as the result of the expenditure upon them of the moneys to be coaxed from the speculative public; while the properties in the Nanaimo coal field were considered, to again quote the defendant Arbuthnot, "a little gold mine." But however open to criticism this comparison of the two fields may be, a consideration of how the the two Suquash properties were dealt with as between themselves shews clearly, to my mind at all events, that actual values were really not considered.

The Garesche-Green lands, 2,798 acres, were put in at $75,000, a little under $27 per acre. On these I think it was that the diamond drill had been at work, but owing to the loose way in which the term "the Suquash property" was used in the evidence, as already noted, I would not speak too positively. But assuming that the work of the drill had properly caused an evenly spread appreciation in price over the whole 20,000 acres —that is the area given in the prospectus for the whole of the Suquash properties—the 17,202 acres of the Hodgson stakings should have been put in at something less than $465,000. They were put in at nearly three times that figure; at least, they cost the plaintiff Company in issued shares $1,320,000. I am satisfied that the defendant Wishard was quite right when he said that the idea of actual values was not present to the minds of these gentlemen at all when they helped themselves to this large block of stock.

These directors, if they had any regard for the law, could not allot shares in the plaintiff Company for anything but money or money's worth. There is, of course, a well-marked line of cases—*In re Wragg* (1897), 66 L.J., Ch. 419, is perhaps the leading case; see also *In re Innes & Co.* (1903), 72 L.J., Ch. 643—supporting the proposition that although it is *ultra vires* of a company to issue its shares at a discount, in other words, for anything but cash or money's worth, never-

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theless, where a company makes a real bargain for the purchase of property—a bargain negotiated between persons mutually independent and *sui juris*—the Courts will not inquire into the *quantum* of the consideration even when the consideration takes the shape of fully paid up shares in the company. But those cases related to what are called private companies, in which the public was not invited to buy shares; so that the element of fraud as against future allottees of shares was not present. They do not weaken in any way the law as to the promotion of public companies as laid down in *In re Leeds and Hanley Theatres of Varieties, Lim.* (1902), 72 L.J., Ch. 1, and the long line of cases which preceded it, notably *New Sombrero Phosphate Co.* v. *Erlanger* (1878), 48 L.J., Ch. 73; and *Gluckstein* v. *Barnes, supra,* both decided in the House of Lords. It follows that these vendor-directors, when they told the public that the plaintiff Company had purchased these properties at $1,395,000, must be taken to have said in so many words that they were then worth the money—to my mind, a palpable untruth. Nothing but the Midas touch could have worked such a miracle as the enormous increase in value in one short year which those figures would represent. Seventy-five thousand dollars for the Garesche-Green lands might possibly be justified; but one's common sense revolts at the price put upon the Hodgson stakings.

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On this branch of the plaintiff's claim, therefore, there must be a declaration that the six defendants I have named ought not to get from the plaintiff Company a larger number of shares than would cover at par the actual value on the 21st of March, 1908, of the Garesche-Green lands and the Malcolm stakings; and there will be a reference to ascertain that value. It would be well, I think, to include in this reference an inquiry as to the moneys actually expended in the acquisition and prospecting of these properties down to the date named, because in the absence of other evidence on the part of the defendants that might be taken as the value of these properties when turned in to the plaintiff Company. There may be a difficulty here as to the defendants Wishard and Hodgson, as they are no longer shareholders in the plaintiff Company. If they cannot

return the excess which may appear in their case, as to either or both of these two properties, there must be judgment against all seven promoter-vendor-directors for the amount of such excess. The reference may include all necessary inquiries on this head. As to the other four (the defendants Arbuthnot, Savage, McGavin and Moran) the position, fortunately, is such that complete justice can be done by simply lessening their shareholdings in accordance with the result of the reference. They must be restrained, however, from all dealings with their shares until after judgment is pronounced upon further consideration after the registrar has made his report.

It is, perhaps, arguable that the allotment of these shares should stand and the defendants left liable for calls in respect of the balances unpaid after crediting whatever may be found to be the value of these properties in March, 1908. It was not, however, pressed in this way, and *In re Western of Canada Oil, &c., Co.* (1875), 45 L.J., Ch. 5, and *In re Innes & Co., supra,* seem opposed to the view suggested. On this point the case can be spoken to on settling the minutes if either side desire it.

I should not, however, pass over without notice the argument of Mr. *Bodwell* that the defendants are protected on this branch of the case by the plaintiff Company's articles, No. 2a, set out in the statement of defence. The answer I think I should give is that of Sargant, J. in *Omnium Electric Palaces, Limited* v. *Baines* (1913), 82 L.J., Ch. 519 at pp. 526-7; affirmed in the Court of Appeal, 83 L.J., Ch. 372: CLEMENT, J.

> "Promoters cannot get over the general equitable obligations recognized and enforced in *New Sombrero Phosphate Co.* v. *Erlanger* (1878), 48 L.J., Ch. 73 by any astuteness in the drafting of the regulations which they prepare for their company."

In *Gluckstein* v. *Barnes, supra,* the argument was treated with very scant ceremony. Nor, in my opinion, does the Act of 1909 relied on help these defendants. It simply provided that the Company's articles, etc., should apply to the new business which the Company was by the Act empowered to add to its "objects"—*quantum valeant* merely, in my opinion.

The third branch of the plaintiff Company's claim is a mere off-shoot of the second. It relates to a block of 1,050 shares, part of the 13,200 shares which were allotted to the six defend-

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ants interested in the Malcolm stakings. If I am right in the judgment I have pronounced as to the total issue, it makes very little difference to the plaintiff Company what the defendants may choose to do with the shares to which, upon further directions, they may be found entitled, as those shares will represent actual money's worth received by the plaintiff Company. What they should do is a matter which would rest upon moral, or immoral obligation, not upon legal right. At the same time I am quite satisfied that this block of shares was taken from the Company's treasury and was not made up, after the shares had been allotted to the vendors, by "passing round the hat" to make up a purse for an old friend of the defendant Arbuthnot. These 1,050 shares were in one sense and in one sense only contributed by the vendor-directors in proportion to their holdings; namely, in this sense, that as they were then the only holders of shares in this Company any further allotment would effect a proportionate reduction in their interest in the Company's capital. And, in an unguarded moment perhaps, the defendant Arbuthnot speaks of these shares as "contributed by the Company to give to Dr. Young." I do not for a moment believe that I have heard the whole truth about this unsavoury transaction. Wishard, I think, came nearer to telling the truth about it than any of the others, but his assumption of ignorance as to what was meant by a "political" fund did not strike me as sincere and honest. As to the others, their story did not commend itself to my judgment as a credible account of this transaction. The motive alleged was, when the extent of the gift is considered, altogether too weak to inspire belief in any but the most credulous. In any case, therefore, these 1,050 should be declared to have been wrongfully abstracted from the Company's treasury, and should in no event be reissued to the defendant Arbuthnot.

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The fourth branch of the plaintiff Company's claim relates to the properties turned in by the defendants Arbuthnot and Reynolds upon the formation of the plaintiff Company, namely, by the defendant Arbuthnot, the Richardson lease and the 3,800 shares in the South Wellington for a money consideration of $350,000; and by the defendant Reynolds, 200 shares in the

South Wellington, for which he received 250 shares in the plaintiff Company.

As to this last-mentioned transaction, I have already pointed out that if the shares of both companies are taken as worth par the defendant Reynolds got $25,000 for $5,000. It is a curious criticism of this transaction that on the 6th of July, 1908—less than four months later—the Company bought 400 shares in the South Wellington for $10,000, *i.e.*, at par. Later on, some shares were exchanged, share for share—nominally $40 for $100—while finally under the agreement of March, 1911, the defendant Savage was content to sell his South Wellington shares at par for debentures.

For reasons already stated, I think the plaintiff Company has made out a case entitling it to a declaration that the defendant Arbuthnot should be paid for those properties their actual worth on the 21st of March, 1908, with interest at 6 per cent., less such sums as have been paid him on account, and to a reference to determine these matters. With regard to the suggestion that the Fiddick lease was acquired by the defendant Arbuthnot in the character of trustee or agent for the South Wellington, and the further charge that the Richardson lease was paid for with moneys of that company, I have come to the conclusion that on this record no relief can be given the plaintiff Company for the simple reason that no such relief is claimed by, nor are there appropriate allegations of fact in, the pleadings. The defendant Arbuthnot cannot be fairly said to have been called on to meet such a case; as, for instance, by producing Hodgson and Plass as witnesses. The oral evidence bearing on it is scanty and is confined to what was brought out on the cross-examination of the defendant Arbuthnot and his bookkeeper, Cathels. The books of the South Wellington Company, kept under the instructions of the defendant Arbuthnot, and the correspondence with Plass, go far to substantiate the charges made. For example, the defendant Arbuthnot credits himself in the South Wellington books with $10,000 as of the 30th of September, 1907, the day on which the lease was procured by Hodgson, or at least in his name—an entry which, unexplained, looks like a direct admission of agency. And as to the Richard-

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son lease, the letters to Plass are so conclusive that if the claim now suggested had been squarely put forward on the pleadings, I would feel bound to say that the Richardson lease was clearly an asset of the South Wellington on the 21st of March, 1908. But for the reasons already stated, I do not think I should make any pronouncement on these matters. They are not before the Court on this record, and the judgment will be without prejudice to any action the plaintiff Company may see fit to take in the premises. The reference, therefore, must proceed upon the basis of Arbuthnot's ownership of the Richardson lease and of the 3,800 shares in the South Wellington, and the inquiry, both as to those shares and the 200 shares held by the defendant Reynolds, will be as to their worth on the 21st of March, 1908. The inquiry will, necessarily, include the matter of the division of the $350,000 as between the lease and the shares.

The plaintiff Company is entitled to its costs of this action up to and inclusive of this judgment. The costs of the Trust Company, both its own and any it may have to pay the plaintiff Company, must be paid by the other defendants. To put it shortly, the trustees for the debenture holders are entitled to complete indemnity at the hands of the *cestui que trust.* Further directions and the question of subsequent costs reserved until after the registrar has reported.

Sixty days stay, except, of course, as to settling and entering judgment, to permit appeal.

Since writing the above, the report has reached me of the decision of the Court of Appeal in *In re Bankers Trust and Barnsley* (1915), 21 B.C. 130. What is said there, particularly by MARTIN, J.A. at pp. 136-7, strongly supports the view I have taken on the first branch of the plaintiff Company's claim, namely, that *absente* the resolution of 75 per cent. of the shareholders passed at a meeting properly called for that purpose the reduction of capital was a proceeding quite *ultra vires.*

From this decision the defendants appealed. The appeal was argued at Vancouver on the 14th to the 26th of April, 1916, before MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

Bodwell, K.C., for appellants: There are two branches to the argument, the first dealing with the evidence and the findings of the learned trial judge, and the second which relates more particularly to the Act and the calling and holding of the shareholders' meeting for the purpose of ratifying the agreement of the 11th of February, 1911. I intend dealing with the first branch only. The trial judge acquitted the Victoria group of any suggestions of fraud, but as they were at the same time both promoters and directors they are not at liberty to have any profit under the agreement referred to, but that, however, would be of no account if the meeting was held and the agreement ratified under the Act. He found, however, that the meeting was not so held and that the whole proceedings at the meeting were a nullity, and that the Victoria group have, therefore, to account to the Company for the difference between what may be found to be the value of the property and the price they obtained for it. If the meeting were declared regular, the whole transaction would be sustained by virtue of the Act. I contend the agreement to which I have referred does not require ratification, as everything arranged for in the agreement was quite within the powers of the Company to deal with. The debentures which were issued the directors had power to issue under clause 44 of the articles of association of the Company. The debentures were issued by the directors and were regularly issued; the only question to consider is consideration for the debentures, that is, the surrender of the shares of the Victoria group, and on this point I would refer to *British and American Trustee and Finance Corporation* v. *Couper* (1894), A.C. 399 at pp. 406 to 415; *Poole* v. *National Bank of China, Limited* (1907), A.C. 229 at pp. 238-9; *In re Samuel Allsopp and Sons (Limited)* (1903), 19 T.L.R. 637; it being laid down that when that which is done is a matter of domestic concern within the Company, and that if it is the wish of the majority of the shareholders, the Court will always confirm it. The whole transaction was carried out, the shares were surrendered and the register had been corrected. For about five years the Company have acted on the agreement, they have paid the interest on the debentures and have secured important conces-

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sions from the trustees, and now after all this time has elapsed, they suggest the debentures are not valid because the Company has failed to comply with the formalities to have the capital stock reduced. They are endeavouring to repudiate its obligations on a plea that a formality which they themselves could remedy never has been remedied. In a case of an executed agreement a Company cannot take that position. It falls precisely within the principle laid down in *Bernardin* v. *The Municipality of North Dufferin* (1891), 19 S.C.R. 581. In *The Waterous Engine Works Company* v. *The Corporation of the Town of Palmerston* (1892), 21 S.C.R. 556 at p. 561 the contract was executory. The learned trial judge ordered that the original owners, who were directors, should account to the Company for the profits on the first transaction when the Company was formed. In coming to this conclusion he completely misunderstood and misapplied the authorities. An owner has a perfect right to promote a company to buy his own property, but he must not be guilty of misrepresentation and he must not be guilty of fraud. On this position he referred to *In re Olympia, Limited* (1898), 2 Ch. 153, and on appeal *sub nom. Gluckstein* v. *Barnes* (1900), A.C. 240, but in this case there was misrepresentation and the transaction was found to be fraudulent in both Courts, following the cases of *Hichens* v. *Congreve* (1831), 4 Sim. 420 and *In re Leeds and Hanley Theatres of Varieties, Limited* (1902), 2 Ch. 809 at p. 813, in which the decisions were founded on fraudulent misrepresentation. In the absence of fraud, it is lawful for a man to promote a company to purchase his own property and to sell it at his own price: see *Gover's Case* (1875), 1 Ch. D. 182. Where the owner who sells to the company is a director in the company and the board of directors are his nominees, his only duty is to disclose the fact that he is the vendor of the property and he has no other duty: see *New Sombrero Phosphate Company* v. *Erlanger* (1877), 5 Ch. D. 73, and on appeal (1878), 3 App. Cas. 1218; *Ladywell Mining Company* v. *Brookes* (1887), 35 Ch. D. 400 at pp. 407-11; *In re Cape Breton Company* (1885), 29 Ch. D. 795 at p. 803; *Burland* v. *Earle* (1902), A.C. 83 at pp. 98-9. All these cases turn on the point of non-disclosure

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by a director that he was the owner of the property sold to his company. The evidence is conclusive and determined in our favour that in acquiring the properties we were not trustees, and, therefore, in selling to the Company we are simply vendors. As to when one is a trustee and when not see *Omnium Electric Palaces, Limited* v. *Baines* (1914), 1 Ch. 332 at p. 347.

Davis, K.C., on the same side: My argument will be confined to the effect of the Act of the 1st of March, 1911. My position is that the effect of the Act is to make the acts done at the meeting of the 1st of March, 1911 (*i.e.*, the issuing and turning over of the debentures, the reduction of the capital and the adoption of the agreement of the 11th of February, 1911), perfectly within the competency of the Company. There are three points to my argument: (1) that the Act was complied with in every respect; (2) even if it were not complied with, the only result would be that what was done was irregular and not *ultra vires,* and that being irregular only, could be ratified; and (3) that they were ratified, the Company being estopped by reason of its various acts, subsequent acts, from disputing its validity. The learned trial judge found that what was done at the meeting was *ultra vires.* I submit he has gone entirely astray on the question of *ultra vires.* If the power exists in the Company, either by the articles of association, the Companies Act or by a private Act to do what they did at the meeting, there is no authority that would support the contention that what was done was *ultra vires* because an improper or insufficient notice was sent out: see *Oakes* v. *Turquand and Harding* (1867), L.R. 2 H.L. 325; *Adams and Burns* v. *Bank of Montreal* (1899), 8 B.C. 314; and on appeal (1901), 32 S.C.R. 719; *Baillie* v. *Oriental Telephone and Electric Company, Limited* (1915), 1 Ch. 503 at p. 515. Where you have an act done which is within the powers of the Company, or which they could have done had they done it properly, once you establish that fact then the act can be ratified. It is not an *ultra vires* act and you then come within all the authorities and all the principles of law with reference to acquiescence, estoppel and ratification. In the case of *Northern Crown Bank* v. *Great West Lumber Co.* (1914), 6 W.W.R. 528 at p. 536,

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it was held that it did not prevent a ratification of an act which was not authorized in the proper way, *i.e.*, where the proper resolution had not been passed. From the facts before the Court, it is clear that the ratifying of the agreement, the reduction of the capital stock and the issue of the debentures are what the Company wanted to do, and are the real acts of the Company, and assuming they did not get 75 per cent. of the shareholders at one time, and it is clear that at the time the act was done they could have got the 75 per cent., then the particular act having been ratified, the agreement that was passed having been acted on, the debentures having been sold, the shares having been delivered, everybody having changed his position by virtue of it, and everyone knowing of it, then I say this objection cannot be raised after the Company has been operated on the strength of the agreement for nearly five years. They purported to act at a shareholders' meeting; and it may be that as a matter of law they were not proper directors at all, but the Company would be bound by what they did when they acted on it: see *Purdom* v. *Ontario Loan and Debenture Co.* (1892), 22 Ont. 597; *Ritchie* v. *Vermillion Mining Co.* (1901), 1 O.L.R. 654. The same principle is laid down in *Burland* v. *Earle* (1902), A.C. 83 at p. 93, that if the act is one within the powers of the Company, then so long as the proper majority was there, or even if the act was done irregularly, the Court will not interfere to set it aside: see also *MacDougall* v. *Gardiner* (1875), 1 Ch. D. 13 at p. 25; *Browne* v. *La Trinidad* (1887), 37 Ch. D. 1 at p. 17; *Southern Counties Deposit Bank* v. *Rider and Kirkwood* (1895), 73 L.T. 374; *Mason* v. *Harris* (1879), 11 Ch. D. 97 at p. 107; *Irvine* v. *Union Bank of Australia* (1877), 2 App. Cas. 366 at p. 374; Palmer's Company Precedents, 11th Ed., Part I., p. 42; *Burkinshaw* v. *Nicolls* (1878), 3 App. Cas. 1004 at p. 1007 *et seq.*; *Agar* v. *Athenæum Life Assurance Society* (1858), 27 L.J., C.P. 95; *Phosphate of Lime Co.* v. *Green* (1871), L.R. 7 C.P. 43; *Dominion Cotton Mills Company Limited* v. *Amyot* (1912), A.C. 546 at p. 553. The second point I desire to take up is that in fact they ratified these transactions at subsequent meetings and in other ways, and the

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Company is therefore estopped from claiming that the resolutions were irregularly passed. The coming into force of the provisions under the Act was subject to a resolution of 75 per cent. of the shareholders of the Company present personally or by proxy, in fact, 96 per cent. of the shares were represented at the meeting, and we say the evidence shews slightly over 75 per cent. of the shareholders themselves were represented, but my contention is that the Act applies to the number of shares represented and not to the individuals. The wording is open to two meanings, and in that case the reasonable interpretation must be put on the statute. At four meetings of shareholders held subsequently (the last being in April, 1913), the acts of the Company at the meeting of the 1st of March, 1911, were ratified. There is, I contend, estoppel in fact, as the parties cannot now be restored to their original position: see Palmer's Company Precedents, 11th Ed., Part I., p. 42. On the question of all the shareholders having notice of the meeting, those who are outside the jurisdiction are not entitled to notice unless the articles expressly provide for it: see Palmer's Company Precedents, 11th Ed., Part I., p. 779; *Windsor* v. *Windsor* (1912), 17 B.C. 105. Now as to whether the notice of the special meeting of the 1st of March, 1911, was good, the notice refers substantially to the very resolutions passed, and states the agreement to be ratified was filed with the registrar of Joint-stock Companies at Victoria, where, if necessary, it could be inspected. I submit the notice is sufficient and complies with the rules laid down: see *Normandy* v. *Ind, Coope & Co., Limited* (1908), 1 Ch. 84 at pp. 96 and 101-2; *Kaye* v. *Croydon Tramways Company* (1898), 1 Ch. 358 at p. 369; *Baillie* v. *Oriental Telephone and Electric Company, Limited* (1915), 1 Ch. 503 at p. 515. You cannot lay down any general rule as to what is a good notice, each case must be considered by itself. If there is anything tricky or misleading it will not be sufficient.

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Harold B. Robertson, for Trust Company: There are two points to consider with reference to the Trust Company. First, the Company did not become interested until after the meeting of the 1st of March, 1911, as trustee pursuant to the debenture

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trust deed, and had no connection whatever with what took place prior to that date. Certain individuals are innocent purchasers for value of these debentures, Messrs. McGavin and Moran being two of them, and there are others. They had no knowledge of the alleged irregularities. Secondly, the order directs costs against us, and that we have to deliver up the trust deed to be cancelled. It also directs that we return all moneys which have been paid on account of the trust deed. Even if the deed be set aside, if the trustee has acted properly he is entitled to his costs before handing over the debentures: see *Merry* v. *Pownall* (1898), 1 Ch. 306; *Ideal Bedding Company, Limited* v. *Holland* (1907), 2 Ch. 157. The trustee is given relief when the document is declared void: see *Everitt* v. *Everitt* (1870), L.R. 10 Eq. 405; *Hughes* v. *Rees* (1884), 10 Pr. 301. We are entitled to our costs.

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O'Neill, for appellant Dr. Young: Dr. Young was brought in as a party after the trial had been in progress for some time. He did not plead as he was not served with a statement of claim. He gave his evidence as to how he received the 1,050 shares in the Company. Wishard is the only one who says he received them for political purposes, and his evidence is vague on the point, whereas three witnesses deny it positively. Dr. Young was not a member of the Government when he received them. The learned judge was wrong in holding the purchase price was swelled by the number of shares he received.

W. J. Taylor, K.C., for respondent: As to the pleadings, fraud was charged and Dr. Young was dealt with also, a motion to amend was made, and the learned judge said we would be allowed to amend in any way necessary to meet the case after the evidence was in.

[MACDONALD, C.J.A.: I have remarked upon that way of proceeding at a trial before, and I wish to remark upon it again. If parties wish to amend their pleadings, they ought to submit their amendment and the matter ought to be settled there and then, not left in this loose way to be dealt with at some future time during the trial, or on appeal. The pleading is not a matter to be left open in that slipshod manner. We have had a great deal of trouble in this Court because of this

kind of practice, and it has been pointed out more than once that there ought to be reform in this respect, and that solicitors ought to pay attention to it. The formal amendment at that time should have been handed up and filed, and any amendment to meet it should have been formally drawn and filed.]

The directors are the trustees of the Company's assets, and when two sets of directors come together and enter an agreement such as that of the 11th of February, 1911, whether it was due to the pressure brought to bear by the Victoria group or the desire of the New York group to have control for their own benefit, it makes no difference which side yields to the other if they thereby complete an arrangement which was prejudicial to the interests of the Company and beneficial to the interests of the directors. The facts are that the arrangement was one that the Company, owing to its financial position, could not carry out successfully. If a director misappropriated funds or did any act *ultra vires* of the directors he could be released only by the assent of all the shareholders: see *Menier* v. *Hooper's Telegraph Works* (1874), 9 Chy. App. 350. If then the agreement in question were not within the powers of the directors, it could not be ratified at a meeting from which some of the shareholders were absent. The act of the Company as to the reduction of the capital at the meeting of the 1st of March, 1911, was an *ultra vires* act; with the sanction of the Court a reduction of the capital may be made, but the Court is the deciding factor: see *Trevor* v. *Whitworth* (1887), 12 App. Cas. 409; *Poole* v. *National Bank of China, Limited* (1907), A.C. 229; *British and American Trustee and Finance Corporation* v. *Couper* (1894), A.C. 399; *Davis & Sons* v. *Taff Vale Railway Co.* (1895), A.C. 542. There are three grounds on which we say they did not comply with the special Act; (1) they did not give a proper notice of the meeting at which they were to ratify the matters set out in the Act; (2) they required 75 per cent. of the shareholders present at the meetings as distinct from the shares, and the required number was not there; and (3) the meeting was held too soon. As to the notice, it was given before the Act was passed. I say the notice must be given after the Company had power to do

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what the notice set out as the business of the meeting. In any case the notice was defective as it did not set out in sufficient detail the purposes for which the special meeting was called: see *Normandy* v. *Ind, Coope & Co., Limited* (1908), 1 Ch. 84 at p. 101; *Kaye* v. *Croydon Tramways Company* (1898), 1 Ch. 358; *Baillie* v. *Oriental Telephone and Electric Company, Limited* (1915), 1 Ch. 503; *Tiessen* v. *Henderson* (1899), 1 Ch. 861. The proxies can only vote on a poll: see *Ernest* v. *Loma Gold Mines, Limited* (1896), 2 Ch. 572, approved on appeal in (1897), 1 Ch. 1; *Young* v. *South African and Australian Exploration and Development Syndicate* (1896), 2 Ch. 273. If the shareholders could not have entered into the agreement the way they did, there cannot be any ratification of it afterwards: see *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875), L.R. 7 H.L. 653 at p. 672; *Spackman* v. *Evans* (1868), L.R. 3 H.L. 171 at p. 230; *La Banque Jacques-Cartier* v. *La Banque d'Epargne de la Cite et du District de Montreal* (1887), 13 App. Cas. 111; *Imperial Bank of China, India, and Japan* v. *Bank of Hindustan, China, and Japan* (1868), L.R. 6 Eq. 91; *Houldsworth* v. *Evans* (1868), L.R. 3 H.L. 263; *Stewart's Case* (1866), 1 Chy. App. 511; *Joint Stock Discount Co.* v. *Brown* (1869), L.R. 8 Eq. 381. On the question of bringing the action at this stage the cases of *Erlanger* v. *New Sombrero Phosphate Company* (1878), 3 App. Cas. 1218 at pp. 1261 and 1282; and *Archbold* v. *Scully* (1861), 9 H.L. Cas. 360 are authority for the proposition that laches are no bar until the period prescribed by the Statute of Limitations has expired. As to a transaction arising out of a mistake by all parties see *Downes* v. *Bullock* (1858), 25 Beav. 54. As to the change in the condition of the Company so that the parties cannot be put back in their original position see *Parker* v. *McKenna* (1874), 10 Chy. App. 96. On the question of reduction of capital see *Bellerby* v. *Rowland & Marwood's Steamship Company, Limited* (1902), 2 Ch. 14; *In re Cameron's Coalbrook, &c., Railway Company, Ex parte Bennett* (1854), 18 Beav. 339, affirmed on appeal 24 L.J., Ch. 130; and on the question of the surrender and purchase of shares see *The Vale of Neath* (1849), 1 Mac. & G. 225. As to the

statement that *Trevor* v. *Whitworth* (1887), 12 App. Cas. 409 was overruled by *Poole* v. *National Bank of China, Limited* (1907), A.C. 229, there is authority that the House of Lords cannot overrule itself: see *London Street Tramways Company* v. *London County Council* (1898), A.C. 375. As to the principles which should govern directors in their actions and in the discharge of their duties to the Company see *Transvaal Lands Company* v. *New Belgium (Transvaal) Land and Development Company* (1914), 2 Ch. 488 at pp. 594-6; *Omnium Electric Palaces, Limited* v. *Baines* (1914), 1 Ch. 332 at p. 347; *Gluckstein* v. *Barnes* (1900), A.C. 240; *Denman* v. *Clover Bar Coal Co.* (1913), 48 S.C.R. 318; *Cook* v. *Deeks* (1915), 33 O.L.R. 209, reversed by the Privy Council (1916), 1 A.C. 554; *Re Bankers Trust and Barnsley* (1915), 21 B.C. 130; *In re Olympia, Limited* (1898), 2 Ch. 153; *Bank of Hindustan* v. *Alison* (1870), L.R. 6 C.P. 54, affirmed (1871), *ib.* 222. On the question of the validity of the transaction and as to waiver see *Chapman* v. *Michaelson* (1908), 2 Ch. 612 at pp. 621-2, affirmed on appeal (1909), 1 Ch. 238.

Bodwell, in reply: It is admitted that in a case of fraud the Court can grant relief and the remedy is damages, the measure of damages being the amount of profit maintained: see *In re Leeds and Hanley Theatres of Varieties, Limited* (1902), 2 Ch. 809. The trial judge stated it was our duty to tell the Company what we paid for the properties handed over, but he found at the same time that we were not trustees when we purchased the properties, so that the authorities shew conclusively we cannot be made to account for the profit because the relation we had with the Company was merely that of a vendor. The agreement of the 11th of February, 1911, was a domestic arrangement acquiesced in by 96 per cent. of the stockholders, and the remaining shareholders could not disturb the arrangement even if they had been present and did not agree to it. On the findings of fact, and on the law, the Company has no action of account against the directors, and secondly, this is a shareholders' transaction and as such will stand in the absence of oppression or fraud.

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Davis, in reply: The acts that were done at the meeting of

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the 11th of February were not *ultra vires* in the strict sense of the word at all. If that is so, their case is gone altogether, as there is no question about ratification, acquiescence and estoppel. The learned judge found the notice of the meeting was insufficient, but all the shareholders who received that notice knew far better what it was about through the negotiations before than the fullest notice would explain, the notice should therefore be held good, as the main ground for rejecting notices is when they are misleading or tricky, and there is nothing approaching that in this case.

Cur. adv. vult.

3rd October, 1916.

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MACDONALD, C.J.A.: The facts and circumstances leading up to the execution of the agreement of the 11th of February, 1911, out of which this action arose, are fully recited in the reasons for judgment of the learned trial judge.

The agreement was the outcome of disputes between a group of shareholders of the plaintiff Company designated below the Victoria group, and a rival group of shareholders designated the New York group. These designations are not quite accurate, but enough so for the purposes of this judgment. The Victoria group was in control of the board of management and the other faction was striving to get control. After negotiations extending over a period of two months, the agreement was come to, the important terms of which are that the principal members of the Victoria group should surrender to the Company their shareholdings of a value of upwards of $800,000, and receive in return therefor debentures of the Company thereafter to be issued.

It was further agreed that the authorized capital of the Company should be reduced by the cancellation of the surrendered shares, together with some unallotted shares, amounting in all to $1,000,000, and that a debenture issue aggregating one and a half million dollars should be made. There was also an article in the agreement releasing the retiring members from any claims by the Company against them for anything theretofore done, as promoters or directors. The parties to the agree-

ment were the Company of the one part and the surrendering members of the other part.

To insure the legality of the transaction, the promoters of it (both groups) procured the passage of an Act of the Provincial Legislature, Cap. 72 of the Acts of 1911, authorizing the Company to reduce its capital in the manner above set out, and to issue the debentures, the latter subject to the approval of the shareholders, and it finally enacted as follows:

"3. The said agreement and all the terms thereof are hereby validated, ratified, and confirmed, subject to the same being adopted by a resolution passed by seventy-five per cent. of the shareholders of the Company present personally or by proxy at any meeting of the shareholders of the said Company called for that purpose, and for the purpose of authorizing the issue of the said debentures after the fourteenth day of February, 1911, and upon a copy of the said resolution being filed with the Registrar of Joint-stock Companies at Victoria, British Columbia."

There is nothing in the objection that the notice convening the meeting was bad because it was given prior to the passing of the special Act above referred to. That meeting was called under powers which the Company possessed apart from the special Act—powers taken by its memorandum and articles of association. I am of opinion, too, that the adoption of the agreement by a majority of 75 per cent. of the members present at the meeting, in person or by proxy, was all that was required —that a majority of 75 per cent. of the whole body of shareholders was not called for. Whether those present comprised 75 per cent. of all the shareholders is not quite cleared up by the evidence, but in view of my construction of the language used in the special Act, I need not pursue that question.

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Now the defect (if any) in the proceedings leading up to the adoption of the resolutions passed at the meeting called for the purpose of obtaining the approval of the members, as required by the special Act, was the insufficiency of the information given to the shareholders by the notice. The notice described the parties to the agreement; it recited its date; that it was deposited with the registrar of Joint-stock Companies at Victoria, and could be seen at the meeting, and gave notice that resolutions would be passed reducing the capital as above mentioned, and authorizing the said issue of debentures, and the adoption of the agreement. There can be no suggestion of

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fraud in connection with this meeting, nor in the manner in which it was convened. There is not, to my mind, the slightest indication of intentional concealment of facts. The meeting was attended by the principal shareholders, either in person or by proxy, and these represented 97 per cent. of the Company's capital. The resolutions were passed unanimously, and the business of the Company has ever since been carried on on the new basis established by those resolutions. The retiring members duly surrendered their shares, the Company's capital was reduced, the debentures were issued and disposed of in accordance with the resolutions, and some of them are now held by strangers. The New York group took over the business of the Company thereafter on the new basis. Four annual meetings of the Company have since been held, at which the members largely attended in person or by proxy. At one of them—that of 1913—all the shares were represented except 31—out of a total of more than 12,000.

This action was authorized by resolution carried by the votes of those controlling the shares of the New York group; in other words, the New York group having obtained control of the Company, having conducted its affairs for four years, now seek in the name of the Company to have what they themselves were party to set aside and rescinded. The carrying out of the agreement without its adoption by the shareholders was *ultra vires* of the directors—not of the Company. What was irregularly done could be ratified and adopted by the shareholders. The contention of the respondents is that what was done could be ratified only in the manner specified in the special Act, *i.e.*, by a resolution, having the support of a majority of 75 per cent. of the shareholders. That was the view taken by the learned judge, and as I am impelled to differ from him, I shall state briefly my reasons for so doing. In the first place, I will assume for the moment that the resolutions were of no effect by reason of the insufficiency of the notice. On that assumption the directors carried into effect the agreement of the 11th of February, 1911, without authority. It is conceded that the Company could have formally ratified and adopted what the directors did had they chosen to do so. That being so, I am of opinion that the adoption by acquiescence

of all the shareholders would be just as effectual as a formal adoption to bind the Company, and that such adoption would be just as much a bar to this action as a formal one would have been if given. To prove ratification of a contract, it is necessary to shew that the shareholders knew what the contract was, and that they have in some way recognized it as binding: Lindley on Companies, 6th Ed., 234. These conditions are, I think, fulfilled in this case.

At the general meeting of the Company held in August, 1911, the chairman read a statement which, in my opinion, sufficiently disclosed the terms of the agreement and what had been done under it up to that time. Copies of this statement were sent to all the shareholders. Each year thereafter, up to and including 1915, annual general meetings of the Company were held, of which all shareholders were duly notified in accordance with the regulations of the Company, and while shareholders largely attended these meetings, either in person or by proxy, no objections to the transactions were raised by any of them. Shareholders who took any interest at all in the affairs of the Company must have known of its re-organization in 1911, the change of management and retirement of the old directors, the reduction of the Company's capital, and the debenture indebtedness; but they were silent for four years, during which period the business of the Company, which was a large one, was carried on, and during which great changes were made in the Company's properties and affairs which cannot now be unmade. A stronger case of ratification by acquiescence it would be difficult to imagine.

Again, there is another view which I think I am entitled to take on the question of ratification by acquiescence. A meeting was in fact held and the resolutions were passed by the specified majority. The notice convening it alone is alleged to have been defective. If so, it contravened what appears to me to be a directory clause in the articles, and the shareholders had notice of that defect which was patent on the face of the notice. They must be presumed to have had knowledge of the Company's regulations and of the law. Having that knowledge, they have made no complaint in respect of the resolutions as passed. In these circumstances a Court of Equity should

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Jan. 7.

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not, I think, rescind the agreement and declare what has been done on the faith of these resolutions invalid.

In what I have said I do not wish to be understood as having formed an opinion on the question whether the notice did or did not sufficiently specify the purposes of the meeting: I have assumed in respondents' favour that it did not. The question of the sufficiency of a notice of this kind is one of fact, as Kekewich, J. said in *Normandy* v. *Ind, Coope & Co., Limited* (1907), 77 L.J., Ch. 82 at p. 85, which must be governed by the circumstances of the particular case.

The appeal should be allowed and the action dismissed.

MARTIN, J.A.

MARTIN, J.A.: There are several points of importance raised in this appeal, but the first and chief one is that raised respecting the regularity of the meeting authorized by the special Act (Cap. 72 of 1911), and if the provisions of that Act have been complied with, then the action fails and this appeal must be allowed. The point is not free from that difficulty which so often arises in the construction of private Acts of Parliament, but as the proceedings taken under that Act are of no general importance and will form no precedent, I shall content myself by saying that, in my opinion, its requirements were complied with, there being more than 75 per cent. of the shareholders personally present, and the meeting was in all other respects regularly held. Much was said regarding the alleged insufficiency of the notice, but I am of opinion, viewing it in the light of all the unusual circumstances, that, as the Master of the Rolls said in *Baillie* v. *Oriental Telephone and Electric Company, Limited* (1915), 1 Ch. 503 at p. 515, it "substantially put the shareholders in the position to know what they were voting about."

Being of this opinion, it would be unprofitable to discuss the other points, and it follows that the appeal should be allowed.

GALLIHER, J.A.

GALLIHER, J.A.: I agree in the conclusions of the Chief Justice.

Appeal allowed.

Solicitors for the various appellants: *Barnard, Robertson, Heisterman & Tait; H. H. Shandley;* and *H. C. Keefer.*

Solicitors for respondents: *Eberts & Taylor.*

STAR STEAMSHIP COMPANY v. CITY OF VANCOUVER AND THE BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

MORRISON, J.

1916

June 19.
July 8.

STAR STEAMSHIP CO. v. CITY OF VANCOUVER

Negligence—Bridge—Defective condition of draw—Collision with ship—Contributory negligence — Perilous alternative — Liability — Railway and municipality.

In order to reach the upper portion of False Creek the plaintiff's freight steamer had to pass, first through the draw of the Kitsilano bridge, and then that of the Granville Street bridge, the distance between the two bridges being about 920 feet. For some days previously to the accident, repairs to the railway passing over the Granville Street bridge by the B.C. Electric Railway Co. necessitated the severance of the electricity by which the draw was operated. The bridge tender informed the proper officers of the Company that at times he was unable to move the draw, but nothing was done. At noon on the day of the accident the captain of the steamer telephoned the bridge tender he would pass through about 2.50 p.m. The steamer on approaching the Kitsilano bridge signalled in the usual way and passed through, but on approaching the Granville Street bridge the captain saw the draw was not working and promptly put his engines full steam astern, but owing to the tide was carried against the bridge, resulting in the damage complained of. The bridge tender had attempted to open the draw but the power being cut off he was unable to do so.

Held, that the accident was due to the negligence of the bridge tender in not notifying the captain of the steamer of the danger of the power being cut off and preventing the operation of the draw.

ACTION by the plaintiff Company for damages sustained by the freight steamer "Rapid Transit" when in collision with the Granville Street bridge across False Creek in the City of Vancouver, owing to the negligence of the defendants. Tried by MORRISON, J. at Vancouver on the 12th of June, 1916. The facts are set out fully in the head-note and reasons for judgment.

Statement

J. N. Ellis, and *W. C. Brown,* for plaintiff.
McCrossan, for defendant City.
McPhillips, K.C., and *Riddell,* for defendant Railway.

MORRISON, J.

19th June, 1916.

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MORRISON, J.: The plaintiff Company is the owner of the freight boat "Rapid Transit," Myers, captain. On the 9th of June, 1914, this craft was on its way with freight consigned apparently to the Brackman-Ker Milling Co., whose wharves are situate in False Creek east of Granville Street bridge, which crosses this navigable water some 920 feet away from the Kitsilano bridge, which is to the west. Steamers intending to enter False Creek and requiring the draws to be opened first signal to the Kitsilano bridge to open and then to the Granville Street bridge. On the occasion in question the captain of the "Rapid Transit" telephoned about noon to the bridge tender of the Granville Street bridge that he intended passing through his bridge about 2.50 that afternoon. In due course the "Rapid Transit" signalled the first or outside bridge, which responded. The Granville Street bridge "tender" heard and saw what was transpiring and took steps, which turned out to be futile, to open his bridge. The boat proceeded through the Kitsilano bridge, and either when passing through or very shortly after, the captain noticed that the Granville draw was not working promptly, but he proceeded, and when some distance in between the bridges, variously estimated at about 100 feet, he realized that the bridge was not opening, and by the time he had got as far as the Ritchie coal bunkers he saw he could not get through, and then he put his engines full speed astern. The channel along at this point was at that time 350 feet wide. There was a strong tide running in, as the evidence goes to shew, at the rate of from 2 to 4 miles an hour. The day was fine. The boat was taken by the current against the bridge and the injuries and damage complained of resulted. The Granville Street bridge is traversed by the line of the British Columbia Electric Railway, the third party hereto, and for some days previously to the accident that Company was engaged in making certain repairs on the said bridge, which necessitated cutting off the electricity which is supplied by the said Company in order to promptly operate the draw. The bridge tender had previously called to the attention of the proper official of the Company the fact that there was no connection sufficient to enable him to open the draw. Nothing

Judgment

apparently was done to remedy this defect, which was known to both defendants and unknown to the plaintiff, during the whole of the time material to the issue in question in this trial.

There is, in my opinion, a preponderance of evidence in support of the plaintiff's contention that at the time he realized the draw would not open the captain of the "Rapid Transit," an experienced navigator in those waters, could not have averted the collision with the bridge. "The duty, a breach of which gives rise to a cause of action in negligence is to exercise due care under the circumstances." I think the captain of the "Rapid Transit" did so exercise due care. I do not think that the bridge tender on this occasion did so exercise due care. It was strongly contended on behalf of the defendants that there were three alternatives or expedients to which Captain Myers could or should have resorted. The first was to cast anchor; the second, to tie up to the Ritchie wharves on the north side, or lastly, to run his ship ashore on the south side in the adjoining mud flat upon which, at that time, there might have been 3 or 4 feet of water. There was a half tide at the time. And perhaps I might add a fourth, namely, to do what he seemingly in his perplexity did, to keep his engines full speed astern.

"If one places another in such a situation that he must adopt a perilous alternative, the party so acting is responsible for the consequences": *Jones* v. *Boyce* (1816), 1 Stark. 493.

I accept the evidence adduced on behalf of the plaintiff, that for the captain to cast anchor when he realized the bridge would not open would have been futile; that to attempt to make a landing on the north side of the fairway would have, in all probability, even if it could have been effected, resulted in disaster, and that in order to ground his ship on the south side it would have been necessary for him to have anticipated that the draw would not open as he was coming through the Kitsilano bridge, a point at which it appears that no one expects the Granville Street draw to open, as it would retard vehicular traffic on that bridge unnecessarily long. There is one outstanding circumstance, taken with what I have already found, which reconciles me to finding in favour of the plaintiff, and that is that the Granville Street bridge tender did not intercept

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the opening of the Kitsilano bridge, which, if he had done, the damages sustained would have been averted. He had ample time in which to inform that bridge tender of the condition in which his draw was. Instead he took chances, and although he vainly tried to open up he, in reason, must have known it was at least doubtful that the draw would open in time.

I find that the accident arose through the defective condition of the draw on the Granville Street bridge as before stated, and the negligence of the bridge tender in not taking precaution to notify the captain of the "Rapid Transit" in time of such defect.

Judgment

On this branch of the case there will be judgment for the plaintiff with costs. The amount of damages, if not agreed upon by counsel, to be spoken to. As to the issue between the defendant and the third party, that remains to be later spoken to if necessary.

Judgment for plaintiff.

Statement

On the 24th of June, 1916, the issue between the defendant City and the B.C. Electric Ry. Co. was argued before MORRISON, J.

McCrossan, for defendant City.
McPhillips, K.C., and *Riddell,* for defendant Company.

8th July, 1916.

MORRISON, J.: The proximate cause of the accident I have already found to have been the negligence of the bridge tender. That was as between the plaintiff and the City. Now as between the City and the third party it seems to me quite immaterial what contractual relations existed unless the latter agreed to insure the City against accidents regardless of whether the City were or were not negligent in the act which brought about the damages complained of. There is no such agreement. *British Columbia Electric Railway Company, Limited* v. *Loach* (1916), 1 A.C. 719 does not apply to a case of this kind. The facts, characteristically, are quite dissimilar. In that case there was no intervening party upon whom it was

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sought in the ultimate result to fasten liability. Had the builders of the tramcar in question sold it to the Company in a defective condition, and the Company, knowing of the defect, chose to use it, resulting in damage to the plaintiff, then there would be a chain of facts in character similar to the case at bar. In a case of that kind I would be surprised to learn that the builders could be held liable for the result of any negligent use to which the Company saw fit to put it.

The City as against the B.C. Electric Railway may have different and effective remedies under their different agreements and arrangements respecting the supply of electricity, but I do not think a consideration of them can arise in this particular case.

Judgment

Judgment accordingly.

LITTLE v. HILL.

MACDONALD, J. (At Chambers)

1916

Aug. 1.

LITTLE v. HILL

Mortgage—Not under Mortgages Statutory Form Act—No acceleration clause—Default in interest—Foreclosure—R.S.B.C. 1911, Cap. 167.

A mortgage, which was not drawn in accordance with the Mortgages Statutory Form Act, did not contain an acceleration clause. There was a proviso for redemption in case the principal and interest should be paid in accordance with the terms therein contained. Default having been made in payment of interest, an action for foreclosure was commenced, although the period for payment of the principal had not yet arrived.

Held, that the condition having been broken, the mortgagee was entitled to a decree of foreclosure.

EX PARTE APPLICATION on a reference from the registrar as to the right of the plaintiff to an order for foreclosure. Interest was overdue on the mortgage in question, which had not been drawn in accordance with the Mortgages

Statement

MACDONALD, J. (At Chambers) 1916

Aug. 1.

LITTLE v. HILL

Statutory Form Act and did not contain an acceleration clause. Heard by MACDONALD, J. at Chambers in Vancouver on the 29th of June, 1916.

Housser, for the application.

1st August, 1916.

MACDONALD, J.: The registrar has referred to the judge in Chambers, the point as to whether an order for foreclosure should be granted herein. It appears that the mortgage in question has no acceleration clause and does not purport to be under the Mortgages Statutory Form Act. There is no principal in arrear under the terms of the mortgage, but interest payable thereunder is overdue. In that event I think the plaintiff is entitled to judgment, as there has been a breach on the part of the mortgagor in the condition upon which he held the property. The mortgage transferred the legal estate to the mortgagee, but a right of redemption remained in the mortgagor, subject to the performance on his part, *inter alia,* of the due payment of principal and interest according to the terms of the instrument. I am supported in my conclusion by the cases cited in Halsbury's Laws of England, Vol. 21, p. 277. The terms of the order for judgment may require consideration, especially as to the relief that might be afforded to the delinquent mortgagor.

Judgment

Judgment for plaintiff.

WESTHOLME LUMBER COMPANY, LIMITED v. GRAND TRUNK PACIFIC RAILWAY COMPANY.

MURPHY, J.

1916

Sept. 26.

WESTHOLME LUMBER CO. v. GRAND TRUNK PACIFIC RY. CO.

Railway—Navigable waters—Obstruction—Action—Limitation—"Continuation of damages," meaning of—Railway Act, R.S.C. 1906, Cap. 37, Sec. 308.

An action for damages sustained by reason of the illegal obstruction of access to navigable waters by a railway company must be brought within one year from the completion of the obstruction.

McArthur v. *Northern and Pacific Junction R.W. Co.* (1890), 17 A.R. 86, and *Lumsden* v. *Temiskaming and Northern Ontario Railway Commission* (1907), 15 O.L.R. 469 followed.

ACTION for damages through the obstruction by the defendant Company of the waters of Cameron Cove, British Columbia, whereby the plaintiff Company was denied access to said waters. The defendant had erected on its own lands at Cameron Bay wharves, landing yards, warehouses, etc., and in January, 1910, proceeded to build an embankment across the front of the plaintiff's lands, thereby cutting off plaintiff's access to the open water. It appeared from the evidence that the embankment complained of was completed more than a year prior to the commencement of this action. Tried by MURPHY, J. at Prince Rupert on the 5th to the 8th of September, 1916.

Statement

Mayers, for plaintiff.
Davis, K.C., and *Patmore,* for defendant.

26th September, 1916.

MURPHY, J.: I find as facts that the fill was made by defendant in its corporate capacity and *bona fide* for the purpose of the construction of its railway. I find also that defendant had not taken the necessary steps to make its action lawful. I find that a longer period than one year elapsed between the completion of the fill and the bringing of these proceedings. On these findings I am bound, I think, by the cases of *McArthur* v. *Northern and Pacific Junction R.W. Co.* (1890), 17 A.R. 86 and *Lumsden* v. *Temiskaming and Northern Ontario Rail-*

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way Commission (1907), 15 O.L.R. 469 to hold that plaintiff is debarred from pursuing this action if the case be not one of "continuation of damage." The case of *Chaudiere Machine and Foundry Co.* v. *Canada Atlantic Rway. Co.* (1902), 33 S.C.R. 11 decides, I think, this point adversely to the plaintiff. The act there complained of was illegal from its inception, and the plaintiff's cause of action arose once for all when it was committed. Had it been legal, then the case cited shews that the cause of action would arise only when damage occurred. The distinction is that in the one case the cause of action is the illegality of the act complained of, whereas in the other it is damage resulting from a lawful act negligently performed.

The only answers made to these cases are, first, that the case last recited lays down the rule that six years is the period of limitation, but section 306 of the Railway Act was not raised, and therefore this case cannot be held to overrule the first two cases cited above; secondly, some distinction was attempted to be made between the words "continuation of damage" in section 306 of the Railway Act and the language construed in the authorities relied upon in *Chaudiere Machine and Foundry Co.* v. *Canada Atlantic Rway. Co., ubi supra,* but I am unable to see any in substance. The action is dismissed.

Judgment

Action dismissed.

REX *EX REL.* ROBINSON v. DIMOND *ET AL.*

MACDONALD, J. (At Chambers)

1916

Oct. 4.

REX v. DIMOND

Criminal law—Stated case—Sale of fruit on Sunday—29 Car. II., Cap. 27—Lord's Day Act, R.S.C. 1906, Cap. 153.

The sale of fruit by a merchant from his store on Sunday is in contravention of the provisions of 29 Car. II., Cap. 27, and also of the Lord's Day Act.

STATED CASE by the police magistrate at Vancouver on the conviction of one Gus Dimond for unlawfully selling goods on the Lord's Day, heard by MACDONALD, J. at Chambers in Vancouver on the 4th of October, 1916. The accused kept a store at No. 1 Hastings Street East, in Vancouver, where he sold fruit, tobacco, confectioneries and ice-cream. On Sunday, the 6th of August, 1916, he sold apples, pears, bananas, and ice-cream to customers, for which an information was laid against him under the Lord's Day Act. The magistrate submitted the following questions: Statement

"1. Is the selling of fruit on Sunday contrary to the provisions of 29 Car. II., Chapter 27 and of the Lord's Day Act, Chapter 153, R.S.C. 1906?

"2. Does the Lord's Day Act by its terms save and except the existing 29 Car. II., Chapter 27, in force in this Province, and if so, is the selling of fruit on Sunday contrary to 29 Car. II., Chapter 27, and if not, can a conviction made in the face of this latter Act be supported on the above *factum* under the Lord's Day Act?"

J. A. Russell, for accused: Fruit being a necessity comes within the exceptions contained in the Lord's Day Act. [He referred to *Reg.* v. *Albertie* (1900), 3 Can. Cr. Cas. 356; *Bullen* v. *Ward* (1905), 74 L.J., K.B. 916; *Amorette* v. *James* (1915), 1 K.B. 124 at p. 131; *Rex* v. *Walden* (1914), 19 B.C. 539.] Argument

R. L. Maitland, for the Crown, referred to *Slater* v. *Evans* (1916), 2 K.B. 403; *Rex* v. *Stinson* (1905), 10 Can. Cr. Cas. 16; *Rex* v. *Sabine* (1904), 8 Can. Cr. Cas. 70; *Rex* v. *Laity* (1913), 18 B.C. 443. On the question of victualling see Stroud's Judicial Dictionary, 2nd Ed., Vol. 3, p. 2187.

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MACDONALD, J.: This matter comes before me as a stated case, submitted by the police magistrate of the City of Vancouver, who convicted Gus Dimond, for unlawfully selling goods on the Lord's Day, commonly known as Sunday, at his place of business situate at No. 1 Hastings Street East, in the City of Vancouver. According to the submission, it is admitted that the defendant is a merchant, carrying on a fruit, cigar, confectionery and ice-cream business at the place mentioned, and that he had exposed for sale and sold fruit to customers on Sunday. The consent of the Attorney-General was obtained to the prosecution. The magistrate desires an opinion of the Court as to whether such sale by the defendant of fruit on Sunday is contrary to the provisions of 29 Car. II., Cap. 27, and of the Lord's Day Act, Cap. 153, R.S.C. 1906. The further question submitted is: [already set out in statement].

The first point presented for argument by counsel for the defendant was that the procedure to be adopted was confined to that outlined in 29 Car. II., Cap. 2, and as the prosecution was not launched within 10 days after the offence alleged had been committed, that such prosecution was out of time. If this contention prevailed it would dispose of the present prosecution, but would not avail to decide the real point, that I think the parties are endeavouring to have determined. It was submitted on behalf of counsel for the Crown that this point was not open for argument according to the terms of the submission, and subject to this objection, I thought it well to hear the argument and give my decision in connection therewith. I think that, as this is a matter of procedure, the provisions of the Lord's Day Act, in force in this Province, could be utilized in the prosecution of the defendant under such Act. I do not accept the construction contended for by counsel for the defendant upon section 16 of the Lord's Day Act. In my opinion, the prosecution was brought within the time allowed by such statute. Assuming that I am right, can the defendant, under what might be termed the saving clauses of these two Acts, claim exemption from prosecutions. In other words, that the sale complained of on Sunday was made under circumstances

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that did not amount to an infraction of the provisions of either of these statutes. I think that section 16 of the Lord's Day Act is only intended to save the elimination of any Provincial statute that might be in force in any Province permitting work or sales, that might otherwise be prohibited under the provisions of such Act. It, in other words, might assist and create exemptions beyond those referred to in section 12 of the Act. This section provides that notwithstanding the offences created by the previous sections of the Act, "any person may on the Lord's Day do any work of necessity or mercy," and then the section for greater certainty, "but not so as to restrict the ordinary meaning of the expression 'work of necessity or mercy,'" outlines certain classes of work which such words shall be deemed to include. Turning then to section 5 of the Lord's Day Act we find that

> "It shall not be lawful for any person on the Lord's Day, except as provided herein, or in any Provincial Act or law now or hereinafter in force, to sell or offer for sale or purchase any goods, chattels, or other personal property. . . . ."

This is the section that, so far as concerns this Act, affects the matter before me for consideration. There is no Provincial Act or law in force in this Province allowing or permitting the sale of fruit by a merchant on Sunday. Speaking generally, then, a person who is carrying on a fruit, cigar, confectionery or ice-cream business, making a sale on Sunday, would be subject to the provisions of the Lord's Day Act. It is admitted that this question has come before the Court for decision previously, in so far as the point to be decided was whether fruit was to be deemed a "necessity" within the provisions of the Lord's Day Act. Taking the view that, save as aforesaid, the Lord's Day Act is in full force in this Province, then the defendant having made sales on Sunday can only hope to succeed in escaping liability by the saving clauses of section 12 of that Act. I have then to determine whether the sale in question comes under the general expression as being one of "necessity or mercy," or under the special clauses referred to. It certainly does not come under the special clauses, and as to the general expression of "work of necessity or mercy," this, as I have already referred to,

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MACDONALD, J. (At Chambers)

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REX v. DIMOND

has been decided by MORRISON, J. I intend to follow his decision, expressing at the same time the desirability of decisions following upon the same line, especially where they have to do with criminal or *quasi*-criminal procedure. I might only add that, carried to a logical conclusion, if the contention put forward by counsel for the defendant prevailed, that fruit can be sold by a storekeeper on Sunday, it would mean that any restrictive provisions of the Lord's Day Act, passed at a time when it is to be presumed the local conditions in Canada were borne in mind by Parliament, would be controlled by and subject to the legislation enacted in 1676. It could also consistently be contended that if sales such as are contemplated here, were held to be within the law and not contrary to statute, that stores could go further and make sales not only of fruit, but of any article that might be termed in the nature of food.

As to the application of 29 Car. II., Cap. 27, I think this statute could have been utilized if the information had been laid in time. The sale of fruit from a store and not from an eating or victualling house is not within the exemptions covered by the Act. See on this point as to sale of ice-cream, *Slater* v. *Evans* (1916), 2 K.B. 403.

Judgment

In conclusion I might say that it has been strongly argued that MCPHILLIPS, J.A. in *Rex* v. *Walden* (1914), 19 B.C. 539, expressed a view of the law which would support the contention of counsel for the defendant. I do not so read his judgment. I think he was dealing with the facts of that particular case and the "necessities" that might arise under certain circumstances. If I am wrong in the construction I place upon such judgment, it would be open to the defendant, I presume, by some other proceeding, to obtain a further decision upon the point.

The answer, then, to be given to the submission will be, as to the first question, that the sale of fruit on Sunday by a merchant from his store, is contrary to both the provisions of 29 Car. II., Cap. 27, and also of the Lord's Day Act, R.S.C. 1906, Cap. 153.

The second question is not as clear in its terms as I would

desire. However, if I understand its meaning, it is that an opinion is desired as to whether a conviction for such sale of fruit on Sunday can be supported under the Lord's Day Act, notwithstanding any of the provisions of 29 Car. II., Cap. 27. If this be the opinion desired, then I have already answered such question in the affirmative.

Questions answered in the affirmative.

IN RE ESTATE OF MAUDE MASON, DECEASED.

Descent—Distribution of estate—Homicide—Insanity—Inheritance Act, R.S.B.C. 1911, Cap. 108—Administration Act, R.S.B.C. 1911, Cap. 4, Sec. 95.

The rule that no one can profit by his own wrong or benefit by his criminal act does not apply to prevent an insane person who commits homicide from taking an inheritance from the person killed.

APPLICATION by the official administrator as to the disposition to be made of the estate of Maude Mason, deceased. Heard by MACDONALD, J. at Chambers in Vancouver on the 3rd of October, 1916. The facts are set out in the judgment. Statement

O'Brian, for official administrator.
Bird, and *Raines,* for certain heirs.

5th October, 1916.

MACDONALD, J.: Claude Douglas Mason was drowned at Roberts Creek, B.C. on the 19th of June, 1915. He died intestate, leaving a widow and an infant daughter. Jennie Mason, the widow, while temporarily insane, killed the daughter Maude Mason and then committed suicide. The question that has been submitted to me for advice, is as to the disposition that should be made by the official administrator of the estate, Judgment

MACDONALD, J. (At Chambers)

1916

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IN RE MAUDE MASON, DECEASED

to which Maude Mason became entitled, upon the death of her father. She would, under the Inheritance Act, R.S.B.C. 1911, Cap. 108, receive all the real estate, subject to a one-third interest in favour of her mother for life. As to the personal estate, she would, pursuant to the Administration Act, R.S.B.C. 1911, Cap. 4, Sec. 95, receive two-thirds thereof and one-third would go to the widow. All the real and personal estate to which the infant Maude Mason thus became entitled would, under ordinary circumstances, upon her death become vested in the mother. It is contended, however, that she could not inherit any of such property through having killed her daughter. If this contention prevailed, then such estate would pass to Maude Mason and Margaret Mary Mason, sisters of Claude Douglas Mason. If, however, the act of Jennie Mason in killing her daughter, did not prevent her from becoming entitled to such estate, then it would pass to her mother, Mrs. Jane Bampton, and her two brothers and sisters. The sole ground upon which counsel relies, in support of the contention that the mother could not, under the circumstances, inherit from the daughter is, that "no one can profit by his own wrong or get a benefit by his criminal act."

Judgment

To the contrary, it was submitted that this principle did not apply, where property became vested in a party, even though guilty of a wrongful act, where such vesting was not by virtue of a will, but by the operation of statute. It was stated that there was no decision, exactly in point, and that all cases bearing upon the question arose through a beneficiary under a will, who had murdered the testator, seeking to derive some benefit from the will. In support of this argument, I am referred to Cyc., Vol. 14, p. 61, and cases there cited. I cannot see why a distinction should be drawn. It suggests itself, that if the principle were not applied, that a son, having a knowledge of the Inheritance Act, and knowing that he would inherit under such Act, might deliberately bring about the death of his father and then successfully contest any proceedings as to his right to the property inherited. He would thus reap a benefit from his felonious act and profit by his own wrong. In the view, however, that I take of the matter on

another branch, it is not necessary for me to come to a definite conclusion on this point.

If Jennie Mason committed a crime in killing her daughter, I am of opinion that any estate, to which the daughter had become entitled on the death of her father, would not vest in the mother. The matter was fully discussed in *Cleaver* v. *Mutual Reserve Fund Life Association* (1892), 1 Q.B. 147, where it was held that Florence Maybrick having been found guilty of the murder of her husband, James Maybrick, was disqualified from asserting any interest in the insurance upon her husband's life. Fry, L.J., at p. 156, refers to the principle of public policy invoked, as follows:

"It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanour. . . . . This principle of public policy, like all such principles, must be applied to all cases to which it can be applied without reference to the particular character of the right asserted or the form of its assertion. . . . ."

Compare p. 159:

"I think that the rule of public policy should be applied so as to exclude from benefit the criminal and all claiming under her, but not so as to exclude alternative or independent rights."

This case is referred to and followed in *Lundy* v. *Lundy* (1895), 24 S.C.R. 650, where it was decided that the devisee could not take under the will of the testator, whose death had been caused by the criminal and felonious act of the devisee himself, and that in applying the rule there is no distinction between a death caused by murder and one caused by manslaughter. The judgment in *Hall, In the Estate of Hall* v. *Knight and Baxter* (1914), P. 1, is to the same effect. It follows and approves of the authority of *Cleaver* v. *Mutual Reserve Fund Life Association, supra*—Cozens-Hardy, M.R. there (p. 6) cites the following from *Crippen, In the Estate of* (1911), P. 108:

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"It is clear that the law is, that no person can obtain, or enforce, any rights resulting to him from his own crime; neither can his representative, claiming under him, obtain or enforce any such rights. The human mind revolts at the very idea that any other doctrine could be possible in our system of jurisprudence."

The turning point, however, to my mind, in this matter is

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whether the killing by Jennie Mason of her infant daughter was a crime. In the submission of facts, it was stated that at the time "she was temporarily insane." It was agreed, in the course of the argument, that I should interpret these words as meaning, that her mind was in such a state that she could not distinguish between right and wrong. And if she had remained alive and been prosecuted, it could have been successfully contended on her behalf that her mind was diseased to such an extent as to render her incapable of appreciating the nature and quality of her act and of knowing that such act was wrong. If such a state of facts is admitted to have existed, then under the provisions of the Criminal Code she was excused and could not be convicted of an offence. She was not guilty of a crime. In that event, in my opinion, she would inherit all the estate of her daughter. The result is that, upon the death of the mother intestate, such estate became vested in her mother, two brothers and two sisters.

I think that all costs should, in the circumstances, be payable out of the estate.

Order accordingly.

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THE NORTH PACIFIC LUMBER COMPANY, LIMITED v. BRITISH AMERICAN TRUST COMPANY, LIMITED.

Crown grant—Prior timber lease over same area—Crown grant subject to lease.

Evidence — Submission of leases not registered — Land Registry Act, R.S.B.C. 1911, Cap. 127, Sec. 105.

The plaintiff Company, holder of the renewal of an original timber lease, brought action for a declaration that a Crown grant held by the defendant Company for a portion of the land within the timber area (and issued to the defendant's assignors subsequently to the original lease but prior to the renewal thereof) is void or in the alternative that it is subject to the rights of the plaintiff conferred by the leases.

Section 105 of the Land Registry Act recites that "Instruments executed before and taking effect before the 1st day of July, 1905, transferring, charging, dealing with, or affecting land or any estate or interest therein, unless registered before the said date (except a leasehold interest in possession for a term not exceeding three years), shall not be receivable by any Court or any Registrar or Examiner of titles as evidence or proof of the title of any person to such land, as against the title of any person to the same land." The plaintiff submitted in evidence the original lease and the renewal thereof, they not having been registered.

Held, that the section is not intended to apply where a party is not attacking the title to the land but is merely endeavouring to obtain a decision from the Court as to the effect of an easement in respect of the land, and that although the leases could not be received as evidence of the plaintiff's title so as to oust the defendant's title, they may be received as evidence of the plaintiff's right to enter upon the lands and cut timber thereon during the term of the lease.

Held, further, that the plaintiff was entitled to a declaratory judgment that the Crown grant was subject to the plaintiff's antecedent lease and any renewals thereof.

ACTION by the lessee from the Crown in possession of the hereditaments included in timber lease No. 51, Sayward District, Vancouver Island, for a declaration that the grant in fee to the defendant of lot No. 175, which was taken out of the said leasehold, is void and that the registration of said grant be cancelled and the register rectified. Tried by MACDONALD, J. at Vancouver on the 7th of October, 1915. The facts are that on the 3rd of February, 1888, her late Majesty demised to James G. Ross and James McLaren for a term of 21 years the said timber lease, covering 23,600 acres, the lease being granted under the provisions of the B.C. Statutes of 1884, and the terms of the lease were so complied with that the subsequent assignees of such lease were enabled to take advantage of an amendment to the Land Act, and upon surrender of such lease, to obtain a new lease under date the 3rd of February, 1902. The latter lease requires the annual payment of $1,180, and is for the period of 21 years, with rights of renewal. The plaintiff Company, which now holds the lease by virtue of an assignment, discovered in 1913 that a Crown grant had been issued on the 4th of November, 1893, for a portion of the land comprised within the boundaries of this lease, in favour of J. M. Leigh and described as lot No. 175. By *mesne* convey-

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ances the defendant Company becomes the registered owner of said lot and holds a certificate of title to the property. The plaintiff attacks the Crown grant in favour of Leigh, praying that it be declared void, or in the alternative, that the said grant is subject to the rights of the plaintiff under the original lease, or the renewal thereof, also that the grant should be delivered up to be cancelled and the registration thereof vacated.

Argument

Wilson, K.C., for plaintiff: Upon the question of our right to maintain the action without making the Crown a party see *Esquimalt and Nanaimo Railway Co.* v. *Fiddick* (1909), 14 B.C. 412, *per* CLEMENT, J. at p. 434 and the cases there cited; *The Queen* v. *Farwell* (1887), 14 S.C.R. 392; and *Farwell* v. *The Queen* (1894), 22 S.C.R. 553. These cases shew most distinctly that the Court can inquire whether or no the Government of British Columbia had any right to make the grant. The land is not the King's private property, but the lands of the Province are held in the King's name by him for the use of the Province, to be disposed of according to law: *Blackwood* v. *London Chartered Bank of Australia* (1874), L.R. 5 P.C. 92 at p. 110 *et seq.* It is true that the Crown demises according to law, and it is true that there is an outstanding interest which the Crown may deal with according to law, but the executive representing the Crown cannot deal with the outstanding interest to the prejudice of the lessee save according to law.

The Dominion and Ontario legislation, giving power to avoid patents "through fraud, error or improvidence," merely gives a new remedy for the old common law right: see Strong, J. in *Farmer* v. *Livingstone* (1883), 8 S.C.R. 153. All charters or grants of the Crown may be repealed or revoked when they are contrary to law, or uncertain, or injurious to the rights and interests of third persons, and the appropriate remedy in England is *scire facias*: see *The Queen* v. *Hughes* (1865), L.R. 1 P.C. 81 at pp. 87-8. There is, however, no machinery for issuing a writ of *scire facias* in British Columbia. Analogous proceedings do not require the Attorney-General's fiat as a *scire facias* would: see *Zock* v. *Clayton* (1912), 28 O.L.R. 447; *Assets Company, Limited* v. *Mere Roihi* (1905), A.C.

202. *Scire facias* is not the only remedy, for where no power exists to grant the writ then the remedies referred to in *The Queen* v. *Hughes, supra,* at p. 87 apply, and the argument of the Attorney-General on p. 86 was approved by Lord Chelmsford, *ib.* at p. 92. See also *Alcock* v. *Cooke* (1829), 5 Bing. 340; 30 R.R. 625, which was explained in the *City of Vancouver* v. *Vancouver Lumber Company* (1911), A.C. 711 at p. 721.

Harold B. Robertson, for defendant.

MACDONALD, J.: In the first place, the defendant contends that this action is not maintainable, or if the Company has any remedy, it should not be in the form of the action brought. It is argued that the plaintiff has not shewn any title, or right to interfere with the defendant as far as the land is concerned. I am quite satisfied that the real contest between the parties is as to the timber upon the land, and not the land itself. The basis of the plaintiff's position is the lease—the original lease coupled with the renewal. The defendant objected to the introduction of these leases as evidence, the provisions of section 105 of the Land Registry Act being involved. This section states: [the learned judge read the section as set out in the head-note, and continued.] This important and drastic section of the Registry Act has not, as far as I am aware, been passed upon heretofore by any of the Courts in the Province. I have not been assisted by any argument which would convince me that the section is not applicable, and should not be applied where the attempt is made to set aside a Crown grant; in other words, to affect the registered title of a party claiming the land through a Crown grant. I allowed the evidence during the trial, referring to the case of *Jacker* v. *International Cable Company* (1888), 5 T.L.R. 13, because if, in the outcome, I was satisfied that the evidence was not proper to be adduced, I could exclude it. If I intended to deal with the Crown grant to the extent of setting it aside, I would feel disposed to pursue such a course, and decide that the evidence so sought to be admitted, in support of the plaintiff's position, should be excluded. In that event, there would be no evidence before the Court which would support the plaintiff's position, and

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enable the attack on its part to be made as outlined. However, as I do not intend to hold that the Crown grant should be set aside, I consider the evidence is admissible, because I do not think that the section is intended to apply where a party is not attacking the title to the land, but is simply endeavouring to obtain a decision from a Court as to the effect of what might be termed an easement in respect of the land. The provisions of the section, while it is true they refer to leasehold interests, state that the instrument is not to be received "as evidence, or proof of the title of any person to such land." It does not add "or any interest therein." I am not, then, receiving the leases as evidences of the title of the plaintiff to the land so as to oust the defendant's title, but to support the contention made that the plaintiff is possessed of the right to enter upon said land, and cut timber thereon for a limited period.

I cannot avoid referring to the fact that the numerous leases that are held by the owners of timber limits throughout the Province would be seriously affected were it to be decided that in the event of some title to the land on which timber might be situated coming in question, the holders of such leases were not enabled to give evidence as to the right that they possess, because they have not registered their leases, especially when such leases were granted by the Crown. I should further add that it was only in the year prior to this section being enacted that provision was made whereby a lease, or charge, could be registered, where the fee had not been already registered. I thus consider that the status of the plaintiff to bring this action is sufficiently established.

Judgment

The next question, however, that arises is, as to whether or not the plaintiff's position is sufficient, whereon to bring the action, in view of the fact that a Crown grant is being attacked, and the Attorney-General is not a party. Numerous authorities have been cited, and reference is made to the case of *Esquimalt and Nanaimo Railway Co.* v. *Fiddick* (1909), 14 B.C. 412, where the right to bring an action affecting a Crown grant was decided to exist, notwithstanding the fact that the Crown was not a party to such action. The distinction is claimed to exist that it is not necessary to join the Crown in an action where

the Crown is not interested. In other words, where the decision as to the validity or otherwise of the Crown grant does not either add to, or deduct from, the land possessed by the Crown. I think there is a great deal of strength in this point, and the distinction might be drawn. In the numerous Ontario cases to which I have been referred, it does not seem to have been an insurmountable barrier to one subject bringing an action against another, where the Crown grant was brought in question, but the Attorney-General was not a party. It is suggested that this procedure could be adopted in the Province of Ontario on account of statutory provision enabling such course to be pursued. I find that, without reference to any statute, Esten, V.C. in *Proctor* v. *Grant* (1862), 9 Gr. 224, dealing with a Crown grant said:

"This is a suit to revoke a patent. Assuming that such a suit may be maintained by a private individual, and that in order to maintain such a suit it is sufficient to shew that at the time of issuing the patent in question some fact was unknown to the Government. . . . ."

However, as I do not propose to set aside the Crown grant, and only to declare its purpose and effect, I do not thus feel it necessary to pass upon the point as to whether or not the Attorney-General would be a necessary party to bring about such a result. In the view I take of the rights of the parties herein, I do not think it necessary he should be, even now, added as a party.

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The original lease being properly granted, then surrendered, and a new lease given in its stead, the question arises, whether the right to the use of the land continues until the termination of the first lease, namely, 1918, or is to continue for the term mentioned in the renewal lease, namely, 21 years, and subject to any further renewal? Before I come to a consideration of this point, I desire to state that had this Crown grant been attacked while Leigh, the Crown grantee was still owner of the property, and such action properly launched, I am satisfied that it should have been set aside. I feel no doubt that the Land Act was absolutely ignored; and stronger terms, if necessary, could be applied to the action of those who obtained a Crown grant under the circumstances disclosed in this action. I have only to refer to one point, that is, the question of resi-

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dence. The alleged residence of the pre-emptor was simply a farce, an absolute violation of the terms under which the lands of this Province are allotted to those people who apply in the proper way, and fulfil certain requirements in the way of payment, residence, and improvements. The Crown, in administering the lands of the Province, could only upon such conditions having been complied with, allow a person to locate and pre-empt land, and in due course, upon fulfilment of the law, issue a Crown grant therefor. It is contended that the Crown itself erred in issuing this Crown grant, in addition to the applicant being guilty of fraud. I do not think that this matter is open to consideration in the action as framed.

I then come to consideration as to the effect of the leases as existing originally, and as renewed. Did the Crown grant issued to Leigh confer upon him anything beyond the land, or, in other words, did he obtain any right to the timber on the land? It was admitted by counsel for the defendant that a Crown grant issued under a statute is subject to such statute, and if the old lease had remained in existence, there is no question that the Crown grant would be subject to its terms. That is as far as counsel is prepared to go. The point is, should I not hold that the rights of the plaintiff go further? In other words, that they extend beyond the period of the original lease? This involves consideration of the surrender of the original lease, and the issuance of the renewal. I think that the intention of the legislation at that time outlining the course to be pursued was, that these old leases might be, perhaps for the sake of uniformity, brought in, and new leases issued subject to renewal. It was an arrangement sought by those holding leases, and considered advisable by the Government of the day. Further, that the holders of the original lease had no knowledge, as far as the evidence goes, of any outstanding claim that would affect their position at that time. They took in good faith, relying upon the Crown, a lease that they considered would be capable of holding the property within the terms of such lease. It is contended that it was, by its terms, "subject to private rights," and that one of the private rights thus affected was the Crown grant in question. Now, the Crown grant, as issued,

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it is admitted, was at the time subject to such original lease. It was subject to the laws in force at the time when the pre-emption was granted, and the Crown grant issued. It is not contended that the owner of such pre-emption obtained right or title to the timber upon the land, but had only a limited use of such timber for certain purposes. It is submitted that such limited use for the term of the original lease might be, and ought to be extended, so that at the expiration of the term of the original lease, the owner, for the time being, of the land, whoever he may be, would obtain an additional value not contemplated when the Crown grant was issued. I consider this position is not tenable. I do not think that the Crown grantee, or subsequent purchasers from him, obtained anything more than the Crown grant intended to convey when it was issued. The difficulty is that the Crown grant does not contain any reference to the lease that was then in existence. The statute, as I have already mentioned, however, to my mind, covers the situation, and protects the lessee. It means this, that a Crown grant was issued without specific reference to a prior instrument given by the Crown, referring to the timber upon the land mentioned in the Crown grant. The Crown grant, on its face, and without regard to the statute then in force, or the maps and documents on file in the department, would carry all the timber on the land. It should not, however, bear such a construction contrary to the statute. It should come within the rule referred to in *Alcock* v. *Cooke* (1829), 5 Bing. 340. I quote, as to such rule, from the judgment of Lord Mersey in the *City of Vancouver* v. *Vancouver Lumber Company* (1911), A.C. 711 at p. 721:

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"The rule is a rule of common law by which a grant by the King, which is wholly or in part inconsistent with a previous grant, is held absoluetly void unless the previous grant is cited in it. But the rule is qualified to this extent, that if the subject had no actual or constructive notice of the previous grant, the second grant will be good to the extent to which it may be consistent with the first grant though void as to the rest."

I think that, in view of the admission made by counsel to which I have referred, and which avoids the necessity on my part of dealing fully with the question of *bona-fide* purchaser for value, I should apply the rule referred to in this judgment. I consider that the Crown grant is, as far as it affects the

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timber, only good to the extent to which it may be consistent with the leases granted to the predecessors in title of the plaintiff Company.

Assuming that the defendant is a *bona-fide* purchaser for value of the land, without notice, it at the most is only entitled to such timber as a pre-emptor could use, by the statute in force under which the Crown grant purported to have been issued.

Then, returning to the question of the termination of the renewal lease, I think that the lease is good, according to its terms, and that the Crown, through the land department, in giving such lease, intended to confer and did confer upon the lessee all the rights therein granted, except the reservation for the benefit of pre-emptors in the original lease, as affected by the provisions of the Crown grant. Then, as to the form of the judgment. It will be a declaratory judgment in the terms I have indicated. This is not an action for possession. There has been no trespass committed by the defendant Company, which involves the consideration of damage, or that shews any intention to immediately interfere with the right the plaintiff possesses as to this timber. I think the course of the litigation has been such as to perfectly warrant this plaintiff in ascertaining, either at the hands of this Court, or by a further review of this judgment, a decision as to its right to the timber that it has held for so many years, and in connection with which, apparently it has paid rental from year to year. I am also impressed with the intimation that there are other pieces of land which are affected; so that the rights of the plaintiff sought to be established in this action will have a far-reaching effect.

Judgment

I feel that, in an action of this kind, a plaintiff is no doubt entitled to a declaratory judgment, even if there is no consequential relief sought. In this connection I refer to the case of *Guaranty Trust Company of New York* v. *Hannay & Company* (1915), 2 K.B. 536.

Then, as to the matter of costs. The plaintiff has failed, according to my view, in its attack upon the Crown grant to the extent of setting aside such Crown grant, but has succeeded in establishing, as to the timber, its prior right under the lease

as against such grant. I think that the issue as to the validity or otherwise of the Crown grant having, to a great extent, been in favour of the defendant, the defendant should get such costs as can properly be allocated to that issue. It may be a difficult matter for the taxing officer to determine, and it may involve a further application to me. The plaintiff gets the general costs of the action.

Order accordingly.

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CANADIAN FINANCIERS TRUST COMPANY v. ASHWELL *ET AL.*

MORRISON, J.
1916
Oct. 31.
CANADIAN FINANCIERS TRUST CO. *v.* ASHWELL

Practice—Jury—Special jury—Costs—B.C. Stats. 1913, Cap. 34, Sec. 49.

The plaintiff not desiring a jury asked that, in the event of the defendant's demand for a jury being granted, it be a special one. On an order being made for a special jury, it was held that the costs of such special jury be costs in the cause.

APPLICATION by the defendant that the action be tried by a jury. The plaintiff, who objected to a jury, asked that, in the event of the defendant's application being granted, it be a special jury. Heard by MORRISON, J. at Chambers in Vancouver on the 23rd of October, 1916.

Statement

C. W. Craig, for the application.
Dorrell, contra.

31st October, 1916.

MORRISON, J.: The defendant applied for a jury herein and, upon hearing counsel, I ordered that the issue be tried by a special jury. Counsel now appearing to particularly settle the terms of that order, I am of opinion that the costs of the special jury should be costs in the cause. It follows then the

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defendant in order to secure a jury will be obliged to pay in the interim the fees therefor. To this counsel for the defendant strongly objects, contending that the plaintiff, who supplemented his request for a jury by a demand for a special jury, should bear the costs thereof, and that that has been the practice, citing the case of the *Royal Bank* v. *Pound* (not reported) in which MURPHY, J. made an order for a "common" jury and refused to order a "special" jury, which order was varied on appeal by striking out the word "common." That is all that appears from the formal order of the Court of Appeal as filed. The judgment in question appears to have been oral, and has never been transcribed, assuming the reporter took cognizance of it. I cannot get any light from that decision to guide me in this matter, and counsel have not furnished me with any other cases. In this instance before me, Mr. *Dorrell* for the plaintiff opposed Mr. *Craig's* application for a jury, contending that the issues herein were not such as were triable by a jury. I had some doubt as to whether he was not right in regard to some of the issues. However, against his strong submission, I ordered a jury, whereupon he asked that the jury, if ordered, should be a special one, and I then so ordered, and that the costs thereof be costs in the cause: Order XXXVI., r. 7 (*d*); and section 49 of the Jury Act, being Cap. 34 of the Acts of 1913. It seems to me that this is the only order that should be made in circumstances such as appear in this matter. Were I to order the plaintiff to pay the costs, he might well fail to deposit with the sheriff the necessary sum required or indeed fail altogether to serve the requisite notices required by section 50 of the Jury Act. The plaintiff does not "desire" a jury at all. The jury is forced on him by the necessities of the case. The defendant, on the other hand, not only requires a jury but demands one. It is easily conceivable, in a state of practice which of course does not exist at this bar, that counsel desiring a special jury but not desirous of paying in the interim for one, might apply simply for "a jury," which, in his mind, would be a common jury, knowing full well that if an order were made for a jury, that his opponent would then ask for a special jury, for which, if the practice were as counsel for the

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defendant now contends for, his opponent would have to pay. He would thus secure a special jury, which he really desired, at the expense of his unwilling opponent. If Mr. *Craig's* contention is the right one, then the Act, in my opinion, is susceptible of such a construction. I do not think the Legislature so intended. I could readily have made it a term of my order that the plaintiff should pay the excess jury fees necessary for a special jury. However, I think this is a favourable opportunity to take a step towards settling, I hope, the practice, about which there appears to be a conflict of opinion in the profession.

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Order accordingly.

DOMINION TRUST COMPANY v. NEW YORK LIFE INSURANCE COMPANY *ET AL.*

HUNTER, C.J.B.C.
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April 19.
COURT OF APPEAL
Nov. 7.
DOMINION TRUST CO. v. NEW YORK LIFE INS. CO.

Insurance—Misrepresentations of insured—Materiality—Suicide—Effect of on policy—Evidence.

Practice—Consolidation of actions—Objection to by parties—Issues not identical—Marginal rule 656.

Separate actions were brought by the Dominion Trust Company (in liquidation) as executor of the estate of W. R. Arnold, deceased, against three insurance companies to enforce payment of certain policies taken out by the deceased. On the first case being called for trial counsel for the two other companies, whose cases had not been called, appeared on the understanding that an arrangement had been made between counsel (to save time and expense) whereby the evidence taken in the first case would be used so far as possible in the second and third cases, although admittedly there was an additional issue in the latter two cases, upon which evidence would have to be taken. Counsel for the plaintiff objected to this, and asked that the actions be consolidated. The trial judge ordered consolidation, notwithstanding the protest of counsel for the several defendants. The defences were: (1), that Arnold had committed suicide, which, under the terms therein contained, would vitiate the policies; and (2), that he was guilty of material misrepresentation in answer-

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ing questions in the several applications for insurance, by stating that his father had died of pneumonia at the age of fifty-six when, in fact, he committed suicide at the age of fifty-four. Judgment was given for the plaintiff.

Held, on appeal, *per* MACDONALD, C.J.A. and GALLIHER, J.A., that upon the evidence deceased came to his death by his own intentional act and that his answer to the questions as to the cause of his father's death was material misrepresentation, which also vitiated the policies.

Held, further, that as the consolidation was effected at the instance of the plaintiff, and on the record he had failed to make out a case, it is unnecessary to consider the propriety of the consolidation of the actions.

Per MARTIN and MCPHILLIPS, JJ.A.: That the Court has no power to summarily order a consolidation of actions where the issues are different on the records, and

Held, further, that the question of whether a party has been prejudiced by consolidation does not arise where the litigant is denied the fundamental right to have his case tried by itself under the control of the counsel he has selected and retained for that purpose.

Statement

APPEAL by defendant Companies from the decision of HUNTER, C.J.B.C. of the 19th of April, 1916, in three consolidated actions brought by the Dominion Trust Company as executor of the estate of the late William R. Arnold, who died in Vancouver on the 12th of October, 1914, to enforce payment of four insurance policies taken out by Arnold in the defendant Companies. The Dominion Trust Company went into liquidation on the 9th of November, 1914, and the liquidator subsequently obtained probate of Arnold's will, the policies having been made payable to his estate. The learned trial judge consolidated the actions, to which counsel for the defendants objected, as the issues were not identical, although nearly the same, there being an issue in the New York Life case that did not arise in the other two, and an issue in the latter two cases that did not arise in the first. Two policies of $50,000 each were issued on Arnold's life by the New York Life Insurance Company on the 25th of September, 1914, the first premium having been paid by two promissory notes that were not payable until after Arnold's death. Both policies contained a clause that "In the event of self-destruction during the first insurance year, whether the insured be sane or insane, the insurance under this policy shall be a sum equal to the premiums

thereon which have been paid to and received by the Company, and no more." Three of the questions and the answers thereto on Arnold's application for insurance were as follow: (1) "Have you an application now pending in any Company or Society? No." (2) "Has any Life Insurance Company ever examined you, either on an application for insurance or for any other reason, without issuing a policy? No." (3) The answer to a question as to his family record was that his father had died of pneumonia at the age of fifty-six.

A policy of $50,000 was issued on Arnold's life by the Mutual Life Assurance Company of Canada on the 27th of November, 1912. The policy contained a clause that "the policy should be void if the assured should die by his own act within two years from the date thereof," and the application for insurance contained a similar question and answer with relation to his family record as contained in the New York Life applications.

A policy of $10,000 was issued on Arnold's life by the Sovereign Life Assurance Company of Canada on the 23rd of October, 1912, the application and the policy being similar to those of the Mutual Life Assurance Company, except that the policy contained the following additional clause: "In the event of death by self-destruction, voluntary or involuntary, sane or insane, the Company shall be liable to pay only the reserve computed upon the government basis."

Statement

The defendant Companies raised the defence that in fact William R. Arnold committed suicide by shooting himself with a shot-gun on the 12th of October, 1914.

The evidence established that Arnold's father had committed suicide by carbolic acid poisoning at the age of fifty-four, and that at the time Arnold applied for the New York Life insurance, two applications that he had made for insurance were pending, one in the British Columbia Life Assurance Company for $50,000 and a second in the Great West Life Assurance Company for $100,000. The facts are set out fully in the judgment of the learned Chief Justice.

Martin, K.C., for plaintiff.
Davis, K.C., for defendant New York Life Insurance Co.

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Sir C. H. Tupper, K.C., for defendants Mutual Life Assurance Company of Canada, and Sovereign Life Assurance Company of Canada.

HUNTER, C.J.B.C.: These are three actions which have been brought by the Dominion Trust Company, now in liquidation, as executor of the estate of W. R. Arnold, against three insurance companies; against the New York Life Insurance Company upon two policies for $50,000 each, one a term policy for ten years and the other an ordinary life; policies as to which applications were originally put in on the 16th of September, 1914. There is also an action against the Mutual Life Assurance Company of Canada for $50,000 on a policy which is dated the 27th of November, 1912. There is a third action against the Sovereign Life Assurance Company of Canada for $10,000 on a policy dated the 23rd of October, 1912. These three actions have come on for trial together, and it is now for the Court to deliver judgment.

First of all, I would like to say that I feel myself very fortunate in having received the assistance of very able counsel, who have been engaged on either side of the case, the assistance extending at every stage of the case with the possible exception as to the view. I also feel fortunate, in coming to a conclusion, that I have not to deal with any question of untruthful testimony, as far as my recollection serves me, in respect of any of the witnesses, notwithstanding the severe strictures which have been passed upon two of these witnesses, namely, Hodges and the chauffeur, Von De Poel. I think that the only matter left for the Court is to decide as to what is the proper inference to be drawn from the facts, the material portion of which, if not actually the entirety of these facts, not being in serious controversy. The main question is as to what is the true conclusion to be drawn with regard to the defence of suicide.

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The late W. R. Arnold was born in London, England, in the year 1883. He came as a child with his parents to Canada, and received what education he got at the public schools at Moosomin, and came still further West as a boy to British Columbia. He engaged in clerking in different places, and eventually joined the old Dominion Trust Company, in which

he started as a clerk, and finally rose to be managing director of that concern and the subsequent concern of the same name, which took its place, and of which corporation he was managing director for four years, with a salary at his death of $14,000, which salary, I believe, if my recollection serves me right, he had been enjoying for some two years prior to his death. His death took place as the result of a gun-shot wound in a garage upon a lot which is situated at Shaughnessy Heights in this city, on which he was intending to build a residence. The death occurred on Thanksgiving Day, October 12th, 1914.

The first question raised by the defendants was as to the status of the Company to sue. As to that, I am of the opinion, as I was during the argument, that the only concern of the defendants is as to the question as to whether the plaintiff is in a position to give them a good legal discharge. There was no reason urged as to why the plaintiff, suing as executor, was not in a position to give a good legal discharge. Therefore, in my opinion, there is nothing in the preliminary objection.

The main defence put forward by the Companies is, that what appears to have been an accidental death, was in reality a case of suicide. It is to this controversy, as to whether the death was the result of wilful self-destruction or an accident, that the evidence has been chiefly directed. Now in support of the theory of suicide, a number of circumstances have been brought out in the evidence which has been led by the defence. In the first place, of course, it appears that not only Arnold himself, but his Company, were in a state of extreme insolvency. The Company was indebted to the extent of some $2,000,000, for which it had no real visible assets. He himself was apparently indebted, either himself personally or through the medium of Syndicate 8 and the so-called Philip account, to the extent of somewhere between $800,000 and $1,000,000. At the time of his death he was owing for rent; he owed a number of workmen for wages in connection with the clearing of his land; he owed his gardener, and he owed his chauffeur some small amounts of money. But these minor debts, of course, count as nothing in comparison with the real condition in which he was with regard to the Company with which he was connected, and with

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regard to the speculations in which he was indulging. Not only was the Company in an insolvent condition, and he himself, but the deposits were rapidly dwindling until, as we have it sworn by Mr. Buchanan, I think it was, that on the 8th of the month, that is to say, four days before his death, upon making inquiry from the central office as to the condition of the deposits and on receiving the unwelcome news that they had dwindled to a very large extent, he heaved a sigh which seemed, of course, to be an indication of severe depression. It is, of course, suggested in connection with this matter, that his hopeless insolvency would naturally weigh upon his mind; that it would bring home to him, in more or less realistic fashion, that the day of his position as a financial magnate was rapidly coming to an end. His financial standing, of course, would disappear. Not only that, but in the eyes of many persons, he might possibly be regarded that he had, to all intents and purposes, become an embezzler and misappropriator of funds, and was within measurable distance of prosecution under the Criminal Code. Certain it is, at all events, that he had misappropriated large sums of money and that he had engaged in a lot of speculations which were visionary and chimerical in character. Not only was he, according to the admissions of all the counsel engaged in the case, liable to criminal prosecution, but according to the evidence of Hodges, he made the admission himself to this gentleman some two weeks before his death, having said to Hodges that he had done things for which he could be sent to the penitentiary and that he (Hodges) knew it. Now, that being the condition of affairs, it is urged by the defendants that in desperation, Arnold, who no doubt had good qualities, wished to protect the Company as far as he could; wished to save his own name and reputation as far as he could, and in addition, wished to leave something for his family, and that for that purpose he made a will, which will is dated some two days before his death. It is to be observed in connection with this will, that it appears to have been a mere repetition of a former will which was drawn up on the 15th of January of that year, that is six or eight months previously, and that the only alteration, as far as the evidence tells

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us, was in connection with Syndicate 8, which necessitated the retypewriting of the third page of the original document. However, the argument is for the Insurance Companies, that this was his best way, according to his idea, out of the difficulties into which he had got; and the only way which he could save his good name, to some extent at all events, was by taking out a large sum of insurance with the intention of doing away with himself when the necessity finally came.

Now the next circumstance which has been pointed to, in connection with this theory of suicide, is that he knew at the time of the taking out of these enormous policies of insurance, that he was not financially able to carry them. He did give a note on the 3rd of October for $668 in connection with the short term policy, and another note for $1,275 in respect of the ordinary life policy. These notes would have matured, one of them nine days from the time he died, and the other 24 days from the time he died. Now the suggestion is a very natural one, that he was coming rapidly to the end of his tether and that the default in the payment of these notes would precipitate general knowledge of his true condition, that is to say, that he was hopelessly bankrupt, and that that was one of the strongest possible reasons for doing away with himself at the time he did. Of course, it is to be noted in connection with that, that the true legal position was not that the policies would immediately lapse by reason of the non-payment of these notes. As a matter of law, they would be carried until the time came for the payment of the next premium. It may very well be that Arnold fully realized that; that he considered the policies quite safe as long as the term covered by the premium had not yet expired, and left the future to take care of itself as to how he should meet these notes, either by renewal or by borrowing money from other sources, or by standing off creditors in the best way that he could, and defending any suit brought in the Courts. However, it is a circumstance which has been dwelt upon, and I think not improperly, to shew that this man was being gradually pressed into this end: that he had tried to do the best he could in the way of accumulating this large insurance, and that the time would soon be at hand when this insurance would inevitably

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lapse, and that he was driven for these, among other reasons, into suicide. It appears also from the evidence that it was not at all his habit to go shooting. It does seem, perhaps, an unusual thing that he should charge the chauffeur with the mission of getting the shells before he went down to the ranch. However, there it is. There is no doubt that he did depart from his usual custom, and did order the chauffeur to purchase these shells, and went down to the ranch with his friend Gibson. It is also noted that he knew the gun was loaded. The evidence of the gardener in the garage is quite positive to the effect that the gardener called his attention to the fact that there was a shell in the gun. At all events, if he did not know that the gun was loaded, he knew that the gun had a shell in it. Of course, whether the shell was charged or had already been discharged, his knowledge as to that does not appear one way or the other. Then the final argument is that he had at once to make a choice for himself as to whether he would go down and meet Mr. Hodges and produce the securities which Mr. Hodges was demanding for the purpose of making a report to the inspector of trust companies, which would mean that, in the course of two or three weeks at the latest, the true condition of the Company would be revealed to the Government authorities. It is then argued that in view of this impending debacle that the man was eventually forced into making up his mind to do what he had been harbouring for some time previously. It also appears that at the time the gun was discharged, there was nobody looking at him. The evidence is that the little boy that was in the garage at the time had his back turned. The little boy says that Arnold was looking at him, and that he had turned his back to Arnold and was engaged in handling some tools when the shot was discharged. Of course, that supports the theory of intentional suicide to some extent. There is also the position of the body found after death, which has been dwelt upon as some evidence of suicide. It is noted that the body was found with the arms partly folded across the breast and the gun was found on the left side of the body, with the muzzle towards the head, and the cane on the right side of the body, with the crook towards the head, and

the natural inference might be, at first blush, that the gun had been deliberately held against his breast, and the trigger pressed with the cane in his right hand. That having done that, the body assumed a natural position and the gun and cane also assumed a natural position, as a consequence of that act.

Now these, as far as I recollect it, are the main reasons for suggesting the conclusion that this man committed suicide. Of course, if these facts were taken by themselves they would undoubtedly form cogent evidence in favour of that theory; but there are other facts which have been marshalled on behalf of the plaintiff, which, of course, have to be taken into account in coming to a conclusion.

The first outstanding fact, to my notion of the matter, is that this man Arnold was still young; that he was 31 years of age; that he was in robust health; that he was happy in his personal relations with his family; that he was a man of sanguine temperament. In fact, as far as the evidence shews, with the possible exception of the incident related by Buchanan, he was not much given to worry. In fact, I doubt if there are very many business men in Vancouver, being in the position that he was in, that would have given any less exhibition of personal worry than appears to have been exhibited by Arnold. The fact seems to be that he was somewhat of a bluffer; that he had been used to bluffing his way through the world, and elbowing his way through difficulties from the time he was a boy, and he appears to have very successfully fended off auditors, directors, shareholders and everybody else from gaining any true knowledge of this concern, although it was in a shaky condition for 18 months or more. He seems to have been an adept at juggling both accounts and assets, in order to meet difficulties as they arose. Then again, in my opinion, it is necessary to look at his outward demeanour so as to gain some indication as to what was going on in his mind. Now, the first thing that I think is of some consequence to look at in connection with this question of his outward demeanour, is this memorandum which has been produced regarding the purchase of the lot on Shaughnessy Heights, which I may refer to as the Nichol memorandum. This memorandum was apparently

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carried about in Arnold's pocket, or kept very handy at least, in which he entered, in natural sequence, the occurrence of the interviews that he has by telephone and personally with this man Nichol, in respect of this lot which he is bargaining about on Shaughnessy Heights. That memorandum runs from the 5th of May until the 10th of October; that is to say, within 36 hours of his death, the last entry reading: "A. H. N. promised to call 10.30. He telephoned 11.30. He promised to call by 12, said he had letter with him." Now that, to my mind, is a pretty strong indication that at the time that Arnold was entering that memorandum he was not harbouring any intention of suicide.

Now we have also given in evidence that on the 10th, that is two days before the death, he had a discussion with a man named Carrick, in which Carrick is endeavouring to interest Arnold in some concern of his (Carrick's) in California. He was contemplating the purchase of some property there, and he was asking Arnold's opinion. Arnold tells him the best thing he can do is to sell some of his Dominion Trust Company stock, and he promises to assist him in that matter. While this discussion with Carrick is going on, it appears that Arnold rang Nichol up in connection with his own matter with regard to this Shaughnessy Heights residence, and the gist of the conversation is that he has eventually arranged with Nichol, that Nichol should bring in the papers, whatever these papers were, to him (Arnold) on Tuesday, that is the day after the death, at 11 o'clock in the morning. Now it seems to me that a man who is contemplating suicide, and making arrangements to that end, is hardly likely to trouble himself with Carrick's concerns or to be particular to have Nichol bring in the papers on Tuesday morning. That was in the morning on the Saturday, two days before the death. On the afternoon of that day he asked his friend Gibson to go out with him to the ranch, that is to say, a place which he is engaged in clearing, on which he had a number of men working. It occurs to him to get the shells, and in pursuance of his directions, the chauffeur got the shells, which apparently they got after guessing at the calibre of the gun which it was intended to use. On going down to the

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ranch, he secured the gun at the cottage, and it being shooting season, he thought he would indulge in a little shooting himself. The evidence is clear enough that he attempted a "pot shot" at a grouse, and missed, and that the gun jammed and Blayden took it from him, and succeeded in getting it in order, and that afterwards the gun is taken by Arnold back into the car. He brought the tent and gun back to town. According to the evidence of Blayden, it was intended that that tent should be taken from the ranch. If the tent was taken, of course nothing would be more natural than to take the gun with it, because the two articles belonged to his friend Nicholson. At all events, there does not seem to be any unnatural reason for his bringing the gun back to town. The only reason that is suggested seems to be a natural one, that he was to take care of it for Nicholson in connection with the tent. On bringing the gun back to town, at the suggestion of his friend Gibson he discharged it into the ditch, no doubt for the purpose of protecting his children at his own house. He knew that he had two boys there, both probably inclined to interfere with the gun if they discovered it there, and as a sensible man would do, endeavoured to unload the fire-arm. He then put it in a wardrobe, and no incident occurs in connection with it there. That same night he went to the office as usual. The witness Gemmell, I think it was, describes his conduct at the office on that night as without any particular significance one way or the other. There seems to be nothing unusual. The next day, which is Sunday, the 11th, he spent, as far as has been told us—at all events as to the afternoon—at golf with Mr. Hodges. He apparently slept soundly that night. An incident is related by his wife to the effect that she had a disturbing dream and that she wakened him, and that he reassured her and went to sleep himself, and slept perfectly sound the rest of the night. On the morning, in pursuance of an order which had been given to him the night before, the chauffeur turned up at the house about 8 o'clock. He left for the garage and reached the garage, according to his account, somewhere between 9.15 and 9.30. Arnold bid his wife and family good-bye in the usual fashion, when one of the boys asked about the gun, and he said in answer to this inquiry

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by the boy, that he had better take it away, otherwise his mother would not have any rest. He then informed the chauffeur that he was taking it away, and the chauffeur suggests, "What about the shells?" And at Arnold's suggestion the chauffeur goes into the kitchen and brings the shells out, so that both the shells and the gun are taken away. According to the evidence of the chauffeur, he reached the garage about 9.30, and as would naturally happen if a man was in a normal condition and not pondering over such an event as suicide, he makes a casual remark to the chauffeur about the condition of the trees, which were visible as they approach the place. He then tells the chauffeur to come in, as it is raining, and at that invitation the chauffeur went into the garage. The chauffeur tells us that he took the gun out of the car and placed it by the wall. There was also a cane which he carried, that was placed by the wall. Then apparently the gardener was found there, and the two of them go out and go over the grounds, discussing the position as to where certain trees are to be planted, and they pretty well travel over the whole ground, and they spend somewhere about 15 or 20 minutes in discussing what was to be done with respect to the planting of the trees and the laying out of paths, just as a man naturally would do who is contemplating going on with the building of a residence. They

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then go into the garage and they begin discussing a plan which is hanging on the wall. Then the incident occurs, which would naturally occur if everything was normal, that Arnold felt the call of nature, and upon it being suggested by the gardener that he had better go upstairs, he objects, as a man might easily do who had his normal senses, that there are women and children close about, and he preferred to go outside. He picks up a piece of paper and goes outside into a place that is intended to be used for a pony stall, and comes back with the "package" which has been referred to in the evidence, which he put into the car, remarking to the chauffeur, "We will get rid of that as we go down town." Now great stress has been laid on that by the doctor, and I think not unduly, to shew that it is incredible that Arnold was under any mental strain at the time, at all events under such a mental strain as would naturally be

the case if a man were contemplating suicide. The gardener then came in again, and Arnold wants him to make some measurements. While the gardener is out taking the measurements, Arnold, as a man would, it seems to me, under normal conditions, has a conversation with the chauffeur. He considers the condition of the tires and makes use of the remark that "soon we will need some new tires." Then a conversation takes place as to where the chauffeur is to put his bench, and the chauffeur makes the remark that the windows are too high; and after some further discussion, they finally fix upon the place where the bench is to be put. Now it does seem incredible that a man should be spending his time in deliberating over a trivial matter of that sort, and discussing a trivial matter of that sort, if he intended to put an end to himself within a short time—in fact, in a few minutes. Then, after this discussion, the gardener came in again and, apparently, the chauffeur is motioned out to wait until Arnold is ready to go to town. It does not appear affirmatively, as far as I recollect, as to what moment of time Arnold resumed possession of the gun in the garage. That is to say, took possession of the gun before the accident took place. But, however that may be, when the gardener came in again they begin discussing the plans again, and the gardener, apparently seeing the breach open, offers the suggestion that the gun is loaded, and Arnold said "yes." Shortly after that, the gardener, in obedience to a former suggestion or direction, picks up a shovel and goes outside for the purpose of letting the water off in front of the garage. Now, in connection with that, it is important to remember that the gardener was some four or five feet away from the entrance; that the entrance to the garage was half open, that is to say, there was one door of the double doors left wide open, so that there was a space of seven or eight feet through which any person from that direction could witness what was going on inside the garage. It was also brought out that in addition to the gardener being only four or five feet away from the door, engaged in letting away this puddle of water, that the little boy—the gardener's son—was in the room at the time, and, of course, it does seem highly incredible that a man who is deliber-

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ately intending to commit suicide—that is a man who cannot be said to be insane in the true sense of that term—would select an occasion of that sort, where there was a man three or four feet outside and a boy who might be looking at him at the exact moment, to commit a deed of this kind, and which he would certainly wish to conceal. In fact, we have the evidence of Dr. Ferguson, who appears to be a gentleman well versed in these matters, to the effect that it is highly unlikely that a man in Arnold's position would select that moment to perpetrate such an act.

Then there is undoubted evidence to shew that this gun was of an extremely tricky and dangerous type. As I have already remarked, it has been shewn by the evidence that on at least four different occasions this gun acted in a very remarkable fashion, to say the least. Of course, its chief danger lies in the fact that it is an automatic self-cocking gun and has a very light pull, that is a pull which is shewn by the evidence to be 4¼ pounds, whereas the standard pull is close to six pounds. The gun itself has been characterized by a man who ought to know a good deal about it, namely, Blayden, as "a brute of a gun." We have also the circumstance that has not been controverted, that Arnold himself was ignorant of guns generally, and very possibly had handled a pump gun, such as this is, for the first time in his life that afternoon at the ranch. It is clear enough that the gun jammed at the ranch with Arnold; that not only did it jam, but that the conditions which invited the jamming on that occasion were undoubtedly accentuated by the fact that the weather was moist and that the shell was a paper shell and not a brass shell. The conditions were undoubtedly aggravated by both the temperature and the character of the cartridge that was being used. Blayden says he fixed it, but it appears that there is some doubt as to whether Blayden inserted another shell. I think the conclusion is reasonably certain that Blayden did insert another shell after having got the gun released from being jammed, and the breach block up in place. It jammed, according to Blayden, with himself, and on one occasion the gun went off unexpectedly. It very likely jammed again when Arnold discharged it before arriving at the Magee

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house. It is quite likely that on that occasion Arnold did not succeed in putting the breach block back in place, but that he was too reluctant to say anything about it to Gibson because it might shew his comparative inexperience, which, as a rule, men are not very likely to admit when handling a gun. It certainly jammed in the witness-box with Stark. The janitor also tells us that he experimented with it during one of the sittings of the Court after the time of adjournment, and that he knocked it against the floor. The breach block fell down, and as he shoved the breach block back into place in some unexpected way the hammer fell although he did not touch the trigger. I do not see that there can be any doubt whatever, as far as the gun itself is concerned, but that it is a decidedly tricky and dangerous weapon; exceedingly dangerous owing to its automatic or self-cocking character, in the hands of a man like Arnold. Now, it is quite possible that at the garage, Arnold would not naturally want to expose his ignorance of guns to the gardener, and yet wanting to make sure that the gun was not left in a dangerous condition when he left the garage, because he knew there were children there, he might possibly have thought—he might not have given very much attention to the matter—that the shell had been discharged; that in reality there was no danger; but that he did not care to have the gun shewing around the place in that shape, and that he in reality was trying to extract the shell which he considered had already been exploded. But, of course, that is all speculation.

There is another circumstance referred to by the doctor, which, to my mind, is a rather weighty one, and that is as to the position of the cane. According to the evidence of the doctor, if Arnold was under a nervous strain, that nervous strain would find itself expressed after death in what is called a cadaveric spasm, and in all probability, if he had been under that nervous tension, the cane would have been found clinched in his right hand, if it had been used, as the defendants suggest, as a means of death, by pressing it against the trigger. Now I think that is a significant circumstance. Of course, it is absolutely impossible for us to say one way or the other whether

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that would have happened, but it does seem to me that that would be a natural occurrence if this man had been under a continued mental strain, which would be the case of a man about to commit suicide, and that the cane would, in all human probability, have been found clenched in his hand. The doctor also tells us that it is his opinion; it is evident that there was no nervous strain at the time of Arnold's death, from the fact of this incident about the package which was put in the car. The doctor argues that that shewed an act of consideration on the part of Arnold; that he did not wish to inconvenience or annoy the inmates by it being necessary to obey a call of nature, and that he did not wish to leave anything offensive in the neighbourhood. According to the doctor, that is evidence of considerateness. Of course, if that is so, this is absolutely incompatible with the frame of mind that a man would naturally be in who was about to take his own life.

Then there is the further circumstance that nothing was left for the wife—only $50 left, according to the wife's evidence, in the house. The house was expensive to maintain. There was nothing for the two children and the wife, to keep them in the manner in which they had theretofore been accustomed to live, the ordinary allowance being from $300 to $350 a month. Not only was there no provision made for her by way of a supply of ready cash, but there was no policy indorsed over to her. That, to my mind, is a very strong circumstance to negative the theory of suicide. If this man had been intending such an act, it appearing in the evidence that he was living in happy relations with his wife, I think it is beyond peradventure that he would make some provision in the way of indorsing some one or other of these policies, because it does seem incredible that a business man in Arnold's position, who was trafficking in insurance to such an extent as he was, should be ignorant of the fact that all he had to do was to indorse over some one of these policies to make it absolutely certain that the proceeds would go to his wife and not be engulfed by the creditors. Not only that, but the will as proved, according to the evidence of Mrs. Arnold, simply carries out an intention that he had expressed five years before, namely, that he was

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going to leave her the sum of $75,000. It shews that he retained an intention in respect to a matter that he had formed five years before.

Then we have the evidence of Mr. Wilkinson that he appears to have considered the advisability of dropping some of his policies, and certainly it does seem an extraordinary state of things that a man who was harbouring suicide should consider dropping any of his policies, because it is the contention that the main inducement to commit suicide was in order to accumulate a large sum of money for his Company and for his family after death, but there it is. We have the evidence of Mr. Wilkinson to the effect that he dissuaded him from dropping some of his older policies.

Then in regard to the securities which Mr. Hodges called for, it appears to be undisputed that these securities or documents, which Hodges had called for, were all produced. In fact, not only produced ready for Hodges's inspection on the Monday, but produced promptly; Hodges had written his letter on the 8th, and Arnold makes no delay about it. He summons Gemmell into his office on the 9th, and reads over this list of documents wanted, and gives him positive orders to have those documents ready for Hodges on Monday morning.

Then there is the circumstance which has been alluded to also, that the wife was about to be confined. It certainly does seem rather a strange time for a man to select to commit suicide, when an event of that kind is about to happen. One would naturally suppose that he would defer an act of that sort.

As far as I recollect, I have enumerated the facts and circumstances which point on the one hand to suicide and on the other hand to accident. It does seem to me that the facts which I have detailed, which go to shew an accident, to a large extent, if not absolutely, neutralize the facts which have been detailed to prove suicide. The outstanding facts are that the man was in robust health; that he had been accustomed all his life to facing difficulties, and that he was happy in his family relations, and that he was a man of very sanguine temperament. Now, I am aware that there is some danger of the Court projecting its own mentality into circumstances

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of this sort, and that because it considers that it might have acted in a given way itself, it therefore should ascribe such action to the actions of the man who is being considered. If I were to be called upon to decide the matter as one of the balance of probabilities, I think I could safely say that the balance of probabilities inclines to the theory of accident and not the theory of suicide. Although there is danger in one assuming to decide, under such circumstances as these, as to what was the main stream of Arnold's intent and what was merely the back eddies and cross currents, and it is, to a large extent, mere speculation. I think I am, however, relieved from finally deciding the matter as a question of probability, for the reason that the onus of proof is upon the defendant Companies. Not only is the onus of proof on the defendant Companies but, in my opinion, there is a double onus of proof. In the first place, suicide is one of the excepted risks specified in the policies. In the second place, as we all know, it is against the teachings of the Christian religion; it is against the common law. An attempt to commit suicide is made a criminal act by the Criminal Code, and it is against the law of nature, and, in fact, against all instincts of self-preservation. But the task which anyone alleging suicide has to accomplish, to my mind, is made very much greater in the case of a man who was in the prime of life, enjoying robust health, and who was happy in his own private domestic relations. As I say, it is difficult to decide finally and conclusively as to whether this man was prompted to commit suicide, or whether the event was a pure accident, but the principles regarding the onus of proof come to my assistance, and having regard to those principles, I can safely say that it has not been proved with reasonable certainty that this man did commit suicide.

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Now, then, with respect to the other branches of the case, with respect to the representations which have been complained of, I do not propose to delve into any of the old law in connection with the rules surrounding conditions, warranties and representations. Undoubtedly the law, before the passage of the Act of 1910, was in a highly unsatisfactory condition. People who took out insurance very often found themselves

trapped by reason of having made unguarded statements or incorrect statements, without necessarily any fraud, only to find that when it suited the purposes of the insurance company that the company contended that the legal effect of the contract was to make these statements warranties, and according to the English law, the condition of the insured became a very unfortunate one. The American law seems to have followed a different channel, and according to the bulk of the decisions in that country, the Courts chose to hold these statements not warranties, but mere representations, which have to be shewn not only false but material. Now, to my mind, a lot of that old law has been swept away by the provisions of this Insurance Act. In the first place, it is provided that the entire contract shall be in writing. That, in itself, of course, is a safeguard. In the second place, it is provided that these statements shall be representations and not warranties, in the absence of fraud. It seems to be also the law that it is not for the company making a defence on a policy to bring forward the agent and produce his evidence as to what is material, but that evidence as to that may be given, on the other hand, by so called medical referees and insurance brokers. It is undoubted that the question of materiality is now for the Court.

Now the first misrepresentation complained of is on the subject of pneumonia. That is a representation which is complained of by all three defendants. It is alleged that because the death of Arnold's father was described as due to pneumonia and not due to carbolic acid poisoning, that that was a false representation, and that it was material to the risk and, therefore, forms a good ground of defence. As far as that particular representation is concerned, I am satisfied, in the first instance, that it cannot be properly described as an untrue description of Arnold's father's death. According to the evidence of the doctors, pneumonia is a highly febrile disease, which, in the course of its progress, produces great mental strain by reason of the cerebral inflammation; that men frequently become delirious in the progress of the disease, and frequently attempt to perform suicidal acts. It is not an uncommon occurrence for people, during the progress of pneumonia, to throw themselves

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out of the window, and in that way cause their own destruction. To my mind—and I think I am fortified in that by the evidence—the carbolic acid poisoning was a mere incident in the progress of the disease. In fact, Dr. Chown himself says that he would describe the death in that case—and properly describe it—as due to pneumonia. So that I am of the opinion that the description of this death as "pneumonia" cannot be said to be an improper description; but, in any event, I do not think it was at all material. According to the evidence of the doctors, there was no controversy about that. The fact that Arnold's father took carbolic acid did not shew that there was any hereditary taint in the direction of lunacy in the family. There being no taint of lunacy shewn or suggested in any way, and the application itself shewing that the deceased Arnold resembles his mother rather than his father, seems to me to effectually dispose of any question of materiality. I am quite satisfied that even if the Companies had known that this man ended his life in that way, by carbolic acid poisoning, that that would have had no influence upon the taking or refusing of the risk.

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With regard to the pending applications, that is a defence which affects only the New York Life Insurance Company. It undoubtedly appears that at the time he was having negotiations with Wilkinson, that is to say, on the 16th, that he was then engaged in dickering with and negotiating with other insurance agents. However, he tells Wilkinson that he must get cheaper insurance, and that he was paying too much. Of course that is a clear intimation to Wilkinson that he was contemplating getting other and possibly cheaper insurance. The real fact of the matter is that the man seems to have been beset more or less by these insurance agents, when they got to understand that it was possible for them to get more insurance, and he seems to have informed Dodds, one of the insurance agents, that he had better go down the back elevator as there was another man in waiting. But I think it is plain enough that at the time he was bargaining, or rather entertaining preliminary proposals, which probably is the proper way to describe it—entertaining preliminary proposals from

different insurance agents, I have not any doubt that he was doing that to the knowledge of them all. These men all knew that he was being dealt with by others. I cannot see any evidence of fraud, in the ordinary sense of that word. As I say, he intimated to Wilkinson that he wanted cheaper insurance, and he explained that he was paying too much. He told Wilkinson that he was considering dropping some other policies, which Wilkinson advised him strongly not to do. Wilkinson knew and the Company knew, because it is so stated on the face of the application, that he was already insured to the extent of $360,000. And both Wilkinson and the Company knew that he was contemplating putting on a large amount of additional insurance. Then the policy itself is dated the 1st of August, by agreement between the parties, and the application is dated as of the 1st of August. Now it seems somewhat difficult to understand how a company which has got the benefit of a policy dated August 1st, and got paid a premium in respect of a risk which never took place, how it can for one purpose insist upon the construction of the policy taking effect as of the 1st of August, and for another purpose insist that it must be construed as of a later date. I am not prepared definitely to say whether or not that would be a good answer to the objection, but it does seem to me at present that it is a case of approbate and reprobate at the same time, which is not allowed, but the benefit and the burden should be taken together. However, I do not think I am driven to decide it on that ground. I am quite satisfied that, as far as the evidence goes, this man was not fraudulently dealing with any of these companies in that sense—in a sense which would avoid the policy. That being so, I think that the fact that there were pending applications is immaterial. It is not material to the risk, for the reason that some $360,000 was already upon this man's life, to the knowledge of the Company. As far as the amount is concerned, that could only be material with regard to the man's financial capacity, and it is always within the power of the Company to protect itself there by demanding cash for the first premium, or by demanding security, or for that matter, it could provide that the policy should lapse within a certain time for non-

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payment of the notes. It could have protected itself in any one of half dozen different ways; so that from that point of view, I cannot see how it can really be said to be material to the question of the acceptance of the risk.

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There was another defence put forward on behalf of the Mutual Life and the Sovereign Life to the effect that because this man did not reveal the fact that he was an embezzler, or that he was muddling his business affairs, that that in some way or other avoided their policies, which had already been in existence for nearly two years. As to that, of course, the Company could have protected itself, if it had seen fit to do so, by making inquiries at the time of considering the acceptance or rejection of the risk. They could have administered inquiries to Mr. Arnold to find out how he was managing his business, if they thought it wise to do so. Of course, it is quite clear that if they had done that they would not have been dealt with any further. But they could also have made it a condition, if they had chosen, in the policy, that anything in the way of criminality should void the policy. And undoubtedly that proviso or exception would be enforced by the Courts, if it appeared in plain unambiguous terms, so that the insured would not be in a position to say that he had been trapped by a bargain of that kind.

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For all these reasons, I have come to the conclusion that the plaintiff is entitled to judgment and that no ground of defence has been substantiated. I will, however, say that I think the Companies were quite justified in resisting this claim for payment of these policies; that there was reasonable ground for defending the case, upon the theory of suicide, for there are a great many circumstances which, until fully investigated, would naturally suggest that that is what happened. And for this reason, I think the Companies were justified, out of regard to other policy-holders, in requiring that a judicial investigation should be had before they paid these claims. They not only were justified because they are trustees for the other policy-holders, but also in the public interest. It certainly cannot be in the public interest that bogus insurance claims shall be paid without contest and without the matter being thoroughly

threshed out. It certainly is in the public interest to keep down the rates of insurance, and if large claims for insurance are obtained fraudulently with a view to ultimate suicide, and have to be paid by the companies, it is easy to see that the insurance rates would have to rise in order to allow the companies to do business. So that I say that both out of the fact that they are trustees for other policy-holders, and from the public interest, I think the Companies were justified in this case in resisting the claim until it was made the subject of judicial investigation. That may have some effect upon the costs, but I propose to leave that question to the settlement of the minutes.

For the reasons I have stated, I think the plaintiff is entitled to judgment.

From this decision the defendants appealed. The appeal was argued at Victoria on the 6th to the 13th of June, 1916, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Davis, K.C., for appellant New York Life.

Sir C. H. Tupper, K.C., for appellants Mutual Life and Sovereign Life.

Martin, K.C., for respondent, applied to put in further evidence, for which no notice had been given. The appellants had served notice that they intended to raise the question of the constitutionality of the Insurance Act. There was no suggestion below that it did not apply to the defendant Companies, and there is no evidence that the Companies took out a licence. He asked that owing to the slip he be allowed to put in evidence that the Companies took out licences, it being a case that comes within rule 868: see *Blue & Deschamps* v. *Red Mountain Railway* (1909), A.C. 361.

Argument

Per curiam: The application is granted.

Judgment

Davis, on the merits: There were three separate actions brought, one against the New York Life, one against the Mutual Life and a third against the Sovereign Life. The trial judge, without the consent of the parties, consolidated the

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actions. Unless the actions are precisely the same, I submit this cannot be done and we are entitled to a new trial: see *Lee* v. *Arthur* (1909), 100 L.T. 61; marginal rule 656. *Sir Charles* represents the Mutual Life and the Sovereign Life, and on consolidation, the question as to who had the conduct of the action arises; this is a ground for a new trial. Arnold applied for insurance in the New York Life on the 16th of September, 1914; two policies of $50,000 each were issued on the 3rd of October, 1914, and Arnold died or committed suicide on the 12th of the same month. The policy contained a provision that in case the insured committed suicide within two years of the date of the policy, the policy shall be void. The premium on these two policies was paid by notes that did not fall due until after Arnold's death. The defences are: (1), that Arnold committed suicide; (2), in answer to a question as to whether he had insurance or had applied for insurance in any other Company he said "No," when, in fact, he had policies in certain companies and had made applications for further policies; and (3), in answering questions of the medical examiner he said his father died of pneumonia when, in fact, he committed suicide. Between the 12th of September and the 3rd of October he applied for $250,000 in insurance in addition in other companies, and it was his duty under the authorities to disclose this to the agent of the New York Life. Another ground for a new trial is the wrongful admission of evidence: *Sugden* v. *Lord St. Leonards* (1876), 1 P.D. 154.

Argument

[MACDONALD, C.J.A.: The trial judges have a tendency to allow in irrelevant evidence, subject to objection; this is a mistake. It is their duty not to allow in any evidence that they think is not relevant to the issue.]

Arnold knew when he applied for these policies that he was penniless and could not pay for the first premium, and he told Hodges (a witness) that he had done things for which he was liable to be put in the penitentiary. A memorandum was found in Arnold's pocket with reference to buying a $40,000 property on Shaughnessy Heights, upon which he would have to pay a large additional sum for building, but it is apparent

from the evidence the memo. was put there in an endeavour to shew that his death was due to accident. A view of the premises was not asked for by counsel, so that the learned judge was in error in ordering it. On the question of the Attorney-General being a party to the action see *Attorney-General for Canada* v. *Attorney-General for Alberta* (1916), 1 A.C. 588. The facts are not in dispute in this case so this Court can draw inferences in the same manner as the trial judge. On the question of his false answer to the question as to whether he had any other applications for insurance pending see *London Assurance* v. *Mansel* (1879), 11 Ch. D. 363 at p. 371; *Wainwright* v. *Bland* (1836), 1 M. & W. 32.

Tupper: As the policies are different the cases should not have been consolidated. On the question of suicide the words in the policies are different. In the Mutual Life policy they are, "If I die of my own act, sane or insane," whereas in the Sovereign Life they are, "Self-destruction, voluntary or involuntary, sane or insane," so that whether he committed suicide or not his act vitiates the policies: see Bunyon's Life Assurance, 5th Ed., 89-90. We say the probate is void as it was granted to a fictitious person that did not exist, the Company being in liquidation when he died. As to the materiality of the misstatements made in answers to questions *uberrima fides* must be observed by applicants: see Bunyon, 34-5, 42 and 59 *et seq.*; *Huguenin* v. *Rayley* (1815), 6 Taunt. 186; *Geach* v. *Ingall* (1845), 15 L.J., Ex. 37.

Argument

Martin: Consolidation is largely discretionary and will not be disturbed unless an injustice is done. The ground for a new trial is practically confined to the question of consolidation. There was no improper admission of evidence, and what was objected to is of little importance and does not affect the issue: see Best on Evidence, 11th Ed., 477; Greenleaf on Evidence, 16th Ed., Vol. 1, pars. 162*f*.-162*h*.; Wigmore on Evidence (Canadian Ed.), Vol. 3, p. 2218, par. 1725. If they go into what Arnold did before his death we are then entitled to go into everything that happened before his death. As to evidence of another's mental condition see Phipson on Evidence, 5th Ed., 50. On the question of burden of proof see Taylor on

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Evidence, 10th Ed., Vol. 1, par. 112; *Doe dem. Devine* v. *Wilson* (1855), 10 Moore, P.C. 502 at pp. 531-2. As to the materiality of the untrue answers to questions, the defendant Company's agent cannot give evidence as to this; it must be proved outside the Company: see *New Era Ass'n* v. *Mactavish* (1903), 94 N.W. 599. On the question of expert evidence in insurance cases see *Anglo-American Fire Ins. Co.* v. *Hendry* (1913), 48 S.C.R. 577; Halsbury's Laws of England, Vol. 17, p. 412, par. 805.

Davis, in reply: On the question of misstatements and lack of notification by the assured with reference to applications and policies in other companies see Halsbury's Laws of England, Vol. 17, p. 551; *Thomson* v. *Weems* (1884), 9 App. Cas. 671 at p. 687; *Joel* v. *Law Union and Crown Insurance Company* (1908), 2 K.B. 863 at p. 883; *Re Arbitration Marshall and Scottish Employers' Liability, &c., Insurance Co.* (1901), 85 L.T. 757; *Davies* v. *London and Provincial Marine Insurance Company* (1878), 8 Ch. D. 469; *Anderson* v. *Fitzgerald* (1853), 4 H.L. Cas. 484.

Argument

On the question of consolidation, *Sir Charles* is deprived of the right to conduct his cases as he pleased for his clients. The Court has no standard on which it can decide whether harm has been done or not, and there is no escape from the fact that counsel has been partially deprived of the right to conduct his case: *Bray* v. *Ford* (1896), A.C. 44; *Laird* v. *Briggs* (1881), 16 Ch. D. 663. Self-serving evidence cannot be accepted: see *Reg.* v. *Wainwright* (1875), 13 Cox, C.C. 171.

Tupper, in reply: As to the position of counsel in case of arbitrary consolidation see *Amos* v. *Chadwick* (1878), 9 Ch. D. 459 at pp. 462-3; *Kuula* v. *Moose Mountain Limited* (1912), 5 D.L.R. 814. As to a Company in liquidation acting as executor see *Concha* v. *Concha* (1886), 11 App. Cas. 541.

Cur. adv. vult.

7th November, 1916.

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MACDONALD, C.J.A.: One of the grounds of appeal is that the trial judge improperly consolidated the three actions instead of trying them separately. Order XLIX., r. 1, reads:

"Causes, matters, or appeals may be consolidated by order of the Court or judge, in such manner as to the Court or judge may seem meet."

In the corresponding English rule the power conferred is to be exercised "in the manner in use before the commencement of the principal Act (The Judicature Act) in the Superior Courts of common law." The practice in these Courts was according to the *dicta* of Cozens-Hardy, M.R. in *Lee* v. *Arthur* (1909), 100 L.T. 61, not to consolidate except "where precisely the same relief" was claimed in both actions. The objection to the order cannot, in my opinion, be maintained on jurisdictional grounds. The learned trial judge may not have exercised the power and discretion vested in him in accordance with good practice. As to this I express no opinion for reasons hereinafter to be mentioned, but unless the parties have been prejudiced new trials ought not, I think, to be ordered. Had the order come before us for review before trial, I should have had to consider this question more fully than I do now; or if I were of the opinion now that the judgment on the merits is not erroneous on the record as it stands, I should have to consider whether there had not been a mistrial so far as appellants are concerned by reason of the course pursued in tying the three actions up together as has been done. But in the view I take of the merits, I do not think I need consider the scope of the rule. The respondent does not and cannot complain of the consolidation, as it was effected at his instance, and if on the record he has failed to make out his case on the merits, it would be worse than idle to send the cases back for a retrial merely because of the erroneous consolidation, assuming it was such. The same considerations apply to appellants' complaint of wrongful admission of evidence. In the result they are not injured.

The learned Chief Justice, who tried the actions together, has very carefully reviewed the evidence both for and against the theory of suicide: he has left this Court untrammelled by anything which might turn on the demeanour and credibility of the witnesses. He bases his conclusions that a case of suicide was not made out on the inferences to be drawn from the facts and circumstances in evidence. I am, therefore, left free to draw my own inferences from those facts and circumstances without embarrassment.

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After careful consideration, I am impelled to the conclusion that the deceased came to his death by his own intentional act. I also think that his answer to the question as to the cause of his father's death was material and was knowingly untrue, and for this reason also the policies were vitiated.

I would allow the appeals and dismiss the actions.

MARTIN, J.A.: We have first to deal with the serious objection to the legality of the trial which is raised by the three defendant Companies. They submit that the learned Chief Justice HUNTER had no power to make the order he did make consolidating their separate actions, and say that though he had jurisdiction to consolidate in a proper case under rule 656, yet here he exceeded the limits of his authority by doing so in a case belonging to a class that has been decided to be one in which his discretion cannot be exercised, which is another way of saying that he acted without jurisdiction by overstepping the bounds of it. An act is just as much *ex juris* because it is done beyond the limits of powers conferred as if it is when done without any power at all. Though a Court may have jurisdiction as this Court has, generally speaking, in all appeals from Provincial Courts in this Province, yet that jurisdiction may be limited as regards time, place, and subject-matter. As regards time we could not, under the old rule, entertain an appeal where the notice had not been given in time—*Laursen* v. *McKinnon* (1913), 18 B.C. 10; nor, as regards place, sit in any other town than Victoria or Vancouver (*cf. Anderson* v. *Municipality of South Vancouver* (1911), 45 S.C.R. 425 at p. 446, where a similar Act was said to be "fundamentally defective"); nor, as regards subject-matter, in any appeal, *e.g.*, from a County Court where the amount involved is under the prescribed sum—section 116, County Courts Act. And so, in like manner, six actions could not be consolidated if, for example, the rule were to say that this should not be done with more than five actions, nor in cases where there were issues affecting mineral claims which should be summarily settled by the gold commissioner on the ground. The existence of any one of these bars or limitations would, upon objection being taken (or if the Court itself raised the objection), oust the

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jurisdiction *pro tanto* (unless the circumstances were such that the other party could waive his objection) and in the same manner and with the same result as though the Court had no jurisdiction at all in the subject-matter. And the fixing of the bounds of the jurisdiction or power of a judge is determined just as effectually by authoritative judicial decisions as it is by rule or statute. And it is equally clear that a judge cannot give himself jurisdiction because he erred in his opinion of the legal effect of said rules, statutes or decisions, or mistook the facts necessary to confer it, for jurisdiction cannot be self-created by mistake of fact or an erroneous interpretation of the law and practice of Courts. I feel impelled to make these observations because of some confusion of thought which manifested itself during the argument between the limitation of jurisdiction and the exercise of a discretion in cases which had been excluded from the field of such discretion, the two having been treated as though they could be co-existent or in some way become so interwoven as to be made operative, whereas they are mutually destructive, because discretion can only exist where there is power, *i.e.,* jurisdiction to exercise it.

The English rule on the power to consolidate differs in terms from ours, but, in the light of the decision of the Court of Appeal in *Martin* v. *Martin & Co.* (1897), 1 Q.B. 429, not in substance, it having been there held that a plaintiff can now apply to consolidate and that the words in the English rule "in the manner in use before the commencement of the principal Act," etc., require only "that if an order is made it should be treated in the same manner as before," and that the only limitation upon the language of the rule is that the actions should be in the same division, leaving the application, if in a proper case, to the discretion of the judge to meet the special circumstances thereof: this is only another way of saying in the language of our rule that consolidation may be ordered "in such manner as to the Court or judge may seem meet," and in deciding what is "meet" a sound judicial discretion must be exercised within defined limits, which is described in *Morgan* v. *Morgan* (1869), L.R. 1 P. & D. 644 at p. 647 as "a regulated discretion, and not a free option subordinated to no rules."

Argument

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What happened here is that when the first case against the New York Life Insurance Company was called on for trial the counsel for the two other defendants in the cases not called on informed the Court that he understood an arrangement had been made with counsel in the first case (to save time and expense) that the evidence taken in the first case would be used so far as applicable in the second and third cases, though there were, admittedly, additional and different issues in the second and third, one additional issue in each, which would necessitate special evidence, *e.g.*, on the question of rescission, but there was no consent to consolidation, which was objected to. This statement was not wholly acquiesced in by the plaintiff's counsel, who asked that the actions should be consolidated, which was strongly opposed by counsel for the three different defendants, but after discussion, the learned judge decided to consolidate the three actions, though both of the defendants' counsel protested against this being done without notice or application in the usual way and without having an opportunity to look into the authorities, and insisted upon their right to have their cases tried separately and to retain their separate control over them as counsel; and counsel for the Mutual Life and Sovereign Life Companies further protested against being brought summarily into a case, the first, in which he was not counsel nor his client a party, and being, as he expressed it, "forced into a consolidation" before his own case had even come before the Court.

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After very careful consideration I have reached the conclusion that these objections are well taken. It was, with all due respect, an unauthorized proceeding to base the exercise of summary jurisdiction upon the fact that the counsel for the defendant in the second and third cases was, by consent of the other counsel, before the Court in the only one that had been called on for trial, to explain, as he understood it, and if correct, to carry out the arrangement that had been made with respect to these cases, and because he happened to be placed in that unusual position, exercise said jurisdiction over his clients and dispense with the formal application to consolidate, made by summons entitled in all the actions, and based upon proper

material which, in the absence of consent, is required by the practice. After examining a large number of cases I have been unable to find any precedent for such a course, and though it may be possible that circumstances might arise where it would be justified, yet I am clearly of opinion that they do not arise here. A litigant does not lose his ordinary rights in the conduct and trial of his own case simply because his counsel may happen to come before the Court in another case for special purpose. But I shall not pause to consider what the exact consequence of this action would be because such consideration is rendered unnecessary by those consequences which inevitably result from the still more serious second objection, *viz.*, that the learned judge had no power to make the order where there were different issues upon the record. An investigation of the cases shews that this contention is really beyond argument, and there has been no change in the long-established practice which is succinctly stated in that high authority Lush's Practice, 3rd Ed., Vol. 2, p. 964:

"But unless the questions in the several actions and the evidence are the same no such order will be made."

This is founded on the decision given more than 20 years before in *The Corporation of Saltash* v. *Jackman* (1844), 1 D. & L. 851, where Williams, J. at p. 855, said that, in such circumstances, "I have no power to make any order," and his judgment was quoted and followed by the Court of Appeal in *Lee* v. *Arthur* (1909), 100 L.T. 61, reversing a decision of Bigham, J. When the case of *Martin* v. *Martin & Co.* (1897), 1 Q.B. 429; 76 L.T. 44, was cited in support of consolidation the Master of the Rolls in *Lee* v. *Arthur*, observed:

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"The case . . . . is no authority in your favour. Where precisely the same relief is claimed, consolidation may perhaps be ordered, but not otherwise."

And he went on to say, after citing the *Saltash* case (p. 62):

"That the Court has power to prevent an abuse of its process I do not doubt. The Court can order the trial of an action to be postponed until the trial of some other action has been heard, but it cannot compel one defendant against his wish to have his case tied up with those of defendants in other actions."

Lord Justice Moulton said, after holding that the order had been made *per incuriam*:

". . . . The question is whether the actions brought against them

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[defendants] can be consolidated so that the appellant [plaintiff] here may have his case tied up with those of the defendants in the other actions. It is, in my opinion, absolutely contrary to the unvarying practice of the Court up to the present time to make such an order as has been made in this case. Consolidation is much more rarely applicable than is generally supposed. . . . ."

In view of this authoritative ruling it is really superfluous to cite others, but I feel warranted in drawing attention to the decision of the Court of Exchequer, *in banco,* in *McGregor* v. *Horsfall* (1838), 3 M. & W. 320, where two actions brought by the same plaintiffs against different defendants on different policies on the same ship had been consolidated, but it was held that the order of Park, J. to that effect should be set aside, counsel for plaintiffs submitting that "the plaintiffs have an undeniable right to try which actions they please and ought not to be prevented from exercising that choice. . . . ."

It would follow from these authorities that the order for consolidation must be set aside as having been made without authority, and the trial would be not merely a mistrial but no trial at all, and void *ab initio.* But these consequences are sought to be avoided because it is urged that the defendants have not been prejudiced by what has been done, and therefore the judgment should stand, and we are invited to consider all the evidence and proceedings at the trial to satisfy ourselves that no prejudice was in fact caused, and are referred to such cases as *Bray* v. *Ford* (1896), A.C. 44, and others collected in the Annual Practice, 1916, p. 704, and Yearly Practice, 1916, p. 595, to see that "no substantial wrong or miscarriage has been thereby occasioned" as mentioned in English Rule 556, and English Order XXXIX. relating to new trial. The first observation I have to make is that said order has been wholly omitted from our Supreme Court Rules, 1912, and 1906, though it was in the old Rules of 1890, so apparently we are thrown back on rule 869 and the Court of Appeal Act, Sec. 15 (3), in considering the propriety of a new trial; said rule 869 empowers this Court to order a new trial "if it shall think fit" and is the same as English rule 869. The second observation upon English rule 656 is that it relates only to new trials upon three specified grounds, *viz.*: misdirection, improper admission or rejection of evidence, or verdict upon a question

not asked to be left to the jury, none of which is now under consideration, because what we are considering is not the question of a new trial but a very different thing, *viz.*: the consequences of the denial of the fundamental right of a litigant to have his case tried by itself under the control of the counsel he has selected and retained for that purpose in all cases save in those where by the relatively modern practice of our Courts (originally introduced by Lord Mansfield in actions against underwriters: Lush's Practice, *supra,* 964) that right may be curtailed by consolidation. Where rights of that description are invaded the trial so called is not a real trial at all, because a litigant cannot lawfully be forced to have his case "tied up," as it is aptly termed in *Lee* v. *Arthur,* with other cases. Cases on the invasion of what may be styled "fundamental" rights of that class—see *Anderson* v. *Municipality of South Vancouver, supra*—are happily, as might be expected, few, but a recent illustration may be found in *Goby* v. *Wetherill* (1915), 2 K.B. 674, wherein the verdict of a jury was set aside because an officer of the Court, the town sergeant to whose care the jury had been entrusted, remained within the jury room, in an excess of zeal, for about 20 minutes while the jury was deliberating. Despite the fact urged upon the appellate Court, that the learned trial judge had found that "beyond shadow of doubt he remained a silent figure in the room and neither by word nor deed interfered in any way," the King's Bench set aside the verdict as having been vitiated by the mere fact of the officer's presence, Bailhache, J. saying: "I regret having to come to this conclusion for I daresay no harm was done"; and Shearman, J. held that "the cardinal principle of the jury system that a jury must deliberate in private" had been infringed upon, which necessitated a new trial. Now, it is just as much a "cardinal principle" in legal history that a litigant must not be interfered with in the trial of his case by another case being interjected into it and tried at the same time, despite his protest, as it is that a jury must not be interfered with by the presence of a stranger during their deliberations, and therefore the Court is not called upon to speculate upon the prejudice that may have resulted. Indeed, in my opinion, the principle in

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the former case is of stronger application because in it the trial has never been lawfully begun and the litigants' rights have been invaded and the trial vitiated *ab initio,* instead of at the end of a hitherto legal trial when the verdict was under consideration. But if it were necessary to go into the question of prejudice, which it is not, it in fact appears on the face of these proceedings because the litigant's counsel has lost control of his client's case, and it is for the client and not for the Court to decide who shall conduct his case. The client may have the belief that the counsel he retained was better qualified than any other to do justice to his particular case, and even though he might be wrong, still he is entitled to his "choice" as it was said in *McGregor's* case, *supra,* and can the Court in effect substitute wholly or in part another counsel for the one so chosen? If so, then where is the line to be drawn? Could not the Court dispense with all counsel and try the case itself, and, going still further, it might likewise dispense, if it thought fit in the exercise of its discretion, with the assistance of the jury which might have been summoned to try the facts. It may possibly be that a judge alone and unaided would have by these methods arrived at the highest possible justice, but should any litigant be placed in the unenviable and invidious position of having to shew to us wherein a learned judge failed in that respect? There can, I think, be but one answer to this, in the negative, and the right of audience and control are just as much a "cardinal principle" as the right to trial by jury, in proper cases, which is "constitutional": *Bray* v. *Ford, supra, per* Lord Watson. It may, of course, be curtailed by rule or statute or established practice, as has been done in certain cases where there is now admittedly power to consolidate, but to the extent that it has not been yet curtailed it still exists as firmly as it has existed from legal time immemorial and any encroachment upon it may be successfully repelled. There is, moreover, one very serious and substantial way in which a defendant is prejudiced by his case being wrongly consolidated, namely, that the effect of consolidation is to make him jointly with all the other defendants, liable to the plaintiff for the costs of the action—*Anderson* v. *Boynton* (1849), 13 Q.B. 308—though, for

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example, his case by itself might have necessitated the taking of very little or no evidence, whereas tried with others the plaintiff may have called many witnesses at great expense on issues foreign to the objecting defendant. In this very case, indeed, the counsel in the first case before consolidation informed the Court that he proposed to give extensive evidence and call many witnesses on the question of rescission of the policy in his Company with which the two other defendant Companies had nothing to do.

But, as already intimated, seeing that there has been no trial at all, the consideration of this question of prejudice is in reality irrelevant and unprofitable, because where there has been no trial no judgment whatever can be pronounced in favour of any party, and it is useless to attempt to patch up or bridge over a situation or difficulty which has no foundation to which a remedy can be applied.

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It is unfortunate that there is, in my opinion, no escape from the conclusion that we are prevented from attempting to cure the error, therefore the appeal must be allowed and the judgment set aside and the defendants restored to the position they were in before the order for consolidation was made, with costs to them incurred by such order.

GALLIHER, J.A.: I do not think the trial can be said to be a nullity, and agree with the course adopted by the Chief Justice of this Court.

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I also concur in the conclusions reached by him upon the merits.

MCPHILLIPS, J.A.: I am in entire agreement with my brother MARTIN.

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Appeal allowed.

Solicitors for appellant New York Life Insurance Company: *Davis, Marshall, Macneill & Pugh.*

Solicitors for appellants Mutual Life Assurance Company of Canada and Sovereign Life Assurance Company of Canada: *Tupper, Kitto and Wightman.*

Solicitors for respondent: *Cowan, Ritchie & Grant.*

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PACIFIC LUMBER AGENCY v. IMPERIAL TIMBER & TRADING COMPANY, LIMITED, *ET AL.*

Bills and notes—No indorsement by payee—Liability of indorser to payee —R.S.C. 1906, Cap. 119, Sec. 131.

Courts—Rule of Canadian precedent.

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Under section 131 of the Bills of Exchange Act a person who indorses a promissory note, not indorsed by the payee at the time is liable to the payee who has given value for it to the maker.

Robinson v. *Mann* (1901), 31 S.C.R. 484 followed.

The Supreme Court of Canada primarily settles the law of Canada, being only subject to review by the Judicial Committee of the Privy Council, and, save as aforesaid, it may disregard the opinion of any other Court in the Empire, including the House of Lords, which only settles the law of the United Kingdom. Where the facts are the same it is the duty of Provincial Courts to give effect to the decisions of the Dominion appellate tribunal.

Slater v. *Laboree* (1905), 10 O.L.R. 648 followed.

APPEAL by defendants other than the defendant Company from the decision of CLEMENT, J. of the 21st of January, 1916, in two consolidated actions on seven promissory notes made by the Imperial Timber & Trading Company, two of which were payable to the order of the National Lumber and Manufacturing Company and indorsed over to the plaintiff Company, and five made payable to the plaintiff Company. The five notes were indorsed by the six directors of the defendant Company, and the two first-mentioned notes by five of them. The facts are, that the Reliance Sash & Door Company was indebted to the plaintiff Company for lumber supplied. Subsequently (in June, 1913) said Company amalgamated with the Imperial Timber & Trading Company, and the amalgamated Company assumed the liabilities of the Reliance Sash & Door Company. The promissory notes given by the Reliance Sash & Door Company were, on their maturity, renewed by the amalgamated Company, and indorsed by the directors of the amalgamated Company. The directors raised the defence (1), that it was understood and agreed that their indorsement was for

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the accommodation of the plaintiff Company; and (2), that as the notes were not indorsed by the payee (plaintiff), they were not liable.

The appeal was argued at Victoria on the 29th of June, 1916, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

O'Neill, for appellants: The appellants are indorsers of the notes in question. We say (1), they were accommodation notes only; and (2), the notes had never been indorsed by the payee. The instruments were never negotiated, and were not negotiable: see *Steele* v. *M'Kinlay* (1880), 5 App. Cas. 754 at p. 770; *Jenkins & Sons* v. *Coomber* (1898), 2 Q.B. 168. In *Robinson* v. *Mann* (1901), 31 S.C.R. 484, the note was negotiated, and they were holders in due course. In *M. T. Shaw & Co., Limited* v. *Holland* (1913), 2 K.B. 15 at p. 27 it was held that a payee cannot be a holder in due course as against the indorsers: see also *Herdman* v. *Wheeler* (1902), 1 K.B. 361; and *Lewis* v. *Clay* (1897), 77 L.T. 653. As to effect of section 131 of the Bills of Exchange Act see *Lehigh Cobalt Silver Mines Co.* v. *Heckler* (1908), 18 O.L.R. 615; *McDonough* v. *Cook* (1909), 19 O.L.R. 267; *Johnson* v. *McRae* (1910), 16 B.C. 473; *Slater* v. *Laboree* (1905), 10 O.L.R. 648. These are all promissory notes, and the first indorser must be the payee or the Act does not apply. It does not become a negotiable instrument until it is so indorsed.

Argument

Mayers, for respondent: The case of *Robinson* v. *Mann* (1901), 31 S.C.R. 484, settled the law in Canada, and it has been followed in case after case: see also *The Ayr American Plough Company* v. *Wallace* (1892), 21 S.C.R. 256; *Knechtel Furniture Co.* v. *Ideal House Furnishers* (1910), 19 Man. L.R. 652; *Lloyd's Bank, Limited* v. *Cooke* (1907), 1 K.B. 794; *Bank of England* v. *Vagliano Brothers* (1891), A.C. 107 at p. 145; *Glenie* v. *Smith* (1908), 1 K.B. 263; *Penny* v. *Innes* (1834), 1 C. M. & R. 439.

O'Neill, in reply.

Cur. adv. vult.

7th November, 1916.

MACDONALD, C.J.A.: I concur in the judgment of my brother MARTIN.

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MARTIN, J.A.: Though the law of Canada on the point now raised has, for over 15 years, been settled by the decision of the Supreme Court of Canada in *Robinson* v. *Mann* (1901), 31 S.C.R. 484, it has nevertheless been submitted to us by the appellants' counsel that the question was wrongly decided by that Court, and certain decisions in certain English cases are relied upon in support of the submission. But, as pointed out by the Divisional Court of Ontario in *Slater* v. *Laboree* (1905), 10 O.L.R. 648, where a similar attempt was made in regard to the same case, we cannot entertain such a suggestion, because the Supreme Court of Canada primarily settles the law of Canada, being only subject to review by the Judicial Committee of the Privy Council, and, save as aforesaid, in its determination of that law, the said Court may, if it sees fit, disregard the opinion of any other Court in the Empire, including the House of Lords, which only settles the law of the United Kingdom. It is our duty, therefore, where the facts are the same, as they are here, to avoid all unprofitable discussion, and simply respectfully give effect to the decision of our immediate appellate tribunal by dismissing this appeal. The observations of their Lordships of the Judicial Committee of the Privy Council in *Trimble* v. *Hill* (1879), 5 App. Cas. 342, on the duty of colonial Courts of Appeal in general, and the Supreme Court of New Zealand in particular, have no application to the three great Dominions—Canada, Australia and South Africa—which are composed of a federation of self-governing colonies with a federal Supreme Court. There is only one colony (officially established in 1840) and styled a Dominion since 1907, September 26th, and no corresponding Court in New Zealand, which is on the same plane in these respects as our oldest colony, Newfoundland, being greater only in the amount of population, but almost 60,000 square miles smaller in area. I note that the population of one of the federated Provinces of Canada, Ontario, is, by the same census of 1911, more than twice as large as that of New Zealand, and its area is nearly four times greater.

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GALLIHER, J.A.: I agree with my brother MARTIN.

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McPHILLIPS, J.A.: This is an appeal from the judgment of CLEMENT, J., the learned trial judge having held the appellants liable, as indorsers upon the promissory notes sued upon. The learned counsel for the appellants, in a very able argument, endeavoured to distinguish the case from *Robinson* v. *Mann* (1901), 31 S.C.R. 484, and contended that the appeal should succeed upon the law as laid down in *Steele* v. *M'Kinlay* (1880), 5 App. Cas. 754, and *Jenkins & Sons* v. *Coomber* (1898), 2 Q.B. 168, an action under section 56 of the Bills of Exchange Act, 1882 (Imperial). *Robinson* v. *Mann, supra,* was a decision upon the Bills of Exchange Act, 1890, Sec. 56, and a decision based upon the construction of the Act. *Steele* v. *M'Kinlay, supra,* was before the Bills of Exchange Act, 1882 (Imperial). It was considered and distinguished by the Judicial Committee in *Macdonald* v. *Whitfield* (1883), 8 App. Cas. 733 (see *per* Lord Watson at p. 748), but is in no way helpful to the decision of this appeal. *Jenkins & Sons* v. *Coomber, supra,* was considered and distinguished in *Glenie* v. *Tucker* (1907), 77 L.J., K.B. 193, in the Court of Appeal, and in the later case of *M. T. Shaw & Co., Limited* v. *Holland* (1913), 2 K.B. 15, the Court of Appeal distinguished *Glenie* v. *Smith* (1908), 1 K.B. 263, and followed *Jenkins & Sons* v. *Coomber,* indicating some indecision at least in the Court of Appeal in England upon the question, a question upon which the Supreme Court of Canada pronounced no uncertain opinion. There is no decision of the Judicial Committee upon the Dominion Bills of Exchange Act in regard to the point under consideration, nor have we been referred to any decision in the House of Lords since *Steele* v. *M'Kinlay,* a decision before the Bills of Exchange Act, 1882 (Imperial). It is to be noted that *Steele* v. *M'Kinlay* was cited in *Robinson* v. *Mann, supra,* therefore it must be conceded that the Supreme Court of Canada gave full consideration to that case. In Maclaren on Bills, Notes and Cheques, 5th Ed., we find this stated, at p. 334:

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"In re-enacting section 56 of the Imperial Act, our Parliament made an important addition to it, *viz.*, the concluding words of the proviso to this section, 'and is subject to all the provisions of this Act respecting indorsers.' This was done as stated by the leader of the Senate who had charge of the bill, to make it clear that indorsers '*pour aval*' such as those

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above spoken of, should be entitled to notice like ordinary indorsers. It would also make them subject to the same liabilities as other indorsers as laid down in the Act: s. 133."

The proviso is to be found in section 131 of the Dominion Act, but these words are not to be found in the Imperial Act. And see Maclaren at p. 332, and Chalmers, 7th Ed., 208.

In *Robinson* v. *Mann, supra,* Sir Henry Strong, C.J., at p. 486, said:

"Next, what was the legal effect of this indorsement? Section 56 of the Bills of Exchange Act, 1890, provides that 'where a person signs a bill otherwise than as a drawer or acceptor he thereby incurs the liability of an indorser to a holder in due course and is subject to all the provisions of this Act respecting indorsers.' Then when the bank took the note was it not entitled to the benefit of the respondent's liability as indorser? Certainly it was, for by force of the statute the indorsement operated as what has long been known in the French Commercial Law as an *'aval,'* a form of liability which is now by the statute adopted in English law."

It is clear, upon the evidence, that the respondent is the holder in due course of the promissory notes sued upon, and that they were negotiated to it, but the contention of the appellants is, that notwithstanding this case, the controlling decisions are *Steele* v. *M'Kinlay* and *Jenkins & Sons* v. *Coomber, supra.* Of course the decisive answer to this contention is, that *Robinson* v. *Mann* is an authority which is binding upon this Court, being the decision of the ultimate Court of Appeal for Canada, and a decision based upon the Dominion Bills of Exchange Act, which, in terms, differs from that of the Imperial Bills of Exchange Act. Further, with the profoundest respect for the English Court of Appeal, there has not yet been a decision of the House of Lords or the Judicial Committee to the effect that the Imperial Bills of Exchange Act has not brought about a change in the law, and that the effect has been as determined by the Supreme Court of Canada in *Robinson* v. *Mann.*

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It would seem to be in consonance with what might have been expected, that the Imperial Parliament, in enacting section 56 of the Imperial Act, following *Steele* v. *M'Kinlay,* intended to introduce the liability known as an *"aval,"* which, according to Lord Blackburn, meant an "underwriting." That certainly, in my opinion, was the intention of the Parliament of Canada, and further words were added in the Dominion Act to, if anything, make it still more clear. The law of *pour*

aval was well known and applied in Quebec previously to the enactment of the Dominion Bills of Exchange Act, and the intention was to continue the law, as after the enactment of the Dominion Bills of Exchange Act the law as to bills of exchange, promissory notes, cheques, and negotiable securities was to be as defined and set out in the Act. Previously, in Quebec, the laws of that Province governed, save in unprovided cases, then recourse had to be had to the laws of England. This is seen by reference to what Lord Watson said in *Macdonald* v. *Whitfield* (1883), 52 L.J., P.C. 70 at p. 79:

"The Civil Code of Lower Canada (article 2340) enacts that 'in all matters relating to bills of exchange not provided for in the Code, recourse must be had to the laws of England in force on the 30th of May, 1849.' By article 2346 of the Code, the same law is made applicable to promissory notes as to bills of exchange, in so far as regards the liability of the parties. . . . . ."

In *Knechtel Furniture Co.* v. *Ideal House Furnishers* (1910), 19 Man. L.R. 652, the Court of Appeal in Manitoba held that—

"Under section 131 of the Bills of Exchange Act, R.S.C. 1906, c. 119, a person who indorses a promissory note not indorsed by the payee at the time may be liable as an indorser to the payee—*Robinson* v. *Mann* (1901), 31 S.C.R. 484, and *McDonough* v. *Cook* (1909), 19 O.L.R. 267, followed in preference to *Jenkins & Sons* v. *Coomber* (1898), 2 Q.B. 168, and cases following it." MCPHILLIPS, J.A.

And see the judgment of the Court, delivered by Perdue, J.A. at pp. 658-9.

Robinson v. *Mann, supra,* being a decision upon the Dominion Bills of Exchange Act, besides being a binding and conclusive decision upon all the Courts of Canada, is a decision upon an Act which is in different terms to the Imperial Bills of Exchange Act, and upon that ground *Jenkins & Sons* v. *Coomber,* and the cases following it, may be distinguished. Lord Parmoor in *City of London Corporation* v. *Associated Newspapers, Limited* (1915), A.C. 674 at p. 704, said:

"I do not think that cases decided on other Acts have much bearing on the construction of the Acts or sections on which the present case depends."

In my opinion, the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Lennie, Clark & Hooper.*

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

HUNTER, C.J.B.C.

1915

March 25.

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NATIONAL MORTGAGE CO. v. ROLSTON

NATIONAL MORTGAGE COMPANY, LIMITED v. ROLSTON.

Mechanics' liens—Priority—Unregistered charge—Notice—Registration of charge by person entitled to registration as owner.

P., an unregistered owner of certain lands, agreed to sell to A., who never registered the agreement. Subsequently P. contracted for the clearing of the lands, and, during the progress of the work, J. on application became the registered owner. On the 3rd of May, 1912, P. under deed from J. applied for and subsequently obtained a certificate of title to the property. In an action to establish liens for clearing the land a reference was ordered to report on the title, and the report dated the 23rd of May, 1913, shewed there was no charge against the lands except the liens. On the 18th of May, 1912, P. assigned his interest in the agreement of sale with A. to N., to whom he at the same time gave a conveyance of the land, and on the 12th of February, 1913, A. quit-claimed to N. his interest under the agreement of sale from P. N. applied to have the assignment registered as a charge on the 20th of May, 1912, but did not make any application to be registered under the conveyance until the 31st of October, 1913. Pursuant to an order for sale in the mechanics' lien action, the sheriff on the 6th of January, 1914, sold all of P.'s interest in the land to R.

Held, that the sheriff sold the fee in the lands which was charged only by the liens to satisfy which the lands were sold, and the liens were entitled to priority over all unregistered interests of which the lienholders had no knowledge, actual or constructive, as the application for registration of a charge by N. (entitled at the time to apply for registration as owners in fee of the legal estate) was a nullity and did not amount to notice of any interest of N.

Held, further, that even if N.'s application had amounted to notice the work under the contract was in progress prior to N. acquiring any interest, and the protection afforded the contractors and their employees by the Mechanics' Lien Act would not be adversely affected.

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APPEAL by defendant from the decision of HUNTER, C.J.B.C. in an action tried by him at Vancouver on the 24th and 25th of March, 1915, for a declaration that the plaintiff Company is entitled to an equitable mortgage in certain land in the Township of Burnaby and for the delivery up and cancellation of a conveyance by which the land was conveyed to the defendant pursuant to a sale under judgment in a

mechanic's lien action. The facts are, that on the 2nd of November, 1911, one Albert J. Passage, who was the beneficial and unregistered owner of the land in question, agreed to sell to one Robert Patterson, who never registered his title. One Bertram S. Jewell made application in April, 1912, to be registered as owner in indefeasible fee and was registered on the 18th of July, 1912. On the 30th of November, 1911, under two agreements between Passage and four Russian contractors, it was agreed that they should do certain work clearing land. On the 19th of January, 1912, the Russians commenced work and employed nine other Russian labourers on the work. These nine labourers began work at various times, two of them on the 1st of May, 1912, one on the 5th of May, 1912, and another on the 15th of May, 1912; they continued working until the 10th of December, 1912. On the 3rd of May, 1912, an application was made to register Passage as owner in indefeasible fee under a deed from Bertram S. Jewell, dated the 23rd of March, 1912, and registration was made on the 29th of July, 1913. On the 18th of May, 1912, an indenture was made between Passage and the National Mortgage Company, Limited, and Robert Patterson, by which Passage assigned to the Company all his rights under the agreement for sale to Patterson. On the same date by another indenture Passage conveyed the land to the National Mortgage Company, Limited. On the 22nd of May, 1912, the National Mortgage Company applied for registration as purchaser of a vendor's interest in an agreement for sale, which included the agreement for sale from Passage to Patterson already referred to. The registrar declined to register under that application under notice of the 10th of July, 1913, and the application was cancelled. In the meantime on the 25th of October, 1912, the nine Russian employees filed mechanics' liens in the land registry office against the land, and duly commenced an action against Jewell and Passage and the four Russian contractors to establish their claims. On the 12th of February, 1913, Patterson gave a quit-claim deed of the land to the National Mortgage Company. On the 25th of February, 1913, the nine Russians obtained judgment in the mechanic's lien action. On

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the 8th of April, 1913, an order for sale was made and a reference ordered to the registrar to certify what interest of the defendants in the action was subject to sale. On the 23rd of May, 1913, the registrar made his report that the defendants in the mechanic's lien action were the registered owners and that there were no charges except the liens against the property. On the 31st of October, 1913, a fresh application was made to the registrar by the National Mortgage Company as owner in fee, which application the registrar declined to register, and gave notice thereof on the 30th of May, 1914. On or about the 6th of January, 1914, the land was sold to the defendants pursuant to order for sale in the mechanic's lien action. On the 13th of March, 1914, an order was made in the lien action confirming the sale to Rolston, and on the same date a deed of conveyance was given to Rolston pursuant to the provisions of the Mechanics' Lien Act. On the 26th of June, 1914, an application was made to register Rolston as owner in fee. On the 13th of August, 1914, a fresh application was made to register the National Mortgage Company as owner in fee. On the 15th of August, 1914, the district registrar of titles gave notice declining to register the National Mortgage Company as owner in fee pursuant to its last application. Subsequently the National Mortgage Company filed a caveat against the land and commenced this action.

Martin, K.C., and *St. John,* for plaintiff.
Macdonell, and *F. M. MacLeod,* for defendant.

25th March, 1915.

HUNTER, C.J.B.C.

HUNTER, C.J.B.C.: I have come to the conclusion that this judgment cannot be held to affect the interest of the plaintiff. The facts are plain enough. On the 2nd of November, 1911, there was an agreement of sale from Passage to Patterson. On the 18th of May, 1912, there was an assignment by Passage to the plaintiff, subject to that agreement, and on that day there was also a straight deed given. The effect, of course, of those documents was to transfer all interest that Passage had in the property to the plaintiff. True, by section 104 of the Land Registry Act, that interest does not become conclusive as

against other parties dealing with the property until the conveyances are registered, but, so far as the documents themselves are concerned, they undoubtedly, I think, passed the estate, so far as it is possible to pass it, out of the grantor into the grantee. Plaintiff was, therefore, the true legal owner of the property at the time these transfers were made. Not only that, but the application to register its interest in the property was on file and had not been disposed of by the time that the judgment was recovered in this County Court action. It seems to me a plain case where the interest of the plaintiff cannot be affected by a judgment in a suit to which it was not a party, the judgment not being a decision *in rem*.

In the case of *Jones* v. *Barnett* (1900), 69 L.J., Ch. 242, which has been referred to, Lindley, M.R. at p. 244, says the statute "could not have been intended to enable the Court to sell the property of B when it supposed it was selling the property of A, B not being a party to the proceedings." The matter is also concluded by the decision in *Entwisle* v. *Lenz & Leiser* (1908), 14 B.C. 51, where it was laid down that a judgment creditor can only get the real interest of the owner in the estate and cannot stand in any better position than the debtor.

For these reasons I think the plaintiff is entitled to succeed.

From this decision the defendant appealed. The appeal was argued at Vancouver on the 29th of May, 1916, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

W. C. Brown, for appellant: As to the origin of title the plaintiff pleads title in Passage, who had acquired title to the property in March, 1911. The plaintiff obtained its deed on the 18th of May, 1912, and nearly two years later acquired a quit claim from Patterson. The claim of the appellant is based upon certain mechanics' liens, the work in respect of which commenced on or about the 1st of May, 1912. Dekteroff, whose claim is for $267.95, commenced work on the 1st of May; Paul Wishloff, whose claim is for $180, commenced work on the 1st of May; and Alec Shabaloff, whose claim is for $290.10, com-

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menced work on the 5th of May. The work was commenced then prior to the acquiring of the plaintiff's interest, and, even assuming the plaintiff had acquired title on its first application of the 22nd of May, it is submitted that the defendant's claim founded on the judgment for this lien relates back to the date of the commencement of the work and would be prior: see Wallace on Mechanics' Liens, 2nd Ed., 13; *Ottawa Steel Castings Co.* v. *Dominion Supply Co.* (1914), 5 O.W.R. 161; *McNamara* v. *Kirkland* (1891), 18 A.R. 271; *Robock* v. *Peters* (1900), 13 Man. L.R. 124 at p. 139. A lien is itself an interest in land: see *Stewart* v. *Gesner* (1881), 29 Gr. 329. This case also shews that a lien attaches from the commencement of the work. Apart from the Land Registry Act, if the respondent has any rights at all they are those of a mortgagee whose money is advanced subsequently to the commencement of the work: see section 9 (*a*), R.S.B.C. 1911, Cap. 154. The relations under an agreement for sale between vendor and vendee are those of mortgagor and mortgagee, and we submit that the judgment is wrong in law and against the evidence, because there is no evidence upon which to found the judgment as drawn, no evidence having been tendered to prove the loan. The respondent had not on the 25th of October, 1912, nor has it yet, any registered interest in the property, nor can it be argued that its two abortive applications to register constituted notice, as section 72 of the Land Registry Act says that registration shall when effected be notice as of date of the application, and the Chief Justice of this Court has held in *Chapman* v. *Edwards, Clark and Benson* (1911), 16 B.C. 334 at p. 336 that it is upon registration as defined in the Land Registry Act, and not upon application that the interest passes under section 74, which is the equivalent of present section 104 of the Land Registry Act. *Levy* v. *Gleason* (1907), 13 B.C. 357 is also in point here. Neither appellant nor respondent have registered title and if they are both in the position of holding equitable titles then the appellant's position is superior, his title arising with the commencement of the work under the mechanics' liens and he having the first valid application filed in the land registry office, his pending application being some

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weeks prior to the respondent's pending application. An action to enforce a mechanic's lien is an action *in rem*: see *Dillon* v. *Sinclair* (1900), 7 B.C. 328; *Hazell* v. *Lund* (1915), 22 B.C. 264; *Lynch* v. *Tarinor* (1893), 13 C.L.T. 426; *Howard* v. *Robinson* (1849), 59 Mass. 119 at p. 121. This case seems to resemble the case of *Mostyn* v. *Mostyn* (1893), 62 L.J., Ch. 959. *Entwisle* v. *Lenz & Leiser* (1908), 14 B.C. 51 is not against us, but rather in our favour.

St. John (*F. A. Jackson,* with him), for respondent: Section 104 of the Land Registry Act differs from the Acts in the other Provinces. On the effect of see *Jellett* v. *Wilkie* (1896), 26 S.C.R. 282; *Coast Lumber Co. Limited* v. *McLeod* (1914), 29 W.L.R. 357 at p. 360; *Barry* v. *Heider* (1914), 19 C.L.R. 197; *Goddard* v. *Slingerland* (1911), 16 B.C. 329. As to the limited effect of an unregistered title see *McEllister* v. *Biggs* (1883), 8 App. Cas. 314. A judgment in a mechanic's lien action is in the nature of a judgment *in rem* but it is not actually so: see Wallace on Mechanics' Liens, 2nd Ed., 23-4; *Bank of Montreal* v. *Haffner* (1884), 10 A.R. 592; Black on Judgments, 2nd Ed., Vol. 2, p. 1201, par. 793: see also Hogg's Australian Torrens System, 775. The mortgage Company having obtained title from Passage we should have been made a party to the mechanic's lien action: see *Jones* v. *Barnett* (1900), 69 L.J., Ch. 242. At a judicial sale the purchaser is bound to investigate the title. As to priority of a lienholder see Thom's Torrens System, 140; *Independent Lumber Co.* v. *Bocz et al.* (1911), 4 Sask. L.R. 103. The Ontario case of *M'Vean* v. *Tiffin* (1885), 13 A.R. 1 does not apply.

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Brown, in reply: As to whether the judgment in the mechanic's lien action is a judgment *in rem* all the requirements called for in *Castrique* v. *Imrie* (1870), L.R. 4 H.L. 414 are complied with. *Bank of Montreal* v. *Haffner* (1884), 10 A.R. 592 can be distinguished on the ground that the Land Registry Act of Ontario is different. The definition of owner for the purpose of starting an action is determined by the old full Court in *Coughlan* v. *National Construction Co.* (1909), 14 B.C. 339 at pp. 350-2. *Chapman* v. *Edwards, Clark and Benson* (1911), 16 B.C. 334 at p. 336. The case of *Abramo-*

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vitch v. *Vrondessi* (1913), 24 W.L.R. 439, has no application here, as it has reference to a registered owner: see Wallace on Mechanics' Liens, 2nd Ed., 16.

Cur. adv. vult.

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MACDONALD, C.J.A.: In November, 1911, one Passage appears to have been beneficial, though not the registered owner of the lands in question. He agreed in writing to sell the land to one Patterson, and shortly afterwards let contracts to four contractors for the clearing of the land. The work of clearing was commenced not later than the 1st of May, 1912. At that date the registered owner was one Jewell. It is not important to trace the registered title further back. The records shew that Jewell applied to be registered as owner in April, 1912, and afterwards obtained a certificate of indefeasible title.

On the 3rd of May, 1912, Passage made application for a certificate of indefeasible title which was granted on the 29th of July, 1913. By virtue of the Land Registry Act this certificate would relate back to the 3rd of May, 1912, so that for the purposes of this case Passage was the registered owner from the said 3rd of May, 1912, subject to the unregistered agreement of sale to Patterson, who never registered his agreement. On the 18th of May, 1912, Passage conveyed the land to the plaintiff subject to the Patterson agreement, and also assigned that agreement and the moneys due thereunder to it. On the 20th of May, 1912, plaintiff applied to register the assignment as a charge. The application states that the plaintiff Company "is entitled to an interest as purchaser of the vendor's interest in an agreement for sale over the real estate hereunder described," it then states that the application is to have the same registered as a charge accordingly.

This is the only document professing to give notice of the plaintiff's interest in the land to be found in the records until the 31st of October, 1913, when the plaintiff for the first time made application to be registered under its said grant.

Before this date the lien proceedings had been prosecuted to judgment, and an order for sale had been made. A reference as to title had been ordered and the report thereon, dated the

23rd of May, 1913, was duly made by which it was certified that "the defendants" (Jewell, Passage and the four contractors who had employed the lienholders) "or one or other of them are the registered owners of said property" as shewn by the register. Then the report proceeds to say "there are no charges of any kind whatsoever against the title of the said defendants" except the liens. When, therefore, the sheriff on the 6th of January, 1914, sold all the right, title and interest of Passage, he sold the fee, and that fee was charged only by the liens to satisfy which the land was sold. These liens, in my opinion, were entitled to priority over all unregistered interests of which the lienholders had no knowledge actual or constructive.

Assuming, though not deciding, that plaintiff is entitled to the benefit of section 72 of the Land Registry Act, it never having in fact succeeded in obtaining the certificate for which it applied on the 20th of May as aforesaid, what does the application of the 20th of May amount to? The plaintiff on that date was entitled to apply to be registered as owner in fee of the legal estate. That being so, it was not entitled to apply to register a charge (Land Registry Act, Sec. 35), and hence its application was a nullity and was no constructive notice at all of any interest of plaintiff in these lands. That section of the Act merely gives legislative recognition to an obvious fact that an owner need not register an agreement under which he or his predecessor in title has parted with an interest in his own land, as a charge on that land in his own favour.

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But even were it otherwise, a notice of that date, 20th of May, to the contractors or their workmen that the plaintiff had obtained an interest in the lands would not have helped them in this action. The contracts for the whole work had been entered into and the work was in progress prior thereto, and the sale of the lands by Passage to the plaintiff could not, I think, have adversely affected the rights of the contractors to continue the work with all the protection which the Mechanics' Lien Act would afford them or their employees. Had plaintiff registered or applied for registration of its deed before the report of the referee it would have been given the right to redeem, but it lost that right by its laches.

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Assuming, though not deciding, that section 104 of the Land Registry Act is capable of a construction which would admit of this contest between the plaintiff and defendant, on the facts the plaintiff has made out no case for relief either legal or equitable. The sale to defendant was made to satisfy registered charges against which plaintiff's unregistered interest cannot prevail.

I would allow the appeal and dismiss the action.

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

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

MCPHILLIPS, J.A.: I agree in allowing the appeal.

Appeal allowed.

Solicitors for appellant: *Ellis & Brown.*
Solicitors for respondent: *St. John & Jackson.*

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GIBSON v. COTTINGHAM

Principal and agent—Sale—Misrepresentation by agent—Materiality of—Knowledge of principal—Rescission.

A material misrepresentation innocently made by an agent, inducing a sale, and known to the principal to be false, entitles the purchaser to rescission.

Cornfoot v. *Fowke* (1840), 6 M. & W. 358 referred to.

Statement

ACTION for rescission of an agreement for sale and cancellation of a chattel mortgage and promissory note, tried by MACDONALD, J. at Vancouver on the 3rd of November, 1916. The facts are stated in the judgment.

H. S. Wood, for plaintiff.
Armour, for defendant.

MACDONALD, J.: It appears that the plaintiff, being desirous of going into the rooming-house business, negotiated the purchase of a quantity of furniture situate in what is known as the Stanley Apartments on Pender Street in this City. The plaintiff and his wife interviewed Mrs. Clark, a real-estate agent, for that purpose; and she introduced the plaintiff to the defendant, who was then in occupation of these apartments. It is quite apparent to me that the object of the plaintiff was, not simply to become the purchaser of the furniture, but also to become the lessee of the premises, in connection with which the lease was about expiring in May, 1916. The plaintiff was greatly interested in knowing whether the business that might be carried on in these apartments would be satisfactory. From statements of the plaintiff and his wife, I take it that they expected to carry on a respectable vocation, first utilizing the tenants that were then in occupation, and later on changing the form of the business, but all with a view to carrying on a business that would be at least respectable and one in which they would not be interfered from time to time with visits from the police authorities. I am quite satisfied that the premises had not only a bad reputation, but that such reputation had been earned by the lessee allowing, from time to time, prostitutes and street-walkers and other immoral people to resort and make use of these premises.

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The situation then presents itself as to whether or no the sale having been completed, the plaintiff is under these circumstances entitled to rescission of the contract and return of the $500 paid in connection therewith. No question arises as to any misrepresentation with respect to the value of the goods. The whole question for consideration is whether the premises were of such a kind as to be disreputable and thus destroy the benefit which might otherwise be derived from the purchase and use of this furniture in the premises mentioned. The principal point raised as being one of misrepresentation is that during the negotiations the plaintiff, or his wife, being suspicious of the character of the premises, inquired from the agent, Mrs. Clark, and that the reply was of such a nature as to destroy his suspicions and pursue the sale, completing it by payment and giving a chattel mortgage back for

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the balance of the purchase-money. No particular stress has been laid by plaintiff's counsel on the actions of the defendant during the time when inspection was taking place of the premises, nor of her representations as to the class of people who were then rooming in these apartments. I find as a fact, to her knowledge, one at least of such tenants was a bad character. She had just recently been convicted in the police court. No inquiry, however, seems to have been made of her as to the character of any other roomers, although it is stated that she represented they were quiet people. I think, however, the strongest point as outlined by the plaintiff is the one to which I have referred, that is, as to whether any statement made by Mrs. Clark was of such a nature as to be binding upon the defendant and thus create a cause of action. Now, in order to have misrepresentation that has any bearing in creating a liability against the defendant, it is necessary that such misrepresentation should be made by either defendant or by someone acting on her behalf. The question arises whether Mrs. Clark, in the first place, was authorized to make a statement which was binding upon her principal, and, in the second place, did she make any statement which is of such a nature as to be material and to have operated upon the mind of the plaintiff in consummating the transaction? It is quite apparent that the plaintiff and his wife were not simply using the telephone in a chance conversation with Mrs. Clark, but were deliberately endeavouring to find out, from the party who ought to know, the character of the premises in which this furniture was situate. I can see very little difference between the account of the conversation as given by Mrs. Gibson, and that given by Mrs. Clark. They may differ in a word or two, but the net result, to my mind, is the same. She went to the telephone for a set purpose, and she came from the telephone, to my mind, assured that as far as the character of these premises was concerned she need not entertain any further fear. The words as stated to have been used, according to the recollection of Mrs. Clark, as I say, differ to some extent, but surely they amounted to this, that she was not referring the plaintiff to someone else for information, but was hazarding her own statement as an agent assisting in the sale of property. It was

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not argued by counsel for the defence that a statement of this kind, if material, and I so find it, was not binding upon the principal unless it could be shewn that the agent made the statement knowing it to be false. I think that such counsel was, in my view of the law, correct in not taking such a ground, although counsel for the plaintiff prepared a well-considered argument in support of the position that was taken by Lord Abinger, the dissenting judge in *Cornfoot* v. *Fowke* (1840), 6 M. & W. 358. In that case the facts are somewhat similar to the one before me today. In my view of the law the principal is liable for a material representation made by an agent in the course of a sale, even though such agent when he made the statement believed it to be true, if as a fact it is untrue, to the knowledge of the principal. In other words, I do not think that a principal who is aware of a fact which would prevent a sale being consummated, can obtain the benefit of a sale carried out through an agent, simply because that agent honestly represented that such a fact does not exist. A material false representation inducing a party to make a contract is equally wrong and creates a cause of action whether he knows it to be wrong or whether he be reckless and disregardful of the truth of it. Now this agent, Mrs. Clark, I will not say was reckless, but at any rate she was careless, of the importance that might be attached by people purchasing property of this kind. In representing that the premises were "in good order," she meant to convey by her words to Mrs. Gibson an important feature—that the premises were respectable. The fact is to the contrary. I think that the representation was material and that it operated upon the mind of the plaintiff in entering into the contract. I accept his statement in this regard, and it is only necessary to refer to the evidence of Mrs. Gibson as to her feelings when she found out the true character of the premises, to support her husband's statement in this connection.

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Plaintiff then sought to obtain rescission of the contract but failed. The defendant is thus liable for the result that followed from the representation made by her agent. The position of affairs was that the plaintiff came into possession of these premises under lease, and also obtained possession of the furniture. They could not, when rescission was sought, come to

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any arrangement for some time, but eventually, according to exhibit filed, the furniture was sold and half the proceeds placed in trust to abide the result of this action. As I understand it, as far as the judgment of the Court is concerned, it is to be operative as if the goods were still *in esse*, so that the money in hand takes the place of the goods so far as the order of the Court is concerned.

I direct and order that the chattel mortgage and the promissory notes given, be delivered up to be cancelled. The agreement of sale is rescinded and there will be a repayment of the sum of $500, with interest at 5 per cent. from the time of issuance of the writ, out of moneys held in trust. I disallow any other claim for damages which may be referred to in the statement of claim. The plaintiff is entitled to costs.

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Judgment for plaintiff.

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VICTORIA DOMINION THEATRE CO. v. DOMINION EXPRESS CO.

VICTORIA DOMINION THEATRE COMPANY, LIMITED v. DOMINION EXPRESS COMPANY, LIMITED.

Carriers—Express company—Contract to forward goods—Delay in transmission—Non-delivery of films—Loss of profits.

The plaintiff delivered a parcel containing films for moving pictures at the receiving office of the defendant Company in Vancouver, addressed to "Dominion Theatre, Victoria, B.C.," and marked "Shipper, Dominion Theatre, Vancouver." Nothing was said by the person who delivered the parcel at the receiving office as to the purpose for which it was being sent to Victoria, or to draw attention to the label. The plaintiff had been in the habit for three years previously of sending a box of films from Vancouver every Wednesday and every Saturday night at 11 o'clock. Through error, the parcel was sent east on the Canadian Pacific Railway, but was stopped in transit and sent back to Victoria, where it arrived one day late. It was held by the trial judge that the defendant Company was liable for the loss occasioned by the delay.

Held, on appeal, that the trial judge drew a reasonable inference from the facts and circumstances that the defendant knew the goods were being

sent to be used in a picture show, and the plaintiff was entitled to recover damages for loss of profits and expenses incurred by the goods being delayed and not delivered at Victoria in time for the show.

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APPEAL by defendant from the judgment of McINNES, Co. J. of the 28th of September, 1916, in the plaintiff's favour for $194 damages, owing to delay in delivering films that were sent through the defendant Company from Vancouver to Victoria. The films were delivered to the defendant Company in Vancouver for shipment to Victoria on Saturday, the 7th of June, 1916, it being the intention of the plaintiff Company to use the films at the theatre in Victoria on the following Monday. A mistake was made by the defendant's officials, and the films were sent east on the Canadian Pacific Railway. The parcel was stopped in transit and sent back, arriving in Victoria one day late.

Statement

The appeal was argued at Vancouver on the 18th of December, 1916, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Armour, for appellant: After the parcel had been sent the wrong way, it was stopped in transit and sent back. There was delivery, but a late one. There is the question of whether we are protected by the conditions in the shipping bill or receipt. There was no notice to the Company that the films were required in Victoria on the following Monday: see *Robertson* v. *Grand Trunk R.W. Co.* (1894), 21 A.R. 204 at p. 219. It has been held a company can limit its liability.

Sir C. H. Tupper, K.C., for respondent: The limitation of liability has no force by reason of R.S.C. 1906, Cap. 37, Sec. 353. It is not necessary to put "rush" on an express parcel. As to the nature of the engagement with an express company see *James Co.* v. *Dominion Express Co.* (1907), 13 O.L.R. 211 at p. 216. A safe and rapid transit is implied in a contract with an express company: see Halsbury's Laws of England, Vol. 4, p. 14. A reasonable time of delivery is the time in which the parcel would arrive by using due diligence. The clause in the shipping bill only applies to loss or injury. As to whether the loss was within the contemplation of the parties

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see *Simpson* v. *London and North Western Railway Co.* (1876), 1 Q.B.D. 274; *Jameson* v. *The Midland Railway Company* (1884), 50 L.T. 426.

Armour, in reply.

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MACDONALD, C.J.A.: The question to be decided is, whether or not the contracting parties could reasonably be held to have had in contemplation the loss in question. Nothing was said by the shipper with respect to the matter of promptness of delivery, but when one looks at all the circumstances of the case, the business between the parties extending over three years, and the nature of the business conducted by the plaintiff here and in Victoria, I am unable to say the learned trial judge drew an unreasonable inference from these facts and circumstances when he came to the conclusion that the defendant must have had in contemplation the fact that these films were to be used on Monday. For three years the plaintiff had been going to the Express Company with films after 11 o'clock on Wednesday and Saturday nights, after the theatre closed, and shipping them to a theatre in Victoria on the same circuit. I think any reasonable man would draw the inference from that that these films were required at the theatre in Victoria on Thursdays and Mondays. Why this very careful practice of sending the films on Wednesday night after 11 and Saturday night after 11, unless that was the purpose? I think the learned judge was not wrong in drawing that inference, and we ought not to disturb the judgment.

MACDONALD, C.J.A.

MARTIN, J.A.: The case of *Jameson* v. *The Midland Railway Company* (1884), 50 L.T. 426, in which it has been said by Mr. Justice Mathew, with his usual clearness, if I may be allowed to say so, is in point:

> "It is said that there was no evidence of knowledge on the part of the defendants that the goods were being sent . . . . to a particular destination for a particular purpose."

That is the crux of the matter, "to a particular destination for a particular purpose." I am of the opinion there was sufficient evidence before the learned trial judge to come to the conclusion—as Mr. Justice Mellor says in *Simpson* v. *London and North Western Railway Co.* (1876), 1 Q.B.D. 274 at p.

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278—to come to a conclusion on the facts of the case, as a jury-man. Therefore, the fact they were needed at a particular place for a particular purpose has been sufficiently established.

As regards the general proposition advanced by Mr. *Armour,* companies cannot be held liable for damages for failure, under ordinary circumstances, to deliver a casual consignment, without particulars of the transaction being brought home, I agree with him. It cannot, I think, reasonably be said it is necessary for express companies to forward by the next train or boat every consignment or parcel that is handed to them. There are, for example, three boats sailing daily for Victoria from Vancouver in the summer months. Can it be said the Express Company has to make up its shipments three times a day to catch each boat? I do not think so. If they send them over once a day it would be reasonable despatch, as referred to in one of the cases. I am of the opinion, therefore, there was sufficient evidence to warrant the learned trial judge in reaching the conclusion he did.

MARTIN, J.A.

GALLIHER, J.A.: I agree.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I am of opinion the learned trial judge in the Court below must be sustained. In so doing, I must say the evidence in itself is not very conclusive, yet I think there was sufficient evidence.

With respect to the contract: I think the contract can not be objected to upon the ground taken—that it was not established that it had the approval of the Railway Board; the plaintiff put in the contract. I am not satisfied that it is necessary to establish that the contract was approved by the Board. But with regard to clause 3 of the contract, I am of opinion that the liability provided against is the liability for the value of the article. If the Company intends to cover damages, such as have been sued for here, special damages arising out of what may be said to be within contemplation of the parties—clause 3 does not exclude that liability, and that is the liability which has been sued for here, and for which judgment has been given for the plaintiff.

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In respect to express companies, generally—and in regard

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to this Company in particular—it is a matter of common knowledge that the Dominion Express Company enjoys in Canada peculiar privileges, very extensive and very great. The public are, to a very large extent, in the hands of the Company for express business. I think it can be said that the Dominion Express Company, as well as others, should exercise the very highest degree of expedition in carrying on their business. I would expect that the Courts would, at all times, hold them to expedition in the completest sense; that is, an express company must at once forward the article entrusted to it, that is to say, at the very first available moment of transportation. If it were not so, it seems to me all advantage of such carriage would be lost. Safety is one thing in dealing with express companies, but expedition is just as necessary. Suppose one were leaving the City of Vancouver, about to do important business in the City of Montreal, and expressed certain valuable documents which were absolutely essential to be gone into when arriving in Montreal. Would it be permitted to the express company to neglect to pursue their obvious duty of expedition and not send the parcel forward upon the first train passing out of Vancouver? If they failed to make the first connection, in my opinion, they failed in performing their contract. The question is, were the damages reasonably within the contemplation of the parties? No case has been made out for a reversal of the judgment.

Appeal dismissed.

Solicitors for appellant: *Davis, Marshall, Macneill & Pugh.*
Solicitors for respondent: *Tupper & Bull.*

IN RE DOMINION TRUST COMPANY AND MACHRAY *ET AL.*

Company—Loss of assets through dishonest dealing of manager—Liability of directors—Company and trust funds kept in one bank account—Ultra vires—Negligence—Misfeasance—Winding-up Act, R.S.C. 1906, Cap. 144, Sec. 123—Can. Stats. 1912, Cap. 89, Sec. 9.

Directors of a company who have not attended any of the meetings of the board and are not shewn to have been cognizant of any of the acts of commission or omission complained of, will not be held answerable for what has been done or omitted by the board.

Marquis of Bute's Case (1892), 2 Ch. 100 followed.

The loss must result from the negligence or *ultra vires* acts of the directors before they can be charged with misfeasance in the legal sense of the word.

Per McPHILLIPS, J.A. (dissenting in part): Section 9 of the Act incorporating the Dominion Trust Company does not require company funds to be kept in a separate bank account from trust funds, and there is error in law in finding the resident directors guilty of misfeasance by reason of company and trust funds being kept in the same bank account.

APPEAL from the decision of MURPHY, J. of the 29th of January, 1916, upon a summons issued by the liquidator of the Dominion Trust Company in pursuance of section 125 of the Winding-up Act for a declaration that the directors of said Company were guilty of misfeasance and breach of trust in relation to their conduct of the affairs of said Company, and that they be held jointly and severally liable for any loss the Company may have sustained by reason of such misfeasance or breach of trust. The facts are set out fully in the judgment of the learned trial judge. Statement

Martin, K.C., for plaintiff.

Whiteside, K.C., M. A. Macdonald, E. B. Ross, McLellan, R. M. Macdonald, Stockton, Jamieson, Armour, and *McPhillips, K.C.*, and *H. S. Wood,* for the various defendants.

29th January, 1916.

MURPHY, J.: Misfeasance summons against directors. MURPHY, J.

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There are 168 specific acts of misfeasance charged, not all of the same character. This decision has to do with but one class, *viz.*: losses incurred by reason of the late managing director of the Company, W. R. Arnold, without the knowledge of the other directors, making loans and advances in the nature of loans without security, either to himself, or to himself in association with others, or to other persons with whom he was not financially associated. To avoid a long inquiry, which might prove a waste of time should the legal points involved be decided in their favour, it is admitted on behalf of each and all of the directors that, as a result of these acts of Arnold, losses have actually been incurred which will have to be paid by the Company. It is further admitted that such losses will exceed in amount any sums possible to be recovered either under Arnold's will or from his estate. The acts complained of being done without the knowledge of the directors sought to be charged, no fraud or moral obliquity can be imputed to them. This is admitted on behalf of the liquidator. This being so, in my opinion, the directors may possibly be liable for (1), losses incurred by *ultra vires* acts where such acts are of a nature that no director, on a perusal of the charter of the Company, could fairly, honestly or reasonably consider such acts to be *intra vires*: *Joint Stock Discount Co.* v. *Brown* (1869), L.R. 8 Eq. 381; *In re Liverpool Household Stores Association* (1890), 59 L.J., Ch. 616; *In re Railway and General Light Improvement Company* (1880), 28 W.R. 541. (2) Losses incurred through the directors' negligence, meaning thereby that in considering their acts or omissions complained of you can deny that they did really exercise their judgment and discretion in a *bona fide* way in connection therewith: *In re Liverpool Household Stores Association, supra*; *In re Railway and General Light Improvement Company, supra*; *In re New Mashonaland Exploration Company* (1892), 3 Ch. 577; *In re Oxford Benefit Building and Investment Society* (1886), 35 Ch. D. 502; *Leeds Estate, Building and Investment Company* v. *Shepherd* (1887), 36 Ch. D. 787; and *Ottoman Company* v. *Farley* (1869), 17 W.R. 761.

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The Dominion Trust Company was incorporated by Cap. 89, Can. Stats. 1912, hereinafter called the "private Act." Its

charter contemplated and authorized the acquiring by the Company of two kinds of assets: First, funds and property in its own right, such as capital reserve and accumulated profits (hereinafter referred to as "Company funds"). Second, trust funds received and administered for the benefit of *cestuis qui trust* (hereinafter referred to as "trust funds"), the Company receiving remuneration for such administration.

As to Company funds, it cannot, in my opinion, be said that any loss of them that has occurred was the result of *ultra vires* acts of the directors. Section 10 of the private Act empowered their investment in certain securities, but did not confine such investment thereto. The only disabling clause (it being always remembered that this judgment deals solely with loans and advances) is section 167 of the Companies Act, R.S.C. 1906, Cap. 79, made applicable by section 16 of the private Act. Section 167 prohibits loans to shareholders. Arnold was a shareholder, but it is not proven that any loss resulted through loans to him *qua* shareholder, and indeed that is not made the ground of complaint. Apart from that limitation, the directors had authority to lend Company funds on any or no security, as they saw fit.

There remains the second ground, negligence. This entails an examination of how the directors carried on the Company's business. The board, by resolution, delegated the operation of the affairs of the Company to a committee, called an advisory committee, made up of a number of directors. The managing director Arnold was an alternate member of this committee. It met regularly for the consideration of business, usually once a week. The board itself met quarterly, and at such meetings the minutes of the meetings of the advisory committee, shewing in detail the business done, were submitted, read and officially dealt with. Every three months a balance sheet, shewing assets and liabilities, earnings and expenses, was submitted and examined, first by the advisory committee and then by the board. Lending rules governing loans were drawn up and handed to the managing director and officials for their guidance. These authorized the managing director to make loans up to $2,000 on real estate first mortgages and up to $1,000 on

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promissory notes secured in a specified manner. Any loans so made had to be submitted to the advisory committee at its next meeting. All other loans had to be authorized by the advisory committee. A yearly audit by auditors elected by the shareholders was provided for. This audit was actually made by a highly reputable firm. In addition, a representative or representatives of the auditing firm had access at all times to the Company's books, and as a fact there is evidence that some such representative was almost continuously employed on the books in the Vancouver office, where the transactions herein considered took place. The board further passed a resolution authorizing the managing director, in conjunction with any one of a number of subordinates (all admittedly under his control and subject to dismissal at his hands), to draw, accept, sign, make and agree to pay all or any bills of exchange, cheques, orders, etc., on the Company's bank account. This resolution, giving as it did the managing director absolute control over the banking account, enabled him largely to make the loans which resulted in the losses complained of. The other method he adopted was that known as "journal entries." He would draw up a voucher directing a credit to be entered in an account which he wished to put in funds, and a debit of the like amount to some other account which was in funds, and for which funds, of course, the Company was and is responsible.

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Purporting to act presumably on the above resolution, he would initial such voucher and have it initialled by some one of his named subordinates and the transaction would go through. No security either for cash advances or such voucher credits would be taken. The voucher credits were, of course, used up by the parties (frequently, it is asserted, by the managing director himself) in whose favour they were thus created. This is probably the simplest example of his system. Frequently it was much more complicated, but the essential feature in all cases was the making of entries in the Company's books on no other authority than vouchers initialled as stated, which entries in the long run resulted in loss to the Company. These acts were in the teeth of the lending rules and of the whole system governing loans as established by the board, and were fraudulent, if not criminal. Directors are not responsible for such

acts, nor for failure without neglect to detect same: *Dovey* v. *Cory* (1901), A.C. 477. Can one deny that they did really exercise their judgment in a *bona fide* way as to Company funds in passing the resolution? In the first place, in my opinion, such resolution never authorized the making of the "journal entries" at all. It is in terms confined to operations on the Company's bank account. If so, the directors cannot be held liable for what they did not authorize, and for what it was the business of the auditors to detect and report. Possibly they might be, if it was proven that they had neglected to give proper instructions to the auditors, but there is no such evidence before me. Then as to control of the bank account, remembering that only Company funds to be used as loans are being dealt with. Admittedly Arnold was a man who inspired the greatest confidence, not only in the directors but in everyone with whom he came in contact. The system and rules governing loans, above outlined, if honestly carried out, would have absolutely prevented what Arnold did. In my opinion, looking at the matter with the directors' eyes at the time the resolution was passed, bearing in mind their lending rules, their admittedly (with their then knowledge) merited confidence in Arnold's ability and integrity, their practically continuous audit by shareholders' auditors, the frequent meetings of their advisory committee, the submission of this committee's minutes to quarterly meetings of the board, and the submission at such quarterly meetings of a detailed balance sheet, shewing not only assets and liabilities but current revenue and expenses, it cannot be said they were negligent in the sense above defined, either in passing the resolution or in failing to detect what was going on. For these reasons, I hold the directors not liable for any loss of the Company funds, caused by bad loans or advances made by Arnold.

There remains the question of trust funds. Section 9 of the private Act imperatively directed the Company to keep these separate and distinct from Company funds. Section 8 imperatively directed in what securities trust funds should be invested by the Company. Section 6 imperatively directed that the affairs of the Company be managed by the directors, and defined what would constitute a quorum. If loss of trust money has

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resulted through disregard of these mandatory provisions, in my opinion, it is clear that such directors as were actually guilty of such disregard or who must be held to have had knowledge of such disregard, and remained quiescent, are jointly and severally liable for such loss both on the ground of *ultra vires* and of negligence.

First, as to *ultra vires,* in my opinion, no intelligent man who reads the private Act could fairly, honestly, or reasonably consider that Company funds could be mixed with trust funds, or that trust funds could be invested in any securities other than those prescribed by section 8. It may be said that the directors did not read their charter. In my opinion, they are bound to read it and understand it at any rate when they are actively about to perform acts as to which it contains directions. There must be imputed to a director special knowledge of the business he has undertaken: *In re Liverpool Household Stores Association, supra,* at p. 619, citing Jessel, M.R. in *In re Railway and General Light Improvement Company, supra.*

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It may be, if a provision of such charter is obscure and competent advice, which proves erroneous, is obtained, a director would not be liable. But, in the first place, as stated, the provisions of the private Act are eminently clear, and it is not suggested that any advice, erroneous or otherwise, was sought or received. Further, in my opinion, all the directors whom I consider liable, with the exception of Reid and Miller, cannot be heard to say they did not read the private Act, for an official copy of it was laid before them at the meeting of provisional directors held November 18th, 1912. Reid was not present, but he is a member of the firm of solicitors who acted for the Company throughout its existence; he constantly attended and took an active part in meetings of the board, and even if I am wrong in holding that a director must know the provisions of his Company's charter, at least in the qualified sense above stated, knowledge of those provisions of the private Act, which, in my opinion, makes some of the directors liable, must, I think, under the facts of the case, be imputed to him. If a director has a special knowledge of the Company's busines, he must give the Company the advantage of such knowledge: *In re*

Brazilian Rubber Plantations and Estates, Limited (1911), 1 Ch. 425 at p. 437. Miller's case will hereafter be dealt with.

Now, admittedly, the Company had but one bank account in Vancouver, into which all funds, company and trust, were paid, a clear violation of the statutory duty imposed by section 9 of the private Act. At the meeting of the provisional directors, held on the 18th of November, 1912, it was resolved the Canadian Bank of Commerce be the bankers of the Company in Canada. At a meeting of the advisory committee, held on the 1st of April, 1913, a motion was passed appointing a committee for making banking arrangements and directing such committee to report to the advisory committee. It is to be noted that it was on this date, or the day previous, that the Dominion Trust Company took actual control of the business of the Dominion Trust Company, Limited, although the transfer was to be considered as dating from the 1st of January, 1913. Up to this date, its banking had been only such as was necessary in connection with its organization and share subscriptions, such as is contemplated by sections 2 and 5 of the private Act. It was now engaging in actual business for the first time through its own officers, and now for the first time it began to handle trust funds. All the directors other than Miller (whose case is hereinafter dealt with), herein held liable, were aware that huge trust funds were coming to the Company from the Dominion Trust Company, Limited, for they were all directors of that Company. The appointment of the banking committee was made for the purpose of making banking arrangements for the Company as an active business concern. On the 8th of April, 1913, this banking committee apparently reported to the advisory committee, for on that day the advisory committee at a regular meeting passed a resolution that the Royal Bank of Canada be the bankers of the Company in Canada, a change of banks it will be noted. On the 14th of May, 1913, at a duly-convened meeting of the board, the minutes of the meeting of the advisory committee held on the 1st and 8th of April, 1913, containing the above resolutions, were read and, on motion, were adopted as read. As stated, there was but one bank account, into which all funds, trust and company, were paid and, in my opinion, every director who was at the

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meeting of the 31st of March, 1913, when the advisory committee was appointed and the resolution empowering Arnold and a subordinate to handle the bank account was passed, and who was also present at the meeting of the 14th of May, 1913, when the minutes of the advisory committee making banking arrangements were read and adopted, must be held to have known of the illegal mixing of funds, for, granted that there was but one banking account into which all funds were paid, it is a clear inference, I think, that the banking committee had arranged with the Royal Bank for only one bank account, and if, first, the advisory committee and then the board approved of the banking committee's action, all the directors present must be held to have ratified the illegal banking, even if this was done without inquiry as to what that action was. Further, at every meeting of the advisory committee, the first business reported was the bank account, and such report—as of course it must—shewed only one bank account in operation. The minutes of each of these meetings was read and dealt with by the board. This view, if correct, disposes of the argument based on the allegation that the reports of the auditors, pointing out the illegality of the bank account, were suppressed by Arnold.

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The directors present at the meeting of the 31st of March, 1913, who are amongst those sought to be charged in these proceedings, were: Clubb, Stewart, Brydone-Jack, Ramsay, Henderson, Keenleyside, Stark, Riggs, Pearson and Drew. Those present at the meeting of the 14th of May, 1913, were: Clubb, Brydone-Jack, Stewart, Pearson, Ramsay and Drew. Henderson, though not present on the 14th of May, 1913, was a member of the banking committee, and was present at the meeting of the advisory committee on the 8th of April, 1913, facts which, I think, render him equally liable with those present at the two board meetings, if loss resulted. The position of Stark, Riggs and Keenleyside will be hereafter dealt with. Reid occupies a peculiar position. He was present at both these meetings as a director, and took part therein as a director, in fact he seconded the resolution passed on the 14th of May, 1913, adopting the minutes of the advisory com-

mittee meeting of the 8th of April, 1913. As a matter of fact, he was not a director of the Dominion Trust Company on those dates at all, being elected on the 15th of May, 1913, at an extraordinary general meeting of the shareholders held on that date. This arose as follows: When the private Act was passed all the directors of the Dominion Trust Company, Limited, were made provisional directors of the Dominion Trust Company. Reid was not then a director of the latter Company. He was elected a director of it at its eighth annual general meeting held on the 25th of February, 1913. No meeting of the shareholders of the Dominion Trust Company was held until the 15th of May, 1913, when he was elected a director. In the meantime, the Dominion Trust Company, as shewn, had taken active control of the Dominion Trust Company, Limited, business, and it was forgotten that although the provisional directors included all the directors of the Dominion Trust Company, Limited, at the date of the passing of the private Act, Reid had been added to that board thereafter. If I were holding the directors liable solely on the ground of *ultra vires,* these facts might affect Reid's liability, but as I think them liable on the ground of negligence also, for reasons hereinafter set out, and as he was duly elected on the 15th of May, 1913, and was, by his presence and active participation in the meetings of the 31st of March, 1913, and the 14th of May, 1913, in my opinion, affected with knowledge of the banking illegality, I do not need to pursue this phase of the matter.

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In addition to keeping trust funds separate, section 8 of the private Act, as stated, imperatively directed the manner of their investment. Now, if I am correct in fixing ratification of the illegal banking on the directors named, the resolution passed at the meeting of the 31st of March, 1913, the result of which was to give Arnold control of the bank account, makes, in my opinion, all the directors fixed with that ratification guilty of a second breach of statutory duty, for they, by passing that resolution and supplementing it by ratifying the illegal banking arrangements, parted with control of the trust funds to Arnold. In my opinion, when these trust funds were once received by the Company, it was the bounden duty of the

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directors to only part with their control of such funds on investments set out in section 8. As stated, section 6 directs that the Company's affairs be carried on by the directors and defines a quorum. To do any act that parted with the control of these funds to any but a quorum of directors was, in my opinion, to do an *ultra vires* act. This does not necessarily mean that a quorum must sign all cheques, but it does mean the establishment of some system whereby trust funds could only be withdrawn when such withdrawal had been authorized by formal action of a quorum of the board of directors.

If I am wrong in these conclusions, I think there is a shorter ground of liability which attaches to all the directors who were at the meeting of the 31st of March, 1913. If the resolution appointing the advisory committee was meant as an abdication in favour of the advisory committee of the directors' powers, then I think it *ultra vires* because it contravenes section 6 of the private Act. A quorum, according to section 6, means a majority of the directors, whose number shall not be less than seven nor more than 21. On the 31st of March, 1913, the actual number of directors was sixteen, all appointed by section 1 of the private Act. A quorum, therefore, could not be less than nine. The advisory committee had only five members and, according to the resolution, its quorum was three. It is true that the shareholders by by-law 13 authorized such

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an advisory committee, but they could not by by-law change the provisions of the private Act. Therefore, whatever was the intention in passing the advisory committee resolution, its legal effect was, in my opinion, to constitute the advisory committee the servants or agents of all the directors present at the meeting of the 31st of March, 1913, when such resolution was passed. If so, since the illegal banking arrangements was the act of this committee all such directors are responsible for same, and as the banking arrangements, combined with the other resolution giving Arnold control of the bank account, gave him likewise control of the trust funds, I think, for reasons already set out, all such directors are responsible for all losses of trust funds which resulted from Arnold's control of the bank account. But it is said there has been no proof that loss resulted from

such control. If this means there has been no loss proven of trust funds as distinguished from Company funds, the answer is that the directors herein held liable have chosen to mix the two funds, and accordingly the onus is on them to shew what are trust funds and what are not. I express no opinion whether it is legally permissible for them on the facts of this case to seek to satisfy that onus. On the record as presented, no such attempt has been or indeed could be made at this stage. It is, therefore, reserved for further consideration should such become necessary. But I apprehend what is really contended is, that the acts hereinbefore set out, whilst they may be a *sine qua non,* are not the *causa causans* of the admitted loss, and *Cullerne* v. *London and Suburban General Permanent Building Society* (1890), 25 Q.B.D. 485 is relied on. In my opinion, that case is distinguishable. There stress is laid on the fact that the resolution itself was innocuous, that in effect what was sought was to make the director liable not for what he did but for joining in a resolution—really *ultra vires*—that something might be done. The directors I hold liable did not resolve that control of these trust funds might be handed over to Arnold. They, in the teeth of their statutory duty, by the two acts of passing the resolution and ratifying the illegal banking arrangement, did actually hand control of the trust funds over to him. In the case cited, those doing the acts complained of were not the directors' servants or agents but fellow directors of equal authority with the director sought to be charged. Hence the crux of the decision is that the *causa causans* of the loss was a new wrongful act by independent persons. In the present case Arnold, in so far as he dealt with the bank account, was not acting *qua* director but under the direct authority of the resolution and within its scope, and therefore as a servant or agent of the directors who passed it. If this view is correct, authorities are not necessary for the proposition that they are responsible for his acts.

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If I am wrong in holding the named directors liable on the ground of acting *ultra vires,* I think the case against them made out on the ground of negligence. In *In re Railway and General Light Improvement Company, supra,* the test applied

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is whether directors acting as those I find liable have acted, would be liable in an action at common law.

It is clear, I think, that where a statutory duty is imposed upon one person for the protection of another, and that duty is violated and loss results to such other person because of such violation, an action would lie at the instance of the party damaged against the person so violating such duty to recover such loss: *Watkins* v. *Naval Colliery Co., Limited* (1912), 28 T.L.R. 569 at p. 570. That, it is true, is a master and servant case, but, if I understand it aright, the decision is merely a particular application of this general principle. Or to use the standard set up in *In re New Mashonaland Exploration Company, supra,* on the facts as hereinbefore set out, cannot one perfectly well deny that the directors held liable did really exercise their judgment and discretion in a *bona fide* way in passing this empowering resolution, and then making it applicable to trust funds by ratifying the illegal banking arrangements without inquiry as to what those banking arrangements were? In that case Vaughan Williams, J. at p. 586 says:

> "To advance money on security without waiting for the security is so unbusinesslike an act that it cannot be called a mere error of judgment or imprudent act,"

and if he had found as a fact this had been done, he would have held the directors liable. In my view, that falls far short of what was done here.

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It is useless to pursue the matter further. Much that has been said when dealing with the *ultra vires* viewpiont applied with even greater force to this question of liability on the ground of negligence. Where the acts complained of are *ultra vires* and also negligent, the viewpoints are closely connected in *In re Railway and General Light Improvement Company, supra,* Jessel, M.R. seems to view the matter there dealt with more as an act without authority, *i.e., ultra vires,* whilst the Court of Appeal, as I read the judgment, lays more stress on negligence.

I therefore hold the following directors jointly and severally liable for the loss of trust funds that has occurred, the exact amount to be the subject of further inquiry: Clubb, Brydone-Jack, Stewart, Pearson, Ramsay, Drew, Reid and Henderson.

Reid, it is true, was not a qualified director (though he purported to act as such) when the acts complained of were committed, but he knew of them and participated in them, and, in my opinion, must be held liable at any rate for negligence for not taking decisive action as soon as he was elected to the board, which was the day after the confirmation by the board of the advisory's action on the banking committee's action.

There remains the question of the liability of the other directors named in the summons. Of these, Machray, Pitblado, Bole, Twelves and Bell attended none of the meetings set out, and had no part in any of the acts complained of nor any knowledge thereof. No case has been cited to me where directors who took no part in the misfeasance or breach of trust relied upon, and who had no knowledge thereof, have been held liable. None of these parties resided or were in Vancouver at the time the things complained of were done; Bell and Machray were not even members of the board. In my opinion, under the circumstances here, none of them are liable: see *Marquis of Bute's Case* (1892), 2 Ch. 100; *In re Brazilian Rubber Plantations and Estates, Limited* (1911), 1 Ch. 425 at p. 437; *In re Denham & Co.* (1883), 25 Ch. D. 752; and *Re Montrotier Asphalte Company* (*Perry's Case*) (1876), 34 L.T. 716. On the same authorities I would, though with some hesitation, hold Riggs, Keenleyside and Stark not liable were it not for the view above expressed, that the advisory committee must be regarded as the servants or agents of the directors who appointed them. Apart from that view, what was done at the meeting of the 31st of March, 1913, did not in itself endanger the trust funds. If banking arrangements had been made by the advisory committee in accordance with the provisions of the private Act, there would have been a separate account for trust funds and a system established whereby no withdrawals therefrom could take place without formal action by a quorum of the board. The empowering resolution would still be operative, but only over Company funds, and I have already held that would not, under the circumstances, entail liability on the directors. It is also true that Riggs, Stark and Keenleyside and, to a less extent, Bell attended some of the

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subsequent meetings of the board at which advisory board minutes, shewing only one bank account in operation, were acted on but, on the whole, I would hold this standing alone does not make them liable as having been negligent.

But in the view I take of the legal effect of the advisory committee resolution and the result of that legal effect when coupled with the Arnold empowering resolution, I must hold Riggs, Starks and Keenleyside jointly and severally liable with the others already found liable for all loss of trust funds resulting from Arnold's control of the bank account.

As to the directors held not liable, the authorities cited shew that neglect of his duties by a director to attend meetings, etc., may, depending on circumstances, be a reason for refusing such director his costs on a proceeding against him such as this. The evidence so far adduced was not directed to this point, and therefore the question of costs of those directors who are held not liable is reserved for further inquiry. Miller was not elected a director until the 24th of February, 1914. He attended a meeting of the board on that day. He then, it is stated, was absent from the city in the course of his duties as general manager until July. He attended most of the meetings of the advisory committee (of which he was not a member but apparently was there as general manager) from the 7th of July, 1914, on. He was at the directors' meeting of the 25th of September, 1914. He was general manager of the Company from its inception. His duties as such are defined by by-law 16. As such general manager he submitted the official copy of the private Act to the provisional directors at the meeting of the 18th of November, 1912. He was present at the directors' meeting of the 31st of March, 1913, when the resolutions hereinbefore dealt with were passed. He was a member of the banking committee and was present at the advisory board meeting of the 8th of April, 1913. He was not present at the directors' meeting of the 14th of May, 1913. On these facts I think he must be fixed with knowledge both of the illegal banking and of the provisions of the private Act relevant thereto, and if so I think he was guilty of neglect in not acting immediately he became a member of the board.

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I hold him jointly and severally with the others liable for all losses of trust funds which resulted from Arnold's control of the bank account that occurred subsequently to his election as a director. The liquidator is entitled to costs against the directors found liable. If leave to appeal is necessary, it is hereby granted to all parties, including the liquidator.

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MURPHY, J.: In giving my reasons for judgment an error of fact was made. It was assumed that the resolution *re* signing cheques that was communicated to the Royal Bank was the resolution passed on the 31st of March, 1913. This is incorrect. It was the resolution passed on the 18th of December, 1912, that was so communicated, as shewn by the minutes of the 8th of April, 1913, of the advisory board. The correction, however, does not affect the reasoning, as all the directors held liable, except Reid, were present on the 18th of December, 1912, and the resolution then passed had the same effect of giving Arnold control of the bank account as did the resolution of the 31st of March, 1913. Reid is held liable for negligence, and his absence from the meeting of the 18th of December, 1912, does not cause me to change my opinion.

I desire also to add a word in reference to the directors who are held not liable. As to them, negligence could be the only ground of liability. The onus of proving negligence is on the liquidator, and I have nothing before me but the bald fact of absence from meetings, which, under the circumstances, I do not think satisfied such onus.

From this decision the directors who were held liable appealed and the liquidator cross-appealed. The appeals were argued at Vancouver on the 27th of April to the 4th of May, 1916, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Davis, K.C., for appellants Clubb and others: Under the English Act the liability of directors for misfeasance is summed up in *Re Wedgwood Coal and Iron Company* (1882), 47 L.T. 612 at p. 613; *In re Forest of Dean Coal Mining Company* (1878), 10 Ch. D. 450 at p. 458; *In re New Mashonaland*

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Exploration Company (1892), 3 Ch. 577 at pp. 583-5; *Dovey* v. *Cory* (1901), A.C. 477 at pp. 483-6; and *Prefontaine* v. *Grenier* (1907), A.C. 101 at p. 109. A director is not responsible when he relies on the statements of the general manager, believing in his integrity and ability. Once it is admitted the directors were not parties to the illegal acts, they cannot be held liable for the acts of the officials: see *In re Denham & Co.* (1883), 25 Ch. D. 752 at pp. 764-8; *Marquis of Bute's Case* (1892), 2 Ch. 100. He is not liable for the auditor's mistake or for not attending meetings: see *Land Credit Company of Ireland* v. *Lord Fermoy* (1870), 5 Chy. App. 763 at p. 772; *Cullerne* v. *London and Suburban General Permanent Building Society* (1890), 25 Q.B.D. 485 at p. 488. What the director has done must be the cause of the loss in order to render him liable, and in this case none of the directors knew of the illegal use of the funds. The Company could only invest in certain securities, and if they went outside of the Act, it was *ultra vires* of the Company: see *Watkins* v. *Naval Colliery Co.* (1912), 81 L.J., K.B. 1056 at p. 1059; *Thacker Singh* v. *Canadian Pacific Ry. Co.* (1914), 19 B.C. 575. The duty of directors is to pass on a loan when it is brought before them, and on doing so, their duty is done.

Argument

Bodwell, K.C., for appellant Reid: The new Company came in on the 31st of March, 1913, when an advisory board was appointed. They selected a bank at which the banking was to be done, and did nothing more. The trial judge finds it was due to the directors' neglect that only one account was kept at the bank, in which both the trust funds and the Company's funds were kept, but we contend the system established was sufficient, if the work had been honestly carried out.

Whiteside, K.C., for appellant Drew: Drew was not a member of the advisory board. There is no duty or obligation on a director to take precautions to prevent a man in a fiduciary position from stealing moneys. The auditor's report was before the directors on the 31st of December, 1913; all the later lending went on behind the directors' backs. Arnold took the money.

Bird, for appellant Bell.

E. B. Ross, for appellant Stark: Stark was not a member of the advisory board, and the learned judge held him liable because he was at the meeting at which the advisory board was appointed, but the by-laws gave the directors the authority to appoint the committee.

McLellan, for appellants Ramsay *et al.*: Ramsay *et al.* were not members of the advisory board, and should not be held responsible.

Jamieson, for appellant Miller: Miller was made a director on the 24th of February, 1914, but was not a member of the advisory board.

Martin, K.C., for respondents: The new Company had its first meeting on the 31st of March, 1913, when Reid, Miller, Machray and Bole were added as directors. The action is for breach of trust, arising out of negligence. The directors should have had a system whereby the assets of the Company were protected. There was lack of system, as Arnold was the only one to sign cheques and all other officials acted solely under his orders. There was no provision whereby the directors would know what business was being done. For instance, one Dalton paid in $85,000 for investment, and the directors knew nothing of it. A director cannot be held liable for non-feasance unless he is guilty of a breach of trust, and a breach of trust is the failure to do what he ought to have done. He must shew the same care and energy as he would with a matter of his own. The balance sheet shews, on its face, that the trust funds and the Company's funds are kept in the same account, and the auditor's report should have put them on inquiry. Breach of trust arises from duty and not as in misfeasance, where it is necessary to shew there was an active misdeed. It is a duty and the negligence is breach of duty: see *Stringer's Case* (1869), 4 Chy. App. 475. The statute provides for two bank accounts, but they only kept one, and the learned judge finds them liable for not keeping their trust funds separate. We contend they are just as responsible for the Company's funds as the trust funds. A director is liable when there is a breach of duty, although there is not actual misfeasance. As to liability of directors see *Joint Stock Discount Co.* v. *Brown*

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(1869), L.R. 8 Eq. 381 at p. 401; *In re Kingston Cotton Mill Company (No. 2.)* (1896), 2 Ch. 279 at p. 284; *Cavendish-Bentinck* v. *Fenn* (1887), 12 App. Cas. 652; *Rance's Case* (1870), 6 Chy. App. 104 at p. 117. The outstanding feature is that they gave the manager full power and control of the affairs of the Company, and it was their duty to see what he was doing from time to time: see *In re National Funds Assurance Company* (1878), 10 Ch. D. 118 at p. 128. If you shew a duty to perform, they must perform that duty. As to their position as trustees see *Speight* v. *Gaunt* (1883), 9 App. Cas. 1 at pp. 4-5; *Clough* v. *Bond* (1837), 3 Myl. & Cr. 491 at p. 496; *In re Brogden. Billing* v. *Brogden* (1888), 38 Ch. D. 546 at p. 571; *Salisbury* v. *Metropolitan Railway Company* (1870), 22 L.T. 839; *In re Oxford Benefit Building and Investment Society* (1886), 35 Ch. D. 502 at p. 512. On the question of breach of duty see *Leeds Estate, Building and Investment Company* v. *Shepherd* (1887), 36 Ch. D. 787 at p. 798; *Ottoman Company* v. *Farley and Others* (1869), 17 W.R. 761; *Municipal Freehold Land Company Limited* v. *Pollington* (1890), 63 L.T. 238 at pp. 240-1; *In re Railway and General Light Improvement Company* (1880), 28 W.R. 541. They simply shut their eyes and said, "Arnold do what you like." As to the care and prudence a director must exercise in performing the duties of his office see Palmer's Company Law, 10th Ed., 222; Beven on Negligence, 3rd Ed., Vol. 2, p. 1230; Hamilton's Company Law, 3rd Ed., 342; *In re Ireland & Co.* (1905), 1 I.R. 133; *Turner* v. *Corney* (1841), 5 Beav. 515; *Davies' Case* (1890), 45 Ch. D. 537. The circumstances were peculiar in *In re Denham & Co.* (1883), 25 Ch. D. 752, and it does not apply to the case before us. *Re Montrotier Asphalte Company (Perry's Case)*, (1876), 34 L.T. 716, is also distinguishable. They contended there was no liability for non-feasance, quoting *In re Liverpool Household Stores Association* (1890), 59 L.J., Ch. 616 at p. 617; and *In re Sharpe* (1892), 1 Ch. 154 at p. 165, but there is a liability where in fact there is a breach of trust. As to the directors against whom the action was dismissed, I submit it should have been without costs, as there was good cause: see *Joint Stock Discount Co.* v. *Brown* (1869), L.R.

8 Eq. 381 at p. 401; *In re Ireland & Co.* (1905), 1 I.R. 133; and *In re Denham & Co.* (1883), 25 Ch. D. 752.

Davis, in reply: The principle of liability is that they may be liable on what they do, but they cannot be liable for what they do not do, so that the non-resident directors, who did not attend meetings, cannot be held liable. There is no doubt that in this case the loss occurred owing to the fact that the system was not honestly carried out.

Bodwell, in reply: If the agents tell the directors that the funds are invested as the Act authorizes, and there was nothing to arouse their suspicion that the business was not transacted as represented, they are not liable; the only fault that can be found with the system is that they only had one bank account, but the loss did not arise from the mixture of funds in one account.

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McPhillips, K.C., for respondent Twelves on the cross-appeal: Twelves lives in Belgium and has attended no meetings. He cannot be held liable: see *Wilson* v. *Lord Bury* (1880), 5 Q.B.D. 518. We are entitled to our costs; the trial judge has so found, and there is no appeal.

Cur. adv. vult.

7th November, 1916.

MACDONALD, C.J.A.: This appeal stands in rather a peculiar position. The trial has not been completed, except so far as those directors are concerned who have been exonerated from responsibility for the acts and omissions complained of in the summons. The position appears to me to be this: the trial reached a stage when it was felt by the learned judge and counsel for all parties that a saving of time and expense could be effected by the learned judge ruling upon certain questions affecting all or some of the parties charged with misfeasance. These questions were questions of negligence and of *ultra vires.* The learned judge set himself the task of deciding, in the first place, whether or not there was evidence to sustain the charges against all or any of the directors and officers charged with misfeasance. He came to the conclusion that certain of the directors, who had taken no active part in the management of the

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Company's business, were not answerable for what had been done or omitted by the board. I think the learned judge came to the right conclusion in respect of these directors. They attended no meetings of the board, and are not shewn to have been cognizant of any of the acts of commission or omission complained of. In *In re Cardiff Savings Bank* (1892), 61 L.J., Ch. 357, Stirling, J. at p. 361 said:

"But neglect or omission to attend meetings is not, in my opinion, the same thing as neglect or omission of a duty which ought to be performed at those meetings."

And he held the Marquis of Bute not liable for the neglect by the board of directors of a statutory duty imposed upon the company.

Having disposed of this part of the case, the learned judge came to the conclusion that the other directors and officers (the appellants) had been remiss in their duties and had exceeded their powers, but only in respect of the management and disposition of property entrusted to the Company for investment and management as trustees or agents.

He narrowed the matter down to findings that the appellants had been guilty of negligence in not, as the statute directed, keeping trust moneys separate from their corporate moneys, and in separate accounts, and in passing a resolution which, in the learned judge's opinion, gave the managing director, Arnold, control of the bank account, in which both corporate and trust moneys were mixed, thus enabling him, as the learned judge thought, to commit breaches of trust by diverting trust moneys to purposes to which the Company had no power to apply them. He thought that the parting with trust moneys, other than on investment in securities specified in the Act, was *ultra vires* of the directors. He therefore held them guilty of misfeasance and breach of trust in respect of trust funds only, and reserved for further consideration the question of the amount for which they were answerable.

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As far as the trial proceeded, it was confined to particular No. 2 of the summons. That particular had to do with the transactions of the Company with what is known as syndicate 8, and the concrete question to be tried was, whether or not any of the sums mentioned in particular No. 2 were lost through the misfeasance or breach of trust of the appellants.

Respondent's principal contention was that the directors failed to adopt and maintain a system of management of the Company's affairs reasonably calculated to protect the Company. One defect relied upon was the disregard of the provision of the Company's Act of incorporation, declaring that corporate and trust moneys should be kept separate. This imperative direction of the statute was admittedly ignored by the Company. I do not think appellants can be heard to say that they were not aware of that provision of the statute. I think the directors were bound to know the provisions of their charter and regulations. It is quite plain that they took no steps to see that the requirement was conformed to by the executive officers. Their counsel took the position that that was a matter of detail which could properly be left to the executive officers, and argued that if the appellants had no notice that this term of the statute was being ignored, they cannot be charged with negligence in that behalf. I think all the appellants must be held to have had knowledge of the breach of the said statutory injunction, but before pointing out the evidence of such knowledge, I will notice, in part, the system under which the directors were performing their functions. They appointed what they called an advisory committee, and delegated nearly all their powers and duties to that committee. The committee met from week to week, and considered the business brought before them. The board met quarterly, and at the board meetings the minutes of the preceding meetings of the advisory committee were accustomed to be read and approved by the board. One of the items invariably found in the minutes of the advisory committee was of this character:

"The bank account was reported. Debit balance, $9,650.15; Cash in hand, $17,326.25."

The above is taken from the minutes of the 8th of April, 1913, about a week after the Company had taken over the business of its predecessor. I do not think appellants can be heard to deny knowledge that a single bank account only was kept, in the face of minutes of this character, read from time to time at the board meetings, and formally adopted.

A motion was made to the Court to admit affidavits of appel-

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lants denying actual knowledge that one account only was kept for both classes of funds. In the disposition I would make of this appeal, it is of no consequence whether the affidavits are admitted or rejected. I will, therefore, assume that each of the appellants will deny actual knowledge of the mixing of the two classes of funds. That denial I do not think can be given effect to, in the face of the evidence I have already referred to.

Now, in my opinion, a system of doing business which ignores a factor which by statute ought to be part of that system is, *prima facie,* a defective and negligent system, and if loss can be shewn to have resulted from it, then I think a case of misfeasance would be made out. In specifying this particular defect, I do not mean to be understood as saying or implying that this is the only defect, or that there may not be negligence beyond this. The trial not being ended, I refrain from discussing the question of other wrongful acts or omissions, and only point to one particular to sustain the learned judge's refusal, at that stage of the trial, to dismiss the summons as against the appellants, which, in my opinion, is the only point we ought to now decide.

I think some confusion has arisen in this case by reason of what appears to me to have been a misapprehension of the meaning of the word misfeasance. I think, when the learned judge found the appellants guilty of misfeasance, what he really meant was that they were guilty of negligence and of acts that were *ultra vires.* But this alone would not amount to misfeasance. There must be loss resulting from the negligence or *ultra vires* acts of the appellants before they can be charged with misfeasance, in the legal sense of the word.

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Towards the close of the proceedings in the Court below, a discussion took place between the learned judge and counsel as to whether loss had been proven or not, and it was finally determined that the learned judge might assume loss for the purpose of deciding the questions he was about to consider.

This assumption of loss is not equivalent to an admission of loss, in fact I cannot understand why a loss should have been assumed—that could not help in the consideration of the questions which the learned judge was about to consider. Even

if loss had been admitted, I can find no indication at all that counsel intended to admit that any loss could be traced to the alleged defective system or *ultra vires* acts of the appellants. I think, with deference, that what the learned judge should have done, instead of finding the appellants guilty of misfeasance, was to have made a finding upon negligence and *ultra vires,* and then, having concluded as he did that there was evidence of such, to have proceeded with the trial.

I think it would be premature at this time to go further than to say that the learned judge was not in error, having regard to the incompleteness of the trial, in refusing to wholly dismiss the summons as against the appellants. The finding that the appellants were not responsible for loss of corporate funds does not justify, as it were, an *interim* judgment and an appeal therefrom in the middle of the trial. If the loss of any sums of money, whether trust or corporate, can be traced to appellants' negligence, then, I think, they are answerable. I am not prepared to say that a system which may entail losses of both classes of funds, can be said to be a good one in respect of the one, and a bad one in respect of the other.

Before leaving the case, I wish to refer to a statement of law made by the learned judge in his reasons, in which he says:

"In my opinion when these trust funds were once received by the Company, it was the bounden duty of the directors to only part with their control of such funds on investments set out in section 8."

That is to say, section 8 of the Company's Act of incorporation. That, no doubt, was the duty of the Company to its *cestui que trust,* but that duty is not to be confounded with the duty which the directors owe to the Company itself. This proceeding is one by the Company against its directors for breach of duties which they, as directors, owed to the Company; it is not a proceeding by *cestui que trust* of the Company against the directors. This is a distinction which, I think, it is important to bear in mind when dealing with the matters which yet have to be dealt with in the trial.

In the result, I would affirm the order dismissing the absentee directors from these proceedings, but would set the judgment aside so far as it relates to the appellants, as I think, in the

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case of the latter, it goes too far. The trial should proceed as if the order had merely dealt with the absentee directors, and as if with respect to the others the learned judge had refused to dismiss the summons.

The appeal should be allowed and the cross-appeal of the liquidator also allowed to the extent above indicated.

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

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MCPHILLIPS, J.A.: This is an appeal from the judgment of MURPHY, J. upon the hearing of a misfeasance summons, the learned judge holding that the directors resident in British Columbia are liable in respect of trust funds misapplied, and excusing the non-resident directors from liability therefor, and as to the misapplication or loss of funds of the Company, other than trust funds, excusing all the directors from liability. The learned judge would appear, in his judgment, to have proceeded upon two grounds as establishing liability, *viz.*: *ultra vires* and negligent acts of the resident directors. In elaborating the points upon which the learned judge proceeded, it will be seen that, in his view, there was a complete handing over of the management and control of the affairs and business of the Company to Mr. Arnold (now deceased), the managing director of the Company. Further, that there was but one bank account, *i.e.*, all the moneys of the Company were placed upon deposit with a chartered bank of Canada to the credit generally of the Company. The learned judge has held that there was a violation of a statutory duty in having but one bank account, saying: "Now, admittedly, the Company had but one bank account in Vancouver, into which all funds, company and trust, were paid, a clear violation of the statutory duty imposed by section 9 of the private Act" (Can. Stats. 1912, Cap. 89). With great respect and all due deference to the learned judge, the enactment is not that there shall be a separate or distinct bank account, but that the moneys and securities of any such trust shall always be kept distinct from those of the Company and in separate accounts, and

marked for each particular trust, capable of always being distinguished from any others in the registers and books of the Company, and not be mixed up with the general assets of the Company. This statutory provision is far from requiring separate accounts in the bank, in fact, to have each account separate if referable to the bank account, it would mean not one trust account but hundreds of accounts, nor does it import that there must be a separate bank account containing only the trust funds, not but what that may be said to be only proper and right, it is another thing, however, to say that it is a statutory requirement. The learned trial judge has remarked upon the fact that a most reputable firm of chartered accountants made a continuous audit of the accounts, moneys, investments, and securities of the Company. It might almost be said, too, that there was a day to day audit. The business of the Company was very great indeed in volume—in the millions—and it was not until the 26th of January, 1914, that the auditors called attention to the fact that there was not a separate banking account, and upon the evidence, it cannot be said that this letter ever got to the notice of the directors, in fact there is evidence that it was suppressed by the managing director, and at this time the financial position of the Company was past repair—it was insolvent. The balance sheet as at December 31st, 1913, which was forwarded with the above-mentioned letter, and which admittedly went before the directors, was most complete and fully in keeping with the understood capacity and ability of the auditors, and was signed by the president, managing director, and secretary of the Company, and by the auditors as well, the statement immediately above the auditors' signature reading as follows:

"We have audited the books and accounts of the Dominion Trust Company at the head office in Vancouver, and at the branch offices in Vancouver, New Westminster, Victoria, Nanaimo, Calgary, Regina, Winnipeg, Montreal, London, and Antwerp.

"All the Company's investments and securities were verified by us and are in order. We have examined the securities for trust funds invested and we report that they are properly dealt with and are in good order and filed separately under the client's name as apart from the Company's own investments.

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"We report to the shareholders that in our opinion the above balance sheet is a full and fair balance sheet and it is properly drawn up so as to exhibit a true and correct view of the state of the Company's affairs according to the best of the information and explanations given to us and as shewn by the books of the Company. We have obtained from the officers of the Company all the information and explanations we have required."

This balance sheet with the accompanying data, elaborate in its nature, would appear to shew that the Company's affairs were in a sound condition, and nothing which would call for any special inquiry. The one person, though, who knew such was not the case was the late managing director. It was a matter of admission at the hearing that losses were incurred by the Company by reason of the default and acts of the late managing director (Arnold), being matters of default and acts done unknown to the directors in the making of loans and advances without security, either to himself in association with others or to other persons with whom he was financially associated, losses falling upon the Company, and which the Company, out of its assets, will be unable to pay, even taking into consideration what may be forthcoming under the will, the Company being a beneficiary thereunder, and other moneys obtainable from and out of the estate of the late managing director. And it was further admitted upon the part of the liquidator of the Company, that the acts complained of being done without the knowledge of the directors, no fraud or moral obliquity could be imputed to them (the directors). Now, in exercising the powers conferred by section 123 of the Winding-up Act (R.S.C. 1906, Cap. 144), the Court

"may make an order requiring [the directors in this case] to repay any moneys so misapplied or retained, or for which [they have] become liable or accountable, together with interest, at such rate as the Court thinks just, or to contribute such sums of money to the assets of the company, by way of compensation in respect of such misapplication, retention, misfeasance or breach of trust, as the Court thinks fit."

The determination of the extent of the liability if the learned judge's judgment appealed from be sustained, will have to be a matter of future inquiry. The question now is, though, whether the directors are responsible and are liable? The evidence is most voluminous, yet, in my opinion, the matter is narrowed greatly by authority, and the effect of the evidence may be summarized and the law applied to the facts as

developed. It is common ground that the directors acted honestly, and were unaware of the wrongful acts of the late managing director. It would appear that the affairs of the Company grew to very large proportions, and the seeming success of the Company was commensurate with the great advance of business development throughout the Province, and in particular in the cities of Vancouver and Victoria.

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"The system and rules governing loans, above outlined, if honestly carried out, would have absolutely prevented what Arnold did. In my opinion, looking at the matter with the directors' eyes at the time the resolution was passed (it was a resolution authorizing the managing director to, in conjunction with some one person in a subordinate position, not a director, to draw and sign bills, cheques, etc.), bearing in mind their lending rules therein admittedly (with their then knowledge) merited confidence in Arnold's ability and integrity, their practically continuous audit by shareholders, auditors, the frequent meetings of their advisory committee, the submission of this committee's minutes to quarterly meetings of the board, and the submission at such quarterly meetings of a detailed balance sheet, shewing not only assets and liabilities but current revenue and expenses, it cannot be said that they were negligent in the sense above defined, either in passing the resolution or in failing to detect what was going on. For these reasons I hold the directors not liable for any loss of the Company funds caused by bad loans or advances made by Arnold."

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The learned judge, however, is not of the view that the resident directors are without fault in respect to the trust funds, and that in respect to losses from and out of those funds compensation must be made, holding that the resident directors were guilty of *ultra vires* acts and negligence.

The learned judge, in his judgment, specifically deals with the points of evidence upon which, in his opinion, liability

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may be imposed upon the directors: shortly, no separate bank account for the trust funds; the resolution of the 31st of March, 1913; admittedly of withdrawals of moneys upon the cheque of Arnold and one other, who might be a subordinate officer of the managing director; that section 8 of the private Act (Can. Stats. 1912, Cap. 89) was not complied with with regard to investment of trust funds, and that, notwithstanding that the advisory committee was authorized by by-law, it was an *ultra vires* act and that the directors did not act by a proper quorum. The learned judge summed up his finding upon the *ultra vires* acts by saying:

"They [the directors], in the teeth of their statutory duty, by the two acts of passing the resolution and ratifying the illegal banking arrangement, did actually hand control of the trust funds over to him [Arnold]."

With respect to the finding upon negligence, the learned judge applied *In re Railway and General Light Improvement Co.* (1880), 28 W.R. 541.

Now, in my opinion, the evidence fails to fix liability upon any of the directors for *ultra vires* acts, all that has been proved has been that Arnold, the managing director, has been guilty of *ultra vires* acts, that some trust funds have not been invested as required by statute, *i.e.*, pursuant to sections 8 and 9 of the private Act, the *ultra vires* acts of the managing director admittedly not known to the directors, cannot be acts for which the directors are liable. It is questionable if any liability at all could be imposed in these proceedings if that which is alleged is non-feasance, which, at best, it might be said to be (*Re Wedgwood Coal and Iron Company* (1882), 47 L.T. 612 at p. 613). However, I do not propose to rely upon this view.

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It was not within the powers of the directors to make the loans made by the managing director, and they were his, not their, *ultra vires* acts, and they were unknown to the directors. The directors proceeded in all that they did regularly and properly, and *In re New Mashonaland Exploration Co.* (1892), 61 L.J., Ch. 617 it was held that:

"To make directors of a company liable for misfeasance or breach of trust in relation to the company on the ground of negligence in performing an act which is within their powers, it must be shewn that they did not really exercise their judgment and discretion in the matter as agents of the company."

Here what was done by Arnold in making the challenged loans, in my opinion, cannot be in any way imputed to the directors. It is strongly impressed upon me that the directors are entitled to be absolved from liability in these proceedings by the decision in *In re Kingston Cotton Mills Co.* (1895), 65 L.J., Ch. 290. See *per* Williams, J. at pp. 295-6.

The *Kingston Cotton Mills* case went to the Court of Appeal on the appeal of the auditors of the company, and they were held not to be liable ((1896), 65 L.J., Ch. 673), the directors being absolved from liability in the Court below. Lindley, L.J. in the appeal at p. 676 used language which can rightly be applied to the position of the directors in the present case—they relied on Arnold, the managing director:

> "In this case the auditors relied on the manager. He was a man of high character, and of unquestioned competence. He was trusted by every one who knew him. The learned judge has held that the directors are not to be blamed for trusting him."

And see *per* Lopes, L.J. at pp. 677-8.

In the present case the business of the Company had gone on for several years, and had grown year by year in volume, and all the proceedings were carried out in supposed compliance with a system, which, if honestly carried out, would have afforded ample protection to the trust funds. There was no dishonesty in the directors; that is admitted, but the dishonesty was that of the managing director, and it was undetected dishonesty, undetected because of the skill and ingenuity of the managing director. Can it then be said that the directors were liable? Kay, L.J. at p. 679, in the last cited case, said "it is said that it is easy to be wise after the event." This language is forceful as applied to the facts before us. The directors admitted to have acted honestly throughout, laid down rules in the carrying on of the affairs of the Company, which were fitting and proper, and in the firm belief that they were being followed, with the aid of skilled auditors always present, went about the exercise of their duties in an honest way, then almost co-incident with the sudden demise of the managing director for the first time is it brought home to them that there has been dishonest conduct by the trusted managing director.

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Upon the question of the effect of the resolution as to the

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advisory committee, and the authority to sign cheques, and the managing director's ability to check out the trust funds, a decision which seems much in point is *Cullerne* v. *London and Suburban Building Society* (1890), 59 L.J., Q.B. 525. Lindley, L.J. at p. 529 said:

"The resolution was not the *causa causans* of the loss, but only a *causa sine qua non*. If the resolution alone had been passed, nothing would have happened; it would have had no result. A new wrongful act by independent persons was the real cause of the loss. The resolution, therefore, was not the real cause—not the *causa causans*."

The supposition was, and the justifiable supposition, that in drawing cheques they would be payments out in respect of *intra vires* loans and investments, not that the managing director would, as it is claimed he did, commit theft of the moneys of the Company—surely this was a happening not to be for one moment apprehended.

After the most anxious consideration of the very able arguments that were addressed to us from the bar, and consideration of the salient facts, it is borne in upon me that the present case is one that cannot be viewed cursorily and liability be imposed upon the directors. There is an absence of those concrete facts which should always be present, admitting of the imposition of such an onerous liability as that imposed by the judgment appealed from. That there has been such a serious loss is a matter to be deplored, but the directors must only bear that burden if the law imposes it.

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Mr. *Davis,* one of the learned counsel for the appellants, frankly stated, in his very forceful argument, that unless the appeal fell within the lines of the decision and *ratio decidendi* of *Dovey* v. *Cory* (1901), 70 L.J., Ch. 753, the appeal would necessarily fail. In my opinion, the appeal is supportable by that case, and by *Prefontaine* v. *Grenier* (1906), 76 L.J., P.C. 4.

In the present case there was absence of ground for suspicion, and I would refer to the language of the Lord Chancellor (Earl of Halsbury) at p. 758:

"I cannot think that it can be expected of a director that he should be watching either the inferior officers of the bank or verifying the calculations of the auditors himself. The business of life could not go on if people could not trust those who are put into a position of trust for the

express purpose of attending to details of management. If Mr. Cory was deceived by his own officers—and the theory of his being free from moral fraud assumes under the circumstances that he was—there appears to me to be no case against him at all."

It may be further remarked that Mr. *Martin,* the learned counsel for the respondent, the liquidator, quite frankly stated that it was not contended that there was any dishonesty upon the part of any of the directors, but in his very forceful and able argument, contended, nevertheless, that they were culpably negligent and recklessly indifferent, and were on that account liable.

In view of the particular facts of the present case, the language of Lord Macnaghten in *Dovey* v. *Cory, supra,* at p. 759 is indeed apt; and see pp. 761-2. *Dovey* v. *Cory* was followed in *Prefontaine* v. *Grenier* (1906), 76 L.J., P.C. 4, wherein I would refer to the head-note, and the judgment which was delivered by Sir Arthur Wilson, at pp. 7-8.

It is not attempted to be proved, and is not the fact, that the directors passed any *ultra vires* loans or made to their knowledge any investments of the trust moneys contrary to the statute. I understand that a large amount of investment of trust moneys was made, and properly and securely made, and passed upon by the directors, but the *ultra vires* loans and abstraction of trust moneys was the act of Arnold, the managing director, during the currency of the time when, in ordinary course, the legitimate and proper investment of the trust moneys was being made with the approval of the directors. In short, it was embezzlement by the managing director, and I am not of the opinion that there was any breach of statutory duty or *crassa negligentia* for which the directors can be held to be liable; there was neither fraud nor negligence upon the part of any of the directors: see *In re Lands Allotment Co.* (1894), 63 L.J., Ch. 291 at pp. 294, 296-301.

It is urged that, owing to there being but the one bank account, that in itself creates liability, giving an opportunity for fraud. I decline to accept this as a true proposition of law, and it was not the *causa causans* giving rise to the loss of the moneys, nor do I think that the conduct of the directors—admitted to be honest—was such conduct, by way of inattention,

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which creates liability. Fry, J. in *Cargill* v. *Bower* (1878), 47 L.J., Ch. 649 at p. 651, said,—

"that the persons who are responsible for fraud are of two classes; they are, first, the actual perpetrators of the fraud, the authors, the agents, the parties to it, those who concurred in it, who either do something to produce the fraudulent result or abstain from doing something which they are under an obligation to do to the person to prevent fraud."

The directors, in my opinion, are not liable upon this view of the law. After all, the directors are but the agents of the company in the carrying on of the affairs of the company. Fry, J. at p. 651 further said:

"In the next place, the principal for whom an agent, in the performance of his duties as an agent, commits the fraud, is also responsible. As a general rule, it appears to me that the one agent is not responsible for the acts of the others unless he does something which makes him a principal in the fraud."

In the present case the guilty party was Arnold, the managing director, not the other directors. Fry, J. in concluding his judgment in the last cited case, at p. 652 said:

"'No doubt there are cases in which a man may be charged with having committed a fraud when he had not committed it himself; but I think that ought to be held in as few cases as possible.'"

It is not shewn that the directors, other than possibly Arnold himself, were at all skilled or experienced financial men. It may be assumed, I think, fairly, that such was not the case, and fraud is not charged against the directors. Lindley, L.J. in *Lagunas Nitrate Co.* v. *Lagunas Nitrate Syndicate* (1899), 68 L.J., Ch. 699 at p. 707 said:

"If directors act within their powers, if they act with such care as is reasonably to be expected from them, having regard to their knowledge and experience, and if they act honestly for the benefit of the company they represent, they discharge both their equitable as well as their legal duty to the company. In this case they clearly acted within their powers; they did nothing *ultra vires*. Fraud is not imputed. The inquiry is therefore reduced to want of care and *bona fides* with a view to the interests of the company. The amount of care to be taken is difficult to define; but it is plain that directors are not liable for all the mistakes they may make, although if they had taken more care they might have avoided them. See *Overend, Gurney & Co.* v. *Gibb* [(1872)], 42 L.J., Ch. 67; L.R. 5 H.L. 480. Their negligence must be not the omission to take all possible care; it must be much more blamable than that—it must be in a business sense culpable and gross."

Upon the facts of the present case, it is certainly not established to my satisfaction—viewing the matter now from this

point of view—that there was conduct of the directors which any jury could reasonably hold that the directors were guilty of negligence, culpable or gross.

In *Liquidator of the Caledonian Heritable Security (Limited)* v. *Curror's Trustee* (1882), 9 R. 1115, proceedings in the way of charging a director for losses incurred through negligence, the Lord Ordinary's judgment, absolving the director's estate from liability, was affirmed on appeal. See the judgment of the Lord Ordinary at p. 1125.

It is unnecessary, perhaps, to point out that in the present appeal it is not suggested that there was any knowledge whatever in any of the directors, much less sanction, of the improper investments and wrongful abstraction of the trust moneys. In the case last cited, Curror had even signed a cheque for certain moneys improperly expended, and the further language of the Lord Ordinary at p. 1127 is somewhat pertinent to the argument addressed to us, that the banking arrangements as to signing of cheques was improper and constituted negligence on the part of the directors.

And in the appeal in the last cited case, see *per* Lord Young at pp. 1129-30.

Adverting again to the question of a separate bank account for the trust moneys, and that that was a statutory requirement—which, in my opinion, is not the statute law—and assuming for the moment that I am in error in this, has the liquidator established that trust moneys have been lost by reason of the non-existence of a separate bank account for the trust moneys, and that the directors personally are answerable for this loss? In my opinion, this has in no way been established. Lord Moulton in *David* v. *Britannic Merthyr Coal Co.* (1909), 78 L.J., K.B. 659 (affirmed (1909), 79 L.J., K.B. 153; (1910), A.C. 74) at p. 668 said:

"The civil liability arising from the breach of a statutory duty is of a wholly different nature from a penalty for such breach. The former gives no cause of action unless damage to a third party follows from it, and then it, in general, gives ground for an action for the amount of such damage at the suit of such third party. But penalties for breaches of statutory duties apply whether damage has been caused or not."

There is nothing by way of admissions or evidence which proves that the failure to have a separate bank account for

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the trust moneys gave rise to the loss of the trust moneys, and it is impossible to visit liability upon the directors for this default, if default it was. In *Thacker Singh* v. *Canadian Pacific Ry. Co.* (1914), 19 B.C. 575 at p. 577 my brother MARTIN said:

"It is not, however, sufficient to have a breach of statutory duty on the part of the defendant to make it liable in an action for negligence. It must be further shewn that such breach was the proximate cause of the accident."

I fail to see upon the admissions and the evidence that any case is made out by the liquidator, the admissions only refer to the acts of Arnold, and that loss ensued; but the question is, are the directors answerable for any of these acts, and for the losses that followed and consequent upon them?

I have dealt with what is alleged to constitute liability in the judgment of the learned judge, but, with great respect, I am unable to arrive at the same conclusion.

In winding-up proceedings, Kekewich, J. in *In re Liverpool Household Stores Association* (1890), 59 L.J., Ch. 616, dealt with questions of misfeasance and breach of trust, as affecting directors, and see his judgment at p. 620. Also see the judgment of Lord Herschell in *Cavendish-Bentinck* v. *Fenn* (1887), 57 L.J., Ch. 552 at p. 557.

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Turning to the misfeasance summons, it is to be noticed that no breach of duty is charged. What is charged is breach of trust, no fraud is charged, and the impeached resolutions set forth that all that was authorized to be done was to be "subject to the Act of incorporation and by-laws of the Company." I am constrained to hold, after the most anxious consideration, that whatever may eventually be held upon proper proceedings taken and sufficient evidence adduced, upon this summons the learned judge was not entitled to hold that there was misfeasance upon which liability could be imposed, and upon this point I would refer to what Lord Herschell said in *Cavendish-Bentinck* v. *Fenn, supra,* at p. 557.

In my opinion, as already stated, there was no statutory duty imposed that there should be a separate bank account for the trust moneys, although that might well have been a proper matter of good business precaution, but if wrong in this, it is

not proved that any of the directors were aware of this, unless it could be said that it became known by reason of the letter which accompanied the balance sheet, etc., as at December 31st, 1913, above referred to. Upon the evidence, I am not inferring that this letter was brought to the notice of any of the directors —it is a matter that can be in any later proceedings dealt with —and evidence upon this point can be adduced in any misfeasance proceedings that may be hereafter brought.

I would affirm the learned judge in his judgment wherein he dismissed generally the misfeasance summons as against John A. Machray, John Pitblado, David W. Bole, C. W. Twelves and Edmund Bell, and would also affirm the learned trial judge in his judgment wherein he dismissed particularly the misfeasance summons as against F. R. Stewart, William D. Brydone-Jack, William H. Clubb, David W. Bole, William Henderson, R. W. Riggs, R. L. Reid, Edmund Bell, R. P. Miller, James Stark, E. W. Keenleyside, James Brady, T. R. Pearson and George E. Drew, in respect to loss of the corporate funds of the Company, and would reverse the judgment of the learned trial judge wherein he declared the said last-mentioned directors to have been guilty of breach of trust and misfeasance in respect to the loss of trust funds, but to be without prejudice to the right to institute further misfeasance proceedings in respect to the loss of trust funds, being of the opinion that no case has been made out of liability upon the admissions and the evidence before the learned judge upon the hearing.

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Upon the whole, therefore, in my opinion, the judgment should be affirmed in part and reversed in part, but without prejudice to the bringing of such further misfeasance proceedings as may be advised, having relation to the loss of trust funds, against any of the above-named directors other than John A. Machray, John Pitblado, David W. Bole, C. W. Twelves and Edmund Bell. The reason for this proviso arises from the fact that it cannot be said that all possible evidence was exhausted, and it is a proviso in the interests of justice, and if any further proceedings be taken, care should be had that the particular ground upon which liability is claimed is clearly shewn and made known, and the amount of the loss to

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the funds and assets of the Company by reason thereof is established—as was done in *In re Liverpool Household Stores Association, supra.*

Appeal allowed in part, McPhillips, J.A. dissenting in part.

Solicitors for the various appellants: *Davis, Marshall, Macneill & Pugh; Whiteside, Edmunds & Whiteside; Wilson & Jamieson;* and *E. B. Ross.*

Solicitors for the various respondents: *Cowan, Ritchie & Grant; McPhillips & Wood; Bird, Macdonald & Ross;* and *McLellan, Savage & White.*

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ROYAL BANK OF CANADA v. WHIELDON

THE ROYAL BANK OF CANADA v. WHIELDON AND BALL.

Practice—Judgment—Costs paid—Decision reversed in Supreme Court—Costs ordered to be refunded—Interest.

Interim injunction—Dissolved—Order for inquiry as to damages—Appeal—Judicial discretion.

The plaintiff recovered judgment which was affirmed by the Court of Appeal, but reversed by the Supreme Court of Canada. The plaintiff's costs of the trial and before the Court of Appeal had been paid by the defendant. The Supreme Court ordered that these costs be refunded but made no mention of interest on the sums so paid.

Held, on appeal (GALLIHER, J.A. *dubitante*), that it is the duty of the Courts of the Province to enforce the judgment of the Supreme Court of Canada as entered. As no mention is made in the judgment of interest, and there is no statutory provision for the same, interest will not be charged.

Per MCPHILLIPS, J.A.: We have the express declaration of the Privy Council (*Rodger* v. *The Comptoir D'Escompte de Paris* (1871), L.R. 3 P.C. 465) that interest is not allowed in regard to refund of costs, and we are concluded by that decision.

Held, further, that on an order being made for an inquiry as to damages owing to the granting of an *interim* injunction, for which the plaintiff gave his undertaking when the injunction was granted, the judicial

discretion of the judge to whom the application is made will not be interfered with by an appellate Court, unless convinced that the judge was clearly wrong.

APPEAL by plaintiff from an order of MORRISON, J. of the 9th of June, 1916, directing a reference to the registrar to ascertain the amount of damages sustained by the defendant Ball by reason of an *interim* injunction, and that the plaintiff pay interest on certain sums paid by the defendant to the plaintiff as costs, from the time they were paid until they were refunded. The plaintiff brought action for the recovery of certain goods and chattels, upon which it held an assignment, and for an injunction to restrain the defendant from selling them. An *interim* injunction was granted and the plaintiff gave the usual undertaking as to damages. The plaintiff obtained judgment in the action, which was sustained by the Court of Appeal, but the Supreme Court of Canada allowed the appeal and dismissed the action. The plaintiff had been paid the costs of trial and of the appeal to the Court of Appeal, and the sums so paid were ordered to be refunded by the Supreme Court.

Statement

The appeal was argued at Vancouver on the 28th and 29th of November, 1916, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

Sir C. H. Tupper, K.C., for appellant: An *interim* injunction was obtained and later it was dissolved on terms that Ball should pay money into Court. There was a complete waiver of undertaking. The learned judge should have referred the application to the judge who tried the action, as he alone was vested with discretion. There is no jurisdiction for ordering that interest be paid on costs: see *Rodger* v. *The Comptoir D'Escompte de Paris* (1871), L.R. 3 P.C. 465. If the undertaking was not dissolved, then an application may be made for an order to assess after the action is disposed of: see *Smith* v. *Day* (1882), 21 Ch. D. 421; *Newby* v. *Harrison* (1861), 30 L.J., Ch. 863. The discretion should be exercised by the judge who is cognizant of the facts, and in these cases the trial judge heard the application: see *Ex parte Hall* (1883), 23 Ch. D. 644 at p. 653; *Re Hailstone; Hopkinson* v. *Carter* (1910),

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102 L.T. 877. There should be no inquiry allowed as to damages when there was a settlement; the injunction being dissolved, there was an end of the undertaking. On the question of interest on costs see *Edge & Sons* v. *W. Gallon & Son* (1899), W.N. 137; *Ashworth* v. *English Card Clothing Company, Limited (No. 2)* (1904), 1 Ch. 704; *Davies* v. *McMillan* (1893), 3 B.C. 72.

Argument

J. A. MacInnes, for respondent: The cases referred to on the question of interest being chargeable on costs ordered to be refunded are overruled: see *Stickney* v. *Keeble* (1915), W.N. 72. Our Interest Act, R.S.C. 1906, Cap. 120, Sec. 15, differs from the English Act. When paid it loses its character as costs and becomes a judgment debt, upon which we are entitled to charge interest as long as it is in their hands: *Macbeth and Co. (Limited)* v. *Maritime Insurance Company (Limited)* (1908), 24 T.L.R. 559. As to the undertaking for damages, it is urged that it was a consent order dissolving the *interim* injunction; in fact, it was vigorously contested and dissolved on the ground that it was improperly obtained. By reason of the injunction the sale was adjourned, and this spoilt the sale, as buyers disappear in the meantime, and are frightened at the litigation. The undertaking is not affected even by a consent order, as it was made to us: *Ross* v. *Buxton* (1888), W.N. 55; *Spence* v. *Hector* (1865), 24 U.C.Q.B. 277; *McCullough* v. *Newlove* (1896), 27 Ont. 627.

Tupper, in reply: The affidavit is not sufficient; it must be shewn there was substantial damages. The cases are collected in the Annual Practice, 1916, p. 2416.

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MACDONALD, C.J.A.: With respect to the interest, I think the learned judge was wrong. Without expressing any opinion as to whether or not the Supreme Court of Canada might, in its judgment, have ordered the sum to be repaid with interest, the fact is that that Court did not so order. The judgment has been formally entered, and I think the Courts of this Province have nothing to do with it, except to enforce it, unless a question should come up with respect to whether or not the sum ordered to be refunded would carry interest by statute, and the registrar refuse to add the interest. Any order which

might be made in that event would not be an order which would in any way vary or interfere with the judgment of the Supreme Court of Canada. I think, therefore, the learned judge was wrong in interfering, as he did, in respect of the interest.

With respect to the other branch of the case, the order for an inquiry as to the damages arising by reason of the postponement of the sale, if the case had come before me in the first instance, I should have had very great hesitation in ordering an inquiry; but the question is one which goes to the discretion of the judge to whom the application was made. It is, as *Sir Charles Tupper* pointed out, a judicial discretion; a discretion from the exercise of which, no doubt, an appeal will lie; but, at the same time, where there is discretion of that kind, it has been the well-recognized rule of appellate Courts not to interfere with the exercise of that discretion, unless convinced that the learned judge was clearly wrong. Now, I am not convinced that the learned judge in this case was clearly wrong, and therefore I think on this branch of the case the appeal should be dismissed.

MACDONALD, C.J.A.

GALLIHER, J.A.: On the question of interest, I understand my learned brothers are both clearly of the opinion that interest should not be allowed. Speaking for myself, while I will not dissent, I do not think anything is to be gained by delaying judgment. I would have required some time to look into that feature.

GALLIHER, J.A.

On the other point, with regard to the reference, I think the trial judge who granted the reference was right.

MCPHILLIPS, J.A.: I also am in agreement that no interest is capable of being allowed. I think the controlling decision is *Rodger* v. *The Comptoir D'Escompte de Paris* (1871), L.R. 3 P.C. 465, followed by WALKEM, J. in *Davies* v. *McMillan* (1893), 3 B.C. 72. Close examination of *Rodger* v. *The Comptoir D'Escompte de Paris, supra,* shews beyond any question of a doubt that it is the duty of the Court of Appeal to carry out the judgment of the ultimate Court of Appeal so that no injury shall ensue to the suitors. Now, if interest was allowable here, I think that, even with the silence of

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the Supreme Court of Canada's judgment, there was ample power vested in the Supreme Court of this Province to carry that out; but we have the express declaration of the Privy Council that interest is not allowed in regard to refunds of costs, and we are concluded by that decision.

Now, with regard to the question of damages, I am in agreement also with what has been said by the Chief Justice with regard to this matter. It is essentially one of discretion, and the discretion has been exercised. I also would have hesitated, had I been acting as the judge in first instance, in granting any such reference upon the very limited material that was before the judge. However, the reference has been directed, and I do not see my way clear to disagree. I would refer to *Hunt* v. *Hunt* (1884), 54 L.J., Ch. 289. That was a case where the discretion was exercised by Mr. Justice Pearson. I think he had more material before him. For instance, he had this, that by reason of the delay (the wife restrained the husband leaving with the children) the troopship on which the defendant and his children were to have sailed had started, and passage for the defendant alone would be provided by the Government in another vessel, so he lost the free passages for the two children. He further said he had been put to the expense of a stay in London through the delay, and had suffered a loss of income, his pay had stopped from the 23rd of November. And it will be seen that the damages are rather precisely stated. Pearson, J., at p. 291, said:

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"The discretion, to my mind, is well pointed out by the present Master of the Rolls in the case of *Smith* v. *Day* (1882), 21 Ch. D. 421, in which he says that you must take into consideration what the damages are, and that if the damages are of such a nature that if it were a case of suing on a contract they would be too remote, then they are not damages which the Court on such an undertaking ought to allow. The damages here are the damages occasioned by Dr. Hunt being detained in this country, and being therefore compelled to spend money while he is here, and losing free passages which were offered him and of which he would have availed himself but for this injunction. Now, inasmuch as it was known to the applicant at the time when she applied for the injunction that the result of granting this injunction would be the very state of things which has happened—that Dr. Hunt would be restrained from leaving this country, practically that the free passages would have to be given up, and that he would have to run his chance of getting passages afterwards if he could—I cannot consider that those damages were too remote, or that they were

damages which were not contemplated at the time when the lady by her counsel entered into the undertaking."

As a matter of fact, Pearson, J. had made a mistake on a point of law. However, he directed the reference. He further said:

"I regret it the more because it has been my own error that has caused it, but I feel that I am bound to grant the application and to say that there must be an inquiry whether the husband has incurred any and what damages by reason of the injunction which was granted; but I certainly shall not allow the defendant any damages if I find that he has not availed himself of every opportunity which may be given him to obtain free passages."

Now, in this particular case a sale was postponed. The allegation is that prospective purchasers were deterred from purchasing and went away, and were not there at the time of the sale. Now, that will all be a matter of proof; and I would think, in passing, there would be considerable difficulty in establishing damages in this particular case; but with that this Court is really not concerned. That will be decided in another Court.

MCPHILLIPS, J.A.

Appeal allowed in part.

Solicitors for appellant: *Tupper, Kitto & Wightman.*
Solicitors for respondent Ball: *Affleck & MacInnes.*

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IN RE KILLAM & BECK

IN RE KILLAM & BECK.

Solicitors—Undertaking to carry out settlement of action—Personal liability—Disciplinary jurisdiction of Court—Summary order for payment.

In an action for an accounting alleging misappropriation of funds by one defendant and breach of duty as an agent by another, a settlement was arranged and the defendant's solicitors gave the following written undertaking: "On behalf of our client G. we undertake to have the agreement arranged between us executed by S. or some third person acceptable to you and to pay you forthwith the cash payment of $300 as arranged."

Held, affirming the decision of MORRISON, J. (MARTIN, J.A. dissenting), that they were personally liable on their undertaking.

Burrell v. *Jones* (1819), 3 B. & Ald. 47 followed.

Per MCPHILLIPS, J.A. (dissenting in part): The solicitors are personally liable on their undertaking, but it is not an undertaking in respect of which the Court should exercise its summary jurisdiction. The proper course is an action for damages sustained by reason of the breach.

APPEAL by Messrs. Killam & Beck from an order of MORRISON, J., made at Chambers in Vancouver on the 2nd of March, 1916, directing that they be held personally liable on their undertaking to carry out the settlement of the action of *Dragoylovich* v. *Wakely et al.* The facts are that the plaintiff brought action against the defendants Gunn and C. Gray & Co. and Wakely for an accounting, alleging misappropriation of funds by Gray & Co. and Gunn (for whom Killam & Beck were acting) and breach of duty as plaintiff's agent by Wakely. An order was taken out to examine the defendant Gunn on the 6th of April, 1915, and at the time of the appointment (after two postponements at Mr. Killam's request), Mr. Killam telephoned Mr. McDougal (plaintiff's counsel) that he had a release of all claims in the action, signed by the plaintiff in the presence of Hamilton Read, a solicitor. On the 25th of April plaintiff notified her solicitor that she was induced by the defendant Gunn to go before a solicitor and sign papers, the effect of which she did not know, but she

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received no money on signing, and was told by Gunn not to go back to her solicitor. She refused to recognize any settlement, and the case was set for trial on the 10th of May following at 11 a.m. At 10.30 a.m. Hamilton Read appeared for the plaintiff and said the case was withdrawn. Mr. Read was not solicitor for the plaintiff on the record. Later, Messrs. Killam & Beck were again notified the case was to go on after an adjournment owing to the plaintiff not appearing, she again having been approached by Gunn and induced to stay away. The case came on for hearing on the 18th of May, and upon the defendant Gunn being examined, the learned trial judge suggested a settlement, and at the request of Killam, a postponement was granted with a view to arriving at a settlement. Nothing was done with regard to settlement, and the case was again set down for the 1st of June, when a basis of settlement was arrived at between the solicitors in Court, whereby Gunn and Gray & Co. were to pay $4,500, secured by an agreement for sale for the property in question in the action, which was to be guaranteed by one Skeffington, and the action was postponed until the 4th of June in order that the settlement might be carried out. On the 4th of June the documents had not been signed by the parties as arranged, and Mr. Killam then gave the undertaking set out in the head-note. Shortly afterwards Skeffington died, and the settlement was never carried out.

Statement

E. M. N. Woods, for Annie J. Dragoylovich.
Martin, K.C., for Killam & Beck.

2nd March, 1916.

MORRISON, J.: This is a motion for an order to compel the firm of Killam & Beck, solicitors, to carry out and perform an undertaking given by them on the 4th of June, 1915, at the trial of an action before my brother GREGORY in Vancouver.

The incident from which the undertaking in question arose occurred during the pendency of an action in which Messrs. Killam & Beck's client Gunn was one of the defendants. The suit had been dragging along for some time, with various proposals for settlement apparently emanating from Messrs. Killam & Beck, and on the 1st of June, the day the trial was to have

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taken place, Mr. Killam made the following proposition of settlement: The plaintiff was to receive $4,500 and was to have judgment against Gunn *et al.* for that amount, this judgment to be secured by an agreement for sale of property on Lulu Island, and which property had been taken in part payment of the original exchange, the purchaser of the agreement of sale to be the defendant Gunn and to be guaranteed by one Skeffington, who was acceptable to the plaintiff's solicitor. There were certain terms as to the payments. The action, in consequence of this, was postponed till the 4th of June for confirmation or consummation of this arrangement, and in the meantime, namely, on the 3rd of June, the plaintiff's solicitor drew up a form of agreement and transmitted it to Killam & Beck for execution by Gunn and Skeffington. On the 4th of June, the plaintiff's solicitor not having heard from Killam & Beck, attended before GREGORY, J. when the trial was adjourned until 2.30, but no response from Killam & Beck having as yet been received, the case was announced to be called again about 4 o'clock. The plaintiff's solicitors therefore wrote the following letter and despatched it by a clerk to Messrs. Killam & Beck's office:

"*Re Dragoylovich* v. *Wakely.*

"The writer attended at 2:30 before Judge GREGORY, and he stated that he would take this case on immediately after the one at bar. The present case is expected to last until four o'clock. Following my arrangement
MORRISON, J. with you, however, we are agreeable to have the case adjourned provided that you give us your undertaking that Mr. Skeffington will execute an agreement for sale prepared by me, and that you will pay over the sum of $300 forthwith, and that if you cannot get Mr. Skeffington, you will get some third person acceptable to the writer to take the place of Skeffington."

The reply, which contains the undertaking, the subject-matter of this application, was given this clerk, who delivered it to the plaintiff's solicitors and is in the form following:

"Vancouver, B.C., June 1st, 1915.

"Messrs. McDougal & McIntyre,
Barristers, etc.
City.

"Dear Sirs,— "*Re Dragoylovich* v. *Wakely.*

"On behalf of our client, Mr. Gunn, we will undertake to have the agreement arranged between us executed by Mr. Skeffington or some third person acceptable to you and to pay you forthwith the cash payment

of $300, as arranged. We might add that Mr. Skeffington was in to sign the papers today, our Mr. Killam being engaged in Court had not looked over the agreement.

"Yours truly,
"Killam & Beck."

When the case was resumed, the following incident occurred:

"Vancouver, B.C., 4th June, 1915, 4:10 p.m.

"Court: Have you got what you wanted?

"Mr. *McDougal*: I just got a letter on my way over, my Lord, and I have not read it as yet, as I have not had time. I wrote a letter a half hour ago, and now I have received this letter [reads same to Court]. What I would ask is the guarantor to ensure us the payment of $4,500? Mr. Skeffington was quite agreeable to us, but I do not know whether he will sign yet. I have my doubts. My friend has given us his undertaking.

"Court: Are you satisfied with it?

"Mr. *McDougal*: Yes, I am satisfied with my friend's undertaking.

"Court: Well, you want to make the settlement in the form of an order of Court."

It appears that the agreement was not executed by Skeffington or any one acceptable to the plaintiff's solicitors. The undertaking is one given by solicitors at the hearing of an action in open Court. The co-existing circumstances may and, indeed, in this case ought to be considered. If the mere form were alone considered it might be difficult to distinguish it from *Downman* v. *Williams* (1845), 7 Q.B. 103; 68 R.R. 413. Although in that case the distinction between a class of cases which I might call commercial cases or cases of principal and agent in the course of business negotiations out of Court, and that class of cases where the undertaking arises out of and during the pendency of an action, and is given in the face of the Court as between solicitors, was not pointed out, yet I think it should be considered here. In the former, the party accepting the undertaking is looking to the principal, who is named and upon whom he relies to respond. In the latter, the solicitor giving the undertaking is an officer of the Court in Court and, as stated by Abbott, C.J. in *Burrell* v. *Jones* (1819), 3 B. & Ald. 47 at p. 49:

"Many persons will deal with solicitors and professional men (from the confidence they have in their known character and situation in life), who will not deal with an unknown client."

And he proceeds to say that "it would be preventing much of the ordinary business of life," if it were held that solicitors entering into contracts, such as the one before him, did not

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make themselves liable. Parenthetically, I may say that the wording of the undertaking in that case differed from this one, but I think those remarks are equally applicable here. Bayley, J., in the same case, held that "the language of an instrument is to be taken most strongly against the party using it." Here, again, the client Gunn, although known to the plaintiff's solicitors and apparently for that reason, was not acceptable. If the plaintiff's solicitors were unwilling, as appears from the material before me, to rely on Gunn, it is reasonable to suppose he would not accept his undertaking. In the letter of the 4th of June from McDougal & McIntyre, Mr. Killam's personal undertaking is asked for, and I am quite satisfied that that is what Mr. *McDougal* was insisting upon at the trial and that was what Mr. Killam intended to give him. If that were not Mr. Killam's real intention, I would not be surprised if the learned judge was misled and perhaps inadvertently.

I think the true construction, having regard to all the circumstances, is that Killam & Beck undertook to have the agreement signed on behalf of their client, not that they undertook on behalf of their client to have it signed. I cannot accept what I understand to be Mr. *Martin's* construction, that the import of the undertaking is that the client undertook, through the medium of his solicitors, to do the act in question; I hold

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the contrary view, that they as solicitors have undertaken: *Burrell* v. *Jones, supra.* Cases of this kind turn so much upon the peculiar circumstances of each case, that it is difficult to proceed wholly with regard to precedents. Even in the case of *Downman* v. *Williams, supra,* so much relied upon by Mr. *Martin,* Lord Denman, C.J., at p. 416 of the Revised report, considered it "impossible to ascertain with certainty, merely from the language of the letter" in question in that case, whether it created a personal liability or not, and he drew inferences from the rest of the evidence to aid him in arriving at a conclusion.

I think, therefore, the only fair construction to be put upon this instrument is that it is the solicitors' personal undertaking, and I grant the application.

From this decision the solicitors appealed. The appeal

was argued at Vancouver on the 5th of June, 1916, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

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Martin, K.C., for appellants.
E. M. N. Woods, for respondent.

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MACDONALD, C.J.A.: The undertaking of solicitors sought to be enforced reads as follows: [already set out in the judgment of the learned trial judge.] This undertaking was addressed by the appellants to McDougal & McIntyre, solicitors for the plaintiff in an action of *Dragoylovich* v. *Wakely*. The circumstances leading up to it are set forth in an affidavit of Mr. McDougal.

The question for decision is as to whether or not this is to be regarded as the undertaking of the solicitors or the undertaking of the client Gunn.

The action above mentioned was brought against Gunn and C. Gray & Co., Ltd. & Wakely, for an accounting, alleging misappropriation of the plaintiff's funds by Gray & Co. and Gunn, and breach of duty, as plaintiff's agent, by defendant Wakely. An adjournment was taken to consider terms of settlement. The defendants Gray & Co. and Gunn were willing to pay the plaintiff $4,500 in settlement, which the plaintiff was willing to accept, provided an agreement were entered into by Gunn, guaranteed by Skeffington, which would insure to the plaintiff the payment of the said sum of $4,500. Skeffington was a man of means and Gunn was a man of no means. The object of the settlement was perfectly clear. It was to secure to the plaintiff the said sum of $4,500 by the guarantee of Skeffington, or some other person acceptable to the solicitors for the plaintiff in that action.

The undertaking set out above does not purport to bind the other defendants. If it binds Gunn only, it is worthless, because Gunn had already agreed to execute the document. He was a man of no means, and it is impossible to suppose that plaintiff's solicitors intended to accept, and it is hardly reasonable to think that the defendants' solicitors intended them to

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accept, a document which was known to both to be worthless. An undertaking of this sort is to be construed by reference to the intention of the parties, to be deduced from the writing itself and the circumstances in which it was given.

The appellants rely on *Lewis* v. *Nicholson* (1852), 18 Q.B. 503; and *Downman* v. *Williams* (1845), 7 Q.B. 103. There were special circumstances in each of those cases which led the Court to the conclusion that it was not the intention of the parties that the person signing the contract should be personally bound. The earlier case of *Burrell* v. *Jones* (1819), 3 B. & Ald. 47, was not dissented from and, in my opinion, that case, in its facts and circumstances, more nearly resembles the case at bar than do the first-mentioned ones. The later cases of *Tanner* v. *Christian* (1855), 4 El. & Bl. 591; and *Paice* v. *Walker* (1870), 22 L.T. 547, support the conclusion to which the learned judge has come, that the undertaking in question here was the personal undertaking of the appellants.

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No question was raised by counsel here or below about the alternative remedy by action at law, nor was any objection raised in respect of the opportunity given the appellants to escape the consequences of failure to carry out their undertaking by paying the sum of $4,500 in manner specified in the order. The sole question before us was whether the undertaking was that of Gunn or that of the appellants.

I would dismiss the appeal.

MARTIN, J.A.: In deciding the question of the personal liability of the solicitors on the undertaking before us, it is important to start right, and that start should be made by bearing in mind the decision of the King's Bench *in banco,* in *Iveson* v. *Conington* (1823), 1 L.J., K.B. (o.s.) 71, affirming Lord Chief Justice Abbott, wherein, at p. 72, it was said:

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"In general, the undertaking of the attorney does not bind his client."

Lord Campbell, C.J. said in a case where the same question arose:

"It is always legitimate to look at all the coexisting circumstances, in order to apply the language, and so to construe the contract; but subsequent declarations shewing what the party supposed to be the effect of the contract are not admissible to construe it":

Lewis v. *Nicholson* (1852), 18 Q.B. 503 at p. 510. With

these guides, I have examined many cases in addition to those cited, and the conclusion I have come to, not without hesitation, and largely caused by a direct conflict of testimony on essential points in the affidavits and depositions, is, that the undertaking is not to be construed as a personal one. Of course, as the same learned judge above quoted also remarked, in language appropriate to the case at bar,

"no authority on the construction of a contract can be precisely in point, unless the words of the contracts are the same: but it seems to me that the present contract resembles that in *Downman* v. *Williams* [(1845)], 7 Q.B. 103; [68 R.R. 413]; which was held to be not a personal undertaking."

All the other judges took this view, and Crompton, J. was of opinion that

"on the whole I think the undertaking in this case more nearly resembles that in *Downman* v. *Williams*, than that in any other decided case."

The cases of *Burrell* v. *Jones* (1819), 3 B. & Ald. 47; 22 R.R. 296; *Hall* v. *Ashurst* (1833), 1 C. & M. 714; and *Watson* v. *Murrel* (1824), 1 Car. & P. 307, are clearly distinguishable for the reasons given by Lord Campbell. As Best, J. observed in *Burrell* v. *Jones*, "the term 'as solicitor,' is merely descriptive of the character they fill, and which has induced them to undertake." In *Downman* v. *Williams*, Tindall, C.J. in giving the judgment of the Court, at p. 109, says:

"The very terms of the letter itself, I 'undertake (on behalf of Messrs. Esdaile and Co.) to pay,' would seem to us, in their natural meaning, to point rather to a promise made by one person as agent for another than as intended to bind the party speaking in the character of a principal; for, upon the latter supposition, there would appear to be no reason whatever for mentioning the name of the principal."

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And later on (p. 111) he points out that if it is sought to change the effect of the letter,

"we think the burden is imposed upon the plaintiff below of shewing, by clear proof, that there was no such agency."

I have, as already noted, examined carefully the "coexisting circumstances" in vain to find any such proof as would remove the said burthen. What occurred in Court clearly did not do so, in my opinion, because the undertaking was before the Court then in writing, just as it is before us now, and subject to the same construction, so there was no ground for any uncertainty on that head, and the solicitor did not verbally expand his written undertaking but simply relied on it, as he does now.

MORRISON, J. I have already expressed my opinion on the subsequent events.

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The case of *Allaway* v. *Duncan* (1867), 16 L.T. 264, not cited to us, is an instructive one (approving *Downman* v. *Williams*), wherein the words "I shall be prepared on his behalf," used by an attorney, were held not to fasten him with personal liability, Bovill, C.J. observing that where a

> "document is ambiguous in its terms, and it is a doubtful matter to interpret [it] according to the meaning of the parties, it becomes . . . . the duty of the Court to put upon it the proper and strict meaning of the words."

The strongest case, I think, in favour of the respondent, *Ex parte Bentley re Bentley* (1833), 2 L.J., Bk. 39, was not cited to us, where the opening words in the notice relied upon against the solicitor, Fisher, were "On behalf of J. A. Palmer," etc. (his client), and it was construed to be a personal promise because he later used the words "I am ready, and hereby offer to allow and pay the costs," etc., which were held to be equivalent to saying "I have the money in my pocket, or in my power at this time; and I am now ready to pay it over to you." *In the Matter of C. and Another* (1908), 53 Sol. Jo. 119, is a somewhat similar case, though not so strong, because in reading the whole letter, and having regard to the dual undertaking, one branch of which (to make application to the magistrates) the solicitors alone could give, it was, as Walton, J. observes, necessary to give it the personal construction in order "to give

MARTIN, J.A. it any effect at all." I notice that in *Great North-West Central Railway* v. *Charlebois* (1899), A.C. 114 at pp. 125-6, in the judgment of the Privy Council, it is said:

> "As between the company and Charlebois, Mr. Blake undertakes on behalf of the company that, directly they can float the bonds . . . . he [Charlebois] shall have a sufficient amount to secure him the balance . . . ."

Clearly, Mr. Blake did not assume a personal obligation in giving that undertaking.

The lesson that one gathers from all the cases, with their often slightly varying language, is that it is sometimes hard to draw the line, and that the safe thing to do is to follow the precedent set out in *Iveson* v. *Conington, supra,* wherein the Court said:

> "If the attornies on either side of a cause will give undertakings, they

must abide by the legal consequences. In general, the undertaking of the attorney does not bind his client, but in this case, as though there was some mistrust, the agreement is penned with the greatest care, and the word 'personally' is introduced, which must mean that the parties intended to make themselves, and not their clients, personally responsible for the legal consequences of the agreement. It can have no other construction; and if the principal had been sued, he might have said that he employed the attorney to conduct the cause in the best manner he could, and not to make undertakings."

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I only add that the jurisdiction of the Court in these matters has been lately reviewed in *United Mining and Finance Corporation, Limited* v. *Becher* (1910), 2 K.B. 296; (1911), 1 K.B. 840; and that *Mullins* v. *Howell* (1879), 11 Ch. D. 763, and *Reeves* v. *Reeves* (1908), 16 O.L.R. 588, are instructive cases on undertakings which were impossible to carry into effect, enforcement in the former being refused because of a mistake on one side only.

MARTIN, J.A.

GALLIHER, J.A.: I agree in the conclusions arrived at by the learned trial judge, and would dismiss the appeal.

GALLIHER, J.A.

MCPHILLIPS, J.A.: This appeal is from an order of MORRISON, J. made on a summary application to compel the solicitors to perform an undertaking given at the hearing of an action in the Supreme Court of *Dragoylovich* v. *Wakely et al.*, Messrs. Killam & Beck the solicitors being the solicitors for C. Gray & Co., and Donald Gunn. Upon reading what took place at the hearing at the time the undertaking was given, it would appear that it was contemplated that the settlement of the action which had been come to, was to be put in the form of an order of the Court, but that was never carried out. The order appealed from in part reads, "or carry out and perform their undertakings given in Court on the 4th of June, 1915," but it cannot be gleaned from the proceedings what was the nature of the undertaking given in Court. All that can be gathered is that the undertaking was contained in a letter of the 1st of June, 1915, which letter was at the time in the hands of Mr. *McDougal*, counsel for the plaintiff at the trial of the action, which took place before GREGORY, J. and is as follows: [already set out in judgment of MORRISON, J.]

In my opinion, it cannot be said that any undertaking is

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proved to have been given in terms in Court, unless it be found to be in writing, and upon the argument addressed to this Court it was finally refined to the contention that the undertaking was to be found in the letter of the 1st of June, 1915, which reads as follows: [already set out.]

It would appear that the letter of the 1st of June, 1915, was handed to Mr. *McDougal* on the 4th of June, 1915, and after his firm had written and delivered a letter to Messrs. Killam & Beck, the letter reading as follows (these letters are the two letters referred to in the proceedings before GREGORY, J.): [already set out.]

After a careful examination of a large number of the authorities, I am of the opinion that the letter is a personal undertaking of the solicitors. I cannot say, though, that I arrived at this conclusion without some considerable hesitation, the more accentuated now by reason of the judgment of my brother MARTIN. The question, however, now to be determined is, whether it is an undertaking in respect of which the Court should exercise its summary jurisdiction? That which was agreed to be done was to obtain the execution of an agreement for sale of land by a Mr. Skeffington or some other acceptable person, and to pay forthwith the sum of $300. As to the $300, that sum has been paid, so that as to the only sum of money agreed to be paid there has been compliance with the undertaking; had that amount not been paid, unquestionably the summary jurisdiction of the Court would have been rightly exercisable in compelling payment thereof. The agreement for sale of land was prepared by Messrs. McDougal & McIntyre, the plaintiff in the action being the vendor, Donald Gunn (one of the defendants in the action) and George H. Skeffington the purchasers (vendees), the purchase price being $4,500, the land being an undivided one-half interest in blocks 1, 2, 3, 4 and 5 in subdivision lettered A of the North half of section 16, block 4, North Range, 6 West, in the District of New Westminster. It would appear that Mr. Skeffington was willing to execute the agreement, but unfortunately died, rendering this portion of the undertaking impossible. Later, the agreement was executed by Donald Gunn and James Allan (in lieu

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of Skeffington), but Allan was not acceptable, and that is the present situation. The order appealed from provided that the undertaking should be carried out and performed on or before the 1st of May, 1916, and in the event of failure, that the solicitors pay to the plaintiff in the action the $4,500 in the manner and in accordance with the terms of the agreement. It cannot be said that the solicitors gave any express undertaking to pay any money save the $300, which has been paid, and at best the undertaking was to obtain execution of the agreement by Skeffington or some other acceptable person. The solicitors would appear to have acted in good faith in undertaking that Skeffington would execute the agreement, and he was about to execute it, but the agreement as drawn had not been passed upon or approved by Messrs. Killam & Beck, and following that his death took place. *Peart* v. *Bushell* (1827), 2 Sim. 38, is a case where the Court refused to exercise its summary jurisdiction to compel a vendor's solicitor to perform an undertaking given by him at the sale to do certain acts for clearing the title to the estate. The undertaking was to cause satisfaction to be entered up at the vendor's expense upon any judgments that might be found against one of the parties through whom the vendor's title was derived and to procure evidence of the deaths of certain other persons, and a covenant for the production of certain deeds unless the originals were delivered up to the purchaser. The Vice-Chancellor in his judgment said:

"If any order is made, it must be for the performance of every one of the items in the undertaking. The nature of some of them is such that they may be impossible of performance; and then am I to throw the solicitor into prison until he has performed them, when it may turn out that they cannot be performed? The solicitor has undertaken to produce evidence of the deaths of two persons. To perform this may be impossible. How then am I to act? I think also that this is not such a matter as comes within my jurisdiction. It is not, strictly, an undertaking in a cause; so that it is not a proper case for the Court to act on with its extraordinary authority. The only remedy for the petitioner is, when his possession is interfered with on account of anything arising upon matters in the undertaking, to bring his action for damages. I am very unwilling to make a precedent where none can be found."

It is true that *Peart* v. *Bushell* was not followed in *United Mining and Financial Corporation* v. *Becher* (1910), 79 L.J.,

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K.B. 1006, the judgment being that of Hamilton, J. (now Lord Sumner). An appeal was brought from this judgment but it became unnecessary to proceed with same: see (1911), 80 L.J., K.B. 686. It will, however, be seen that Hamilton, J. was dealing with an express undertaking to repay a specific sum of money, a very different case to the case we have before us. In the present case the solicitors have not undertaken to pay the purchase price of the land. Further, it may well be that it will be impossible to produce a person who will be acceptable to execute the agreement for sale. In my opinion, the fullest extent of the order that could be made on summary proceedings would be an order to carry out and perform the undertaking in its terms, but not with the added term—the payment of the $4,500 personally by the solicitors—with the result that in default of payment imprisonment would follow. This is not a case for the exercise of the extraordinary authority of the Court. It may seem to be unfortunate that this remedy is not available, but so it was in *In re Williams* (1849), 12 Beav. 510, 516; 85 R.R. 158.

An action may be brought against the solicitors if it be advised, and in an action it can be determined what (if any) damages have been sustained in consequence of or by reason of the breach of the undertaking. It may well be that the damages might not be $4,500: see *Thompson* v. *Gordon* (1846), 15 L.J., Ex. 344. It was there attempted to compel the attorney to pay the debt and costs upon an undertaking given by him:

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> "The rule must be discharged. The attorney's engagement is to give information when the party goes out of prison. The matter is merely the subject of an action. It is impossible for us to ascertain the amount of damage received by the plaintiff. The plaintiff may bring his action, and then the jury will say how much the debt and the custody of the debtor were worth."

The agreement for sale executed in accordance with the undertaking would not necessarily import that the $4,500 would be received.

It is most essential that solicitors be held to their undertakings and that they should practise their profession with a high sense of honour. Nevertheless, in all matters of personal undertakings, they should be unambiguous in form and parties

cannot be heard to complain if their reading of them be not always capable of being acceded to—here we do not find any undertaking to pay this $4,500, and, in my opinion, it is not a proper case for the exercise of summary jurisdiction.

I would allow the appeal.

Appeal dismissed, Martin, J.A. dissenting, and McPhillips, J.A. dissenting in part.

Solicitor for appellants: *P. E. Pierce.*

Solicitors for respondent: *McDougal & McIntyre.*

SMITH AND HUNTER v. GAUTSCHI AND GAUTSCHI: ROYAL BANK OF CANADA, GARNISHEE.

Attachment—Bank account—Garnishee order—Name of defendant on order different from name in bank—Knowledge of bank.

A garnishee order was taken out in an action in which Henri Gautschi was defendant, and served on a bank in which one Gautschi Henri had an account. The bank notified Gautschi Henri that his account was garnisheed, and paid the amount of the account to their solicitors for payment into Court. The solicitors advised the bank that they should not pay the money into Court, and it was thereupon put back in the defendant's account, from which it was subsequently paid out. Henri Gautschi kept his account in the bank in the name of Gautschi Henri.

Held, reversing the decision of MCINNES, Co. J. (MCPHILLIPS, J.A. dissenting), that on the facts the bank had concluded that Henri Gautschi and Gautschi Henri were one and the same person, and is liable for the amount garnisheed.

APPEAL by plaintiffs from the order of MCINNES, Co. J. of the 29th of May, 1916, dismissing the proceedings in the action as against the garnishee. The action was against Henri Gautschi and his wife. A garnishee order was taken out and

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served on the East End branch of the Royal Bank in Vancouver. It appeared that Henri Gautschi kept an account in said Bank in the name of Gautschi Henri. Upon the bank clerk being served with the garnishee order he, after consultation with his superior officer, notified Gautschi Henri that his account had been garnisheed, and paid the money in his account to the Bank's solicitors for payment into Court. The solicitors then advised the Bank that, in the circumstances, the money should not be paid into Court, and the money was then paid back into Gautschi Henri's account, from which it was later paid out upon the presentation of the defendant's cheques.

Statement

The appeal was argued at Vancouver on the 14th of December, 1916, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

S. S. Taylor, K.C., for appellant: The bank clerk, on being served with the summons, immediately sent the money standing in the name of Gautschi Henri to the Bank's solicitors to be paid into Court. There can be no question the Bank knew it was the same man. *Koch* v. *Mineral Ore Syndicate* (1910), 54 Sol. Jo. 600 is in our favour.

Alfred Bull, for respondent Bank: The judgment debtors were Gautschi and his wife. When the bank clerk was served he said, "we have no man by that name, but we have a man whose name is the other way." On the question of the duty of a banker see Grant on Banking, 6th Ed., 6. The rule *strictissimi juris* applies here. There must be no mistake in the summons. It is altogether a question whether the Bank knew it was the same man. The two names were naturally connected, but they did not know the two names applied to the same man. The order must so name the judgment debtor as to establish him as the person owing the money: see Annual Practice, 1917, p. 812.

Argument

Taylor, in reply.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal should be allowed. There can be no doubt about this, that where an individual keeps his bank account under a trade name and is sued and his bankers garnisheed, the bankers ought to satisfy themselves as to whether the judgment debtor is the person who

keeps the account under the trade name in the bank. If under all the circumstances they ought to have no doubt about it, then it is not necessary to amend the summons, so as to state that the judgment debtor is carrying on business under the trade name, and if the bankers are satisfied beyond reasonable doubt that the right fund is being garnisheed, then it is their duty to pay it into Court. In this case they were satisfied. After consultation, of Mr. Kynoch with his superior officer, they decided to notify the judgment debtor that his account had been garnisheed, and they notified him that they had paid the money to their solicitors to be paid into Court. They made up their own minds, and I must confess, on the evidence, I can hardly see how there could be any reasonable doubt that Henri Gautschi and Gautschi Henri were the same person. In fact, they shewed by their conduct that there was no reasonable doubt, and I think they were very ill-advised in parting with the money, except to pay it into Court to the credit of this action.

MACDONALD, C.J.A.

The appeal is allowed.

MARTIN, J.A.: This is a remarkable case, because we are asked to decide in favour of the bankers, when they have already decided against themselves. They have done so by the notification of the 25th of April, 1916. They notified their customer that they had actually charged against him the very amount. That is their decision; they not only so notified him, but they also telephoned him to the same effect. There is absolutely no question at all of any reasonable doubt. They had already made their decision.

MARTIN, J.A.

In the case of *Koch* v. *Mineral Ore Syndicate* (1910), 54 Sol. Jo. 600, the Lord Justices based their judgment entirely on the question of identity, Vaughan Williams, L.J., Fletcher Moulton, and Buckley, L.JJ. agreeing:

"Before the Bank would treat this account as attached they wanted to be satisfied as to the identity of the account. . . . . They could hardly justify refusing to honour a cheque when they were uncertain whether the garnishee order served on them referred to that account at all."

In that case the solicitors, on being informed of the bank's decision, offered to try to bring the man to the bank with a

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view to his identification as the judgment debtor. To this the bank offered no objection, and Berckhardt came to the bank, but when asked if he had something to say, replied he had not, and left the bank hurriedly without saying anything, which did not occur in this case.

I would allow the appeal.

GALLIHER, J.A.: I think we must allow the appeal. What doubt I might have had on the evidence before I read the notice, I do not see how, in the face of that notice, the Bank can contend that they entertained any doubt as to the identity of the party.

GALLIHER, J.A.

McPHILLIPS, J.A.: In my opinion the learned judge in the Court below must be sustained. I think the cases are uniform in all matters of attaching debts, that the greatest strictness must be pursued, and to admit the wrong name being used, and an account in the bank being thereby attached, would be assenting to something which would render it impossible to carry on business affairs.

The Bank should not be required, in accordance with the case which my brother MARTIN referred to, and which I read rather differently, to take the responsibility to pay money into Court in attachment proceedings so palpably defective. If moneys could be attached under a wrong name, and the Bank paid it into Court, it would stand in the position of having no effective plea or release which could be substantiated in Court.

MCPHILLIPS, J.A.

I do not disagree with the view that when the evidence warrants it and complete identity is established by the admission of the bank's customer, and all proper amendments are made, that then an effective attachment of the moneys may be accomplished, but here we have error throughout, even upon the proceedings in this appeal, and no amendment asked or made. The appeal should be dismissed.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellants: *George R. McQueen.*
Solicitors for respondent (Garnishee): *Tupper & Bull.*

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SCHMID v. GIFFIN

SCHMID AND KRUCK v. GIFFIN: ROBIN HOOD MILLS, LIMITED, CLAIMANT.

Practice—Discontinuance—Service of notice—Marginal rule 290—Attaching order—Money paid into Court—Assignment of after discontinuance of action.

When an action is discontinued after money has been paid into Court under an attaching order, the money ceases to be subject to any Court process, and the defendant may assign the fund to a third party who may successfully resist an application that the fund be kept in Court to abide the result of further action between the same parties.

APPLICATION for an order directing the cancellation of an entry of notice of discontinuance of an action, heard by MURPHY, J. at Chambers in Vancouver on the 31st of May, 1916. The facts are that upon an attaching order being served on the 10th of May, 1916, on the Royal Bank, where the defendant had deposited to his credit $1,059.79, the bank transmitted said sum by cheque to the registrar of the Court, who received it and placed it to the credit of the action on the morning of the 11th. On the same day the plaintiff's solicitor (although making certain inquiries but not learning that the money was in Court), for the purpose of correcting an error, filed a notice of discontinuance of the action and issued a second writ and a second attaching order. After the issue of the second writ the defendant's solicitor learned that the money had been paid into Court to the credit of the first action and that notice of discontinuance of said action had been filed. The defendant then made an assignment in writing of the money in Court to the Robin Hood Mills, Limited, the claimant. The plaintiff after obtaining, *ex parte,* a stop order, made this application.

Statement

Gibson, for plaintiff: The notice of discontinuance is not effective until it is served. On the question of discontinuance see *Brooking* v. *Maudslay* (1886), 55 L.T. 343; *Spincer* v.

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Watts (1889), 23 Q.B.D. 350; and *Moon* v. *Dickinson* (1890), 38 W.R. 278.

Miss *Paterson,* for defendant: The first action in which the money was paid into Court has been discontinued, the moneys were assigned to a third party, and the Court has no jurisdiction to deal with it. As to dealing with money in Court see *Brereton* v. *Edwards* (1888), 21 Q.B.D. 226; *Warburton* v. *Hill* (1854), Kay 470; 23 L.J., Ch. 633; *Ross* v. *Goodier* (1894), 5 W.L.R. 393; and *Otto* v. *Connery* (1907), *ib.* 403.

Kappele, for claimant.

1st June, 1916.

MURPHY, J.: In my opinion, the notice of discontinuance filed herein is effective as against the plaintiff at any rate. It is in writing, as required by marginal rule 290. There is nothing in that rule requiring personal service on the defendants. The word "notice," I think, implies communication to the other side, but not necessarily by personal service. Such actual communication was obtained here by finding the notice filed amongst the records of the suit. It may well, I think, be argued that the mere filing is sufficient where no appearance has been entered: see rule 206 and notes thereon in Annual Practice, 1916, p. 349, particularly on the words "required to be delivered." I do not need to go so far here, but rest my opinion on the wording of rule 290. It follows, I think, that the money ceased to be subject to any Court process and was the property of the defendants. It may be they must have an order to get it from the registrar, but that does not, I think, prevent them from assigning it to a third party, and leaving such third party to make the application. The summons is dismissed.

Judgment

Application dismissed.

WILLIAMS v. DOMINION TRUST COMPANY.

MURPHY, J.

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WILLIAMS v. DOMINION TRUST CO.

Company—In liquidation—Executor of estate—Right of retainer—Power of liquidator to waive without leave of Court—Winding-up Act, R.S.C. 1906, Cap. 144, Secs. 34 and 36.

Authority to carry on a company's business under the Winding-up Act does not empower the liquidator to part with the company's right of retainer as executor.

Upon the making of a winding-up order all the company's affairs are under the control of the Court, and acts such as parting with the company's right of retainer as executor must have the express sanction of the Court.

MOTION by way of originating summons to determine the following question under Order LV., r. 3 (*a*) of the Supreme Court Rules:

"Has the Dominion Trust Company as executor of the estate of W. R. Arnold, deceased, a right of retainer of all or any money coming into its hands for the purpose of paying itself in priority to all other creditors of the said estate?"

Statement

The Dominion Trust Company was ordered to be wound up under the provisions of the Winding-up Act on the 9th of November, 1914. On the 19th of April, 1915, the will of the testator was proved and probate was granted to the Dominion Trust Company, the executor named in the will. On the 12th of October, 1915, the defendant Company by its liquidator made a declaration under section 99 of the Administration Act declaring the testator's estate insolvent within the meaning of the Act, and that the estate and its administration and distribution would be administered by the executor under the provisions of said Act. Subsequently insurance moneys payable on the death of the testator, amounting to $207,000, were received by the defendant as executor. Under the alleged right of retainer, the defendant retained these moneys as against the creditors of the testator, notwithstanding the making and filing of said declaration, it being urged that the liquidator omitted to obtain the authority of the Court under section 36 of the Winding-up Act, and the act of the

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Company in making and filing the said declarations was therefore a nullity. Heard by MURPHY, J. at Chambers in Vancouver on the 29th of September, 1916.

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Burns, for plaintiff.
Martin, K.C., for defendant.

1st November, 1916.

MURPHY, J.: The liquidator is an officer for the time being of Court and except in minor matters acts entirely under its direction: *Re Ontario Bank* (1912), 27 O.L.R. 192. He could not, therefore, part with the right of retainer of the Dominion Trust Company unless authorized by the Court to do so. An order was obtained under section 34 of the Winding-up Act authorizing him to carry on the business of the Company so far as is necessary to the beneficial winding up of the same. It is contended this order is void as no previous notice was given to creditors, etc., but as it has been passed and entered, and has not been set aside by appeal or otherwise, I must, I think, treat it as operative: *Brigman* v. *McKenzie* (1897), 6 B.C. 56. But, in my opinion, authority to carry on the Company's business does not empower the liquidator to part with the Company's right of retainer. On the facts here, parting with this right means materially reducing the assets, and falls, I think, under section 36 of the Act requiring a substantive approval by the Court. In *Re Ontario Bank, supra,* at p. 202, it is laid down that under section 36 the liquidator cannot, without the consent of the Court, lawfully accept less than payment in full of *inter alia* debts. The same case disposes of the argument founded on estoppel. The attempt to distinguish between the act of the Dominion Trust Company as executor and as a corporate entity is not, in my opinion, sound. Once the winding-up order was made, all its activities were under the control of the Court, and acts such as parting with its right of retainer, involving the consequences resulting here, must have express Court sanction. This being my view, it is unnecessary to decide the other question submitted.

Judgment

Order accordingly.

THE ROYAL BANK OF CANADA v. PACIFIC BOTTLING WORKS, LIMITED *ET AL.*

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Dec. 11.

ROYAL BANK OF CANADA *v.* PACIFIC BOTTLING WORKS

Practice—Interlocutory appeal—Further evidence—Application to introduce—Notice of—Filing—Leave of Court—Marginal rule 868.

Judgment—Order XIV.—Surety—Right to question amount obtained on disposition of securities—Appeal.

A party intending to offer new evidence on an interlocutory appeal must give notice thereof in his notice of appeal and file the material intended to be used.

On an application for leave to sign final judgment, a defendant, who was surety for the debt sued upon, sought leave to defend on the ground that the plaintiff should have obtained a greater sum for certain securities he sold, the proceeds of which were applied in reduction of the debt, an order was made for leave to sign final judgment.

Held, on appeal, reversing the decision of GREGORY, J. (MCPHILLIPS, J.A. dissenting), that the order should be set aside and the defendant be allowed in to defend.

APPEAL by defendant Doering from an interlocutory order of GREGORY, J. of the 28th of June, 1916, giving the plaintiff liberty to sign final judgment on a promissory note, the Pacific Bottling Works Company being the principal debtors and the other defendants sureties. The note was a renewal of several previous notes, the original having been for $35,000. The Bank took certain securities for the note, part of which was 203 shares in the B.C. Breweries, Limited, and the defendant Doering raises the defence that the Bank disposed of these shares at $100 a share, when they were worth $125 a share on the market, that if they had been sold at the market price his debt would have been reduced by $5,075. Owing to the defendant Doering's absence, an affidavit was not obtained from him for use in the Court below, but was filed on the second day of the hearing of the appeal, when an attempt was made to introduce it as new evidence.

Statement

The appeal was argued at Vancouver on the 5th, 6th and 11th of December, 1916, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

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A. H. MacNeill, K.C., for appellant: The action was on a promissory note and the defendant Doering entered an appearance and filed a defence, but owing to his absence, his affidavit could not be obtained. The Pacific Bottling Works are the principal debtors and the others are sureties. The principal deposited with the Bank shares in the B.C. Breweries, Limited, as security. The Bank sold these shares at $100 a share when they were worth $125, thus compelling Doering to pay $5,075 more than he would have if the shares had been sold at their market value. Doering should be allowed in to defend.

Sir C. H. Tupper, K.C., for respondent: This is a question of costs only. On the question of the form of the affidavit see *May* v. *Chidley* (1894), 1 Q.B. 451; Annual Practice, 1916, p. 1545. We were not bound to make the note an exhibit to be served with the affidavit.

[At this stage Mr. *MacNeill* filed an affidavit of Charles Doering to be used as new evidence, a copy being handed to *Sir Charles Tupper.*]

Argument

I object to the introduction of this affidavit as new evidence at this stage: see *M. Isaacs & Sons, Lim.* v. *Salbstein* (1916), 85 L.J., K.B. 1433; *Spencer* v. *The Ancoats Vale Rubber Company, Limited* (1888), 58 L.T. 363; and *Lagos* v. *Grunwaldt* (1910), 1 K.B. 41 at p. 49. As to this being an interlocutory appeal see *Standard Discount Co.* v. *La Grange* (1877), 3 C.P.D. 67.

MacNeill, on admission of affidavit: The Court has power to allow the affidavit in under rule 868. Discretion as to allowing further evidence in on an interlocutory proceeding begins when the argument begins, and under the circumstances should be allowed in.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the application, or the attempt perhaps I should call it, to introduce new evidence on this appeal must be denied. The rule, it is true, provides that a party wishing to offer new evidence on an interlocutory appeal may do so without special leave of the Court. That is a legal right which the rule gives to either party to an appeal, and, of course, of that legal right we cannot deprive the party wishing to take advantage of it; but there must be

some reasonable limits within which that right is to be exercised; in other words, there ought to be some procedure governing the exercise of that right. It appears that in England the opinion has been expressed that, where a party intends to offer new evidence on an appeal, notice of that should be given in the notice of appeal itself; and I take it also, that the material intended to be used should be filed. Now, it seems to me that that is a very proper rule to lay down with regard to procedure in this Court. The Court, of course, will always have discretion to give special leave where that has not been done; but, where the party is insisting on the legal right given by the statute, he must give notice of what he proposes in his notice of appeal, and file his material, and then he is entitled to refer us to new material as part of the record.

MACDONALD, C.J.A.

MARTIN, J.A.: I agree.

MARTIN, J.A.

MCPHILLIPS, J.A.: I agree. I might say that, possibly, it was owing to an observation made by myself that this affidavit was filed. When I made the observation it had reference to this point, that apparently there was no opportunity to file the affidavit for the defence, as I understood it; and my observation was to this effect, that as evidence of good faith the affidavit might have been filed before entering upon the argument of the appeal; and that fits in with what has been said by the Chief Justice and my brother MARTIN, that the affidavit could have been filed before the sitting of this Court and notice given to the other side. With regard to procedure, where evidence of this kind is to be adduced, it is certainly just and convenient that the party proposing to use it should, at the earliest opportunity, advise the other side. I think this affidavit should be excluded upon the ground that once the appeal is opened in the Court of Appeal, it is then too late. I cannot quite see, even with the statutory right, unless the rule read in such terms, that after the appeal is entered upon by the appellant's counsel, new material may then be filed.

MCPHILLIPS, J.A.

Affidavit refused.

Tupper: The proof of the note was by Jardine's affidavit.

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As to the sufficiency of the affidavit see *May* v. *Chidley* (1894), 1 Q.B. 451; *Ward* v. *Dominion Steamboat Line Co.* (1902), 9 B.C. 231. With relation to the sale of the shares at $100 each, the defendant has a right to an accounting, but he must first pay the note. Section 58 of the Bills of Exchange Act makes Doering an indorser. There is no evidence that the indorsers were sureties, and if they were, there is nothing to shew that the Bank knew it. Indorsers are sureties during the currency of the bill: *Duncan, Fox, & Co.* v. *North and South Wales Bank* (1880), 6 App. Cas. 1; *Taylor* v. *Bank of New South Wales* (1886), 11 App. Cas. 596; *The Molsons Bank* v. *Heilig* (1894), 25 Ont. 503; and on appeal (1895), 26 Ont. 276.

Argument

MacNeill, in reply: The substantial defence is the right to an accounting as to the security held by the Bank. Another person who can swear positively as to the facts can make the affidavit. As to Doering being a surety see Chalmers on Bills of Exchange, 7th Ed., 241. As to his right to the securities see *Ward* v. *National Bank of New Zealand* (1883), 8 App. Cas. 755. There is a substantial question as to whether the Bank dealt properly with the securities, and this is a ground for allowing the defendant in to defend.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would set aside the order and allow the defendant in to defend. There is nothing in the record to shew that an explanation ought to be given by the Bank of the fact that securities, which were sworn to be worth $125 a share, were parted with for $100 a share, or were parted with and only $100 a share credited on the debt sued for. I think this is quite a different case to that relied on by *Sir Charles Tupper,* to the effect that a surety has no right to a transfer of securities from the creditor until he has paid the debt. That is not the position in this case. The securities have been sold and the proceeds of them have been applied in reduction of the debt. The surety is now sued for the balance of the debt, and sets up as a defence that a greater sum ought to have been obtained for the securities; in other words, he sets up that the securities have been wasted. Now, I think that is a very different case from that put by *Sir Charles Tupper* when he cited

to us the numerous cases of the class of *Duncan, Fox, & Co.* v. *North and South Wales Bank* (1880), 6 App. Cas. 1.

MARTIN, J.A.: I am of the same opinion. I had some doubt about it originally, but there must be really something in this case to try, or it would not have been necessary to have the unnecessarily unduly prolonged argument we have listened to.

MCPHILLIPS, J.A.: I take the contrary view. I do not think that the learned judge's judgment in the Court below was wrong upon the material before him; and we have the same material. I think the onus, which was upon the defendant, was not discharged. The admission of what I consider, at most, of a sketchy character of defence as outlined here, would not be carrying out the jurisprudence as we have it. At the very highest, all we have got is a claim that there should be an accounting; but, in my opinion, not even a suggested case sufficient to call for an accounting. If it were a matter of consent, the judgment in *Wallingford* v. *Mutual Society* (1880), 5 App. Cas. 685, might be followed. In that case the House of Lords finally allowed judgment to stand as security for the debt, directing an accounting to be had. Of course, in that case, it was by consent; but their Lordships intimated that they might have had some doubt about it if it had not been a matter by consent. I am firmly of the opinion that the defendant has not made out a case to be allowed in to defend. Whatever rights (if any) the defendant may have against the Royal Bank of Canada, may be litigated in a proper action.

MCPHILLIPS, J.A.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Wilson & Jamieson.*
Solicitors for respondent: *Tupper & Bull.*

COURT OF APPEAL

1916

Dec. 12.

ERRICO v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Negligence—Evidence—Privilege—Jury—Improper comments by counsel—Misdirection—New trial—Costs of abortive trial.

ERRICO v. B.C. ELECTRIC RY. CO.

In an action for damages owing to the negligence of the motorman of a street-car, the conductor refused to produce in evidence the written report of the accident that he had given to his company, the contents of which were privileged. Counsel for the plaintiff, when addressing the jury, said: "The plaintiff has sworn to one set of facts with regard to the occurrence, the conductor has sworn to another, the evidence as to which is right may be found in that report, the company have declined to allow its contents to be disclosed. Now, gentlemen, you may draw your own inference."

Held, that counsel is not entitled to tell the jury that they may draw such an inference, and the learned judge not having instructed the jury that they were not entitled to draw an unfavourable inference from the non-production of the report, there was misdirection and there must be a new trial.

Wentworth v. *Lloyd and Others* (1864), 10 H.L. Cas. 589 followed.

Note on ruling as to costs.

APPEAL from the decision of MURPHY, J. of the 27th of September, 1916, in an action for damages owing to the alleged negligence of the defendant Company. The plaintiff boarded a car near the main station, getting in by the door from which the people come out, in order to obtain the seat near the door. The plaintiff was partially paralyzed in both legs, and walked with a cane. He got on, paid his fare, and says he went to sit down, but in taking one step the car stopped with a jerk and he fell, injuring himself. The car did not stop until it reached Abbott Street, 600 feet from where the plaintiff got on. The defendant claimed the plaintiff was negligent in not sitting down immediately on paying his fare, and that, if he had done so, when the car stopped, he would have been seated.

Statement

The appeal was argued at Vancouver on the 12th of December, 1916, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

McPhillips, K.C., for appellant: The plaintiff had partial paralysis and used a cane. The conductor's report of the accident to the Company is privileged and plaintiff's counsel had no right to comment on it to the jury. This justifies a new trial.

Martin, K.C., for respondent: It is for the jury to find whether the car was properly handled, and they have passed upon it.

McPhillips, in reply: There is no presumption of fact against a party who enforces the rule of privilege: see *Wentworth* v. *Lloyd and Others* (1864), 10 H.L. Cas. 589; Phipson on Evidence, 4th Ed. 182-3; *Sutton* v. *Devonport* (1857), 27 L.J., C.P. 54. The cause of the accident was that the plaintiff remained standing. As to deficient persons contributing to the accident see Beven on Negligence, 3rd Ed., Vol. 1, p. 159. He should have seated himself immediately on entering the car: see *De Soucey* v. *Manhattan Ry. Co.* (1891), 15 N.Y. Supp. 108.

Argument

MACDONALD, C.J.A.: I think there should be a new trial. I base my conclusion on the remarks which were made by counsel for the plaintiff, in his address to the jury. During the course of the trial, a witness for the defendant, the conductor in charge of the car on which the accident occurred, was asked if he had made a report to his company in respect of the occurrence, and it came out that he had made such a report. It is unquestioned here that the contents of that report were privileged, and need not have been disclosed. Mr. *Martin* asked him a question with respect to the contents of the report, which he declined to answer on the ground of privilege. Now, in his address to the jury, Mr. *Martin,* in effect, put it to the jury that they were entitled to take that refusal to disclose the contents of the report as entitling them to draw an inference unfavourable to the defendant. In effect, he told them this:

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"The plaintiff has sworn to one set of facts with regard to the occurrence, the conductor has sworn to another, the evidence as to which is right may be found in that report, the company have declined to allow its contents to be disclosed. Now, gentlemen, you may draw your own inference."

Now, the case is exactly analogous to the case to which we

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were referred, *Wentworth* v. *Lloyd and Others* (1864), 10 H.L. Cas. 589. In that case, the trial was without a jury, and professional communications between solicitor and client were withheld on the ground of privilege. The Master of the Rolls said he was entitled to draw an unfavourable inference against the person who had withheld those communications, and to treat the case on the footing of *Armory* v. *Delamirie* (1722), 1 Str. 505, where the jeweller had refused to produce the jewel which he wrongfully took out of its setting in the ring. Lord Chelmsford, remarking upon the course pursued by the Master of the Rolls, said that there was no analogy between the two cases at all. In other words, that the Master of the Rolls was wrong in drawing any unfavourable inferences against the party refusing to allow disclosure of the privileged communication. Now, if that be so, if the Court is not entitled to draw such an inference, counsel is not entitled to tell the jury that they may draw such an inference. It is a question of law and not a question of fact. It is a question upon which the learned judge should have instructed the jury, and told them that they were not entitled to draw that unfavourable inference from the non-production of the report. The objection was properly taken, but the learned judge refused, in effect, to tell the jury that Mr. *Martin* had no right to ask them to draw any such inference. In the circumstances, coupled with what the learned judge said afterwards, when the matter was brought to his attention, to the effect that both counsel had presented their case fairly to the jury, I think there was misdirection—certainly non-direction on a question of law, and that the verdict must be set aside and a new trial ordered.

MACDONALD, C.J.A.

As to costs, I do not think we ought to depart in this case from the usual rule. If we do, then in almost every case, where it can be pointed out that the respondent's conduct had something to do with the trial being abortive, the same application would be made. But whether it is just or whether it is not, it has for so long a time been the practice of this Court, as well as of other Courts in other Provinces, to direct that the costs of the abortive trial shall follow the result of the second

trial, that it is rather late now to depart from it, except under very exceptional circumstances.

MARTIN, J.A.: I have reached the same conclusion. The circumstances were such that an injustice was done to the defendant Company, which should have been corrected by the learned trial judge, when objection was taken. Mr. *Martin,* in seeking to detract from the consequences of his action, put it to us that we should regard it rather in the light of his commenting upon the fact that the witness did not contradict, or did not seem to wish to contradict a certain statement in the report. But that, of course, is not the trouble. The trouble is this, that he attacked the Company, in his address to the jury, because they did not produce the report. That is abundantly clear. Mr. *Martin* said:

"I can refer to the report. I am not referring to what the report stated. I asked my learned friend to produce it, and surely I can make use of the fact that he did not produce it."

He certainly did make use of the fact, and in a very clear, precise way, stated it in a short, effective address to the jury, which turned almost exclusively upon that part of it.

MARTIN, J.A.

The consequence is that I am afraid it is impossible to say that a very serious prejudice was not done to the defendant Company. Therefore, I agree that a new trial should be granted.

As to costs, I am of the same opinion. We cannot distinguish this case from the general rule, as we could and did in *Swift* v. *David* (1910), 15 B.C. 70, where the defendant prevented the trial from going on; and in *Carty* v. *B. C. Electric Ry. Co.* (1911), 16 B.C. 3, where the plaintiff insisted upon his right to excessive damages where liability was admitted.

GALLIHER, J.A.: I agree in ordering a new trial.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I agree.

MCPHILLIPS, J.A.

Appeal allowed and new trial ordered.

Solicitors for appellant: *McPhillips & Smith.*
Solicitors for respondent: *Martin, Craig & Parkes.*

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1916

Nov. 7.

JOHNSTON v. FINCH

JOHNSTON v. FINCH.

Deed—Lease—Mistake—Rectification of—Burden of proof.

In order to rectify a mistake in the drawing up and execution of a lease, the party seeking rectification must produce clear and unambiguous evidence that the mistake was mutual.

APPEAL by defendant from the decision of GREGORY, J., of the 20th of April, 1916, in an action by a lessor for balance due for rent under a covenant contained in a lease, for rates, taxes and assessments that the lessee covenanted to pay in respect thereof, and for insurance premiums that the lessee covenanted to pay. The defendant alleges that prior to the signing of the lease he entered into negotiations with the plaintiff's agent for the purpose of securing a lease of the premises in question, and, at the request of the agent, he made an offer in writing, which was delivered to and accepted by the plaintiff. This offer did not contain any agreement on behalf of the lessee to pay taxes or insurance premiums. Subsequently when the lessee signed the lease, which was drawn by the lessor's solicitors, the covenants with reference to taxes and insurance premiums were not read over to him. He executed the lease on the understanding that it was in the terms of his letter, not knowing that it contained covenants on his part to pay the taxes and insurance. He counterclaimed for rectification of the lease by striking out the paragraphs containing the covenants in question. The learned trial judge held that the lease having been drawn in the usual form and no mention having been made as to payment of the insurance premiums and taxes, it must be assumed that the lessee was to pay them.

Statement

The appeal was argued at Vancouver on the 7th of November, 1916, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

W. J. Taylor, K.C. (*F. C. Elliott,* with him), for appellant: The defendant signed a lease agreeing to pay $250 a month

rent. The lease contained a clause whereby the defendant covenanted to insure and pay the taxes. He denies that he agreed to insure or pay the taxes, and it was a mistake that the lease contained this clause. The lease should, therefore, be rectified. The defendant wrote a letter to the plaintiff, setting out the terms of the lease, which the plaintiff accepted: see *Bromley* v. *Johnson* (1862), 10 W.R. 303; *Fordham* v. *Hall* (1914), 20 B.C. 562; *Davis* v. *Fitton* (1842), 4 Ir. Eq. Rep. 612 at p. 615; Halsbury's Laws of England, Vol. 25, p. 50; *Garrard* v. *Frankel* (1862), 30 Beav. 445 at p. 450.

Maclean, K.C., for respondent: They contend there was an agreement in writing prior to the lease, but this is not so. Any previous arrangement was partly written and partly verbal. In face of the lease, they are precluded from this evidence: see Fry on Specific Performance, 5th Ed., 392. The onus is on the defendant to shew the intention of the parties up to the time of the execution of the deed, and the evidence must be clear that the deed does not embody the final intention of the parties: see *Fowler* v. *Fowler* (1859), 4 De G. & J. 250 at p. 265. On the question of evidence of surrounding circumstances with reference to covenant for taxes in a lease see *Booth* v. *Callow* (1913), 18 B.C. 499; *In re Canadian Pacific R.W. Co.* (1900), 27 A.R. 54.

Argument

MACDONALD, C.J.A.: I think the appeal must be dismissed. The defendant's contention is that there was mutual mistake in the drawing up and execution of the lease; that it was not in accordance with a prior agreement to which the parties had come. The law is perfectly clear, and has been for a long time, that in order to make out a case of mutual mistake, the evidence of it must be very clear indeed. The party seeking rectification must shew, beyond practically all doubt, that the mistake was mutual. There is no such case made out here on the part of the defendant, who is setting up a mutual mistake against the plaintiff's claim to recover taxes and insurance. We have the statement of Mr. Shandley, not questioned by the judge—in fact accepted by him—that the question of taxes and insurance was discussed and agreed upon. The defendant was to pay them. Now, unless we could say that Mr.

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Shandley was not to be believed—and that cannot be said, because the learned trial judge believed Mr. Shandley's evidence—it is not possible, following the principles which govern Courts in cases of this kind, to give the relief which the appellant asks for.

MARTIN, J.A.: The first observation I make is: It is perfectly clear that there was not a complete written agreement before the lease, which makes it in effect a parol agreement. The learned judge said, "it must be quite clear, I think, to everybody, that considerable discussion took place," speaking of the alleged written document. If the document is complete in itself, it is not necessary to have a discussion. There are three things which this document contains: (1), the beginning of the term; (2), the manner in which the rent was to be paid; and (3), the taxes. Now, the next thing is that the learned trial judge has found that there was not enough proof within the citation that he makes from Fry on Specific Performance. In such a case the proof must be clear and irrefragable, and as strong as possible. I think that really disposes of the matter. I do not think it is necessary to add anything more to that finding. The facts here are not in existence to justify me in interfering with the judgment of the learned trial judge. I refer to the case of *Booth* v. *Callow* (1913), 18 B.C. 499, which is instructive. It is, I note, inexcusably wrongly reported in 24 W.L.R. 813, wherein my judgment is given exactly opposite to what it was.

MARTIN, J.A.

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

GALLIHER, J.A.

MCPHILLIPS, J.A.: I think it is clear beyond question that the evidence does not establish a mutual mistake. The law, however, will still admit of an agreement being rectified (the other party agreeing thereto), even though the mistake is unilateral, and in some cases specific performance may be refused if the other party refuses to agree to rectification. Then there are cases where the mistake is fundamental; fundamental in the sense that it is the subject-matter that is affected. That is the material subject-matter, and the parties are not *ad idem*.

MCPHILLIPS, J.A.

Now, the subject-matter of this case, after all, is, the premises under demise with the proviso that they could be purchased at a certain price within a certain time. Taxes and insurance are not fundamental, they are merely incidents which go along with the lease or with the right to purchase. Further, an insuperable obstacle that I see in the way is this, the lease is executed under seal. It is in a like position to a conveyance, and the decisions are uniform, that once there is a conveyance, the conveyance only may be looked at, save in cases of fraud or misrepresentation amounting to fraud. At the outset of the argument I asked the learned counsel for the appellant whether he considered that, upon this evidence, fraud could be established. I did not understand counsel to say that he could insist upon that. At any rate, there is no finding of the trial judge, and there is no evidence upon which I could come to the conclusion that fraud was established. Therefore, it finally comes to the position that this, at its highest, was a unilateral mistake. The mistake was not fundamental. It has not been proved that there was a prior contract, which would entitle rectification on that principle, *i.e.*, that the lease should conform thereto.

MCPHILLIPS, J.A.

I cannot see that the case is one that warrants, upon authority, any relief. The lease was executed; it must stand in the terms executed.

Appeal dismissed.

Solicitors for appellant: *Courtney & Elliott.*

Solicitors for respondent: *Elliott, Maclean & Shandley.*

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1916

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COMSTOCK v. ASHCROFT ESTATES, LIMITED.

Agistment—Loss of horse—Negligence—Onus of proof.

An agister is bound to take reasonable care of animals in his charge. If an owner demands an animal and the agister is not able to produce it, the onus is on him to shew that he took all reasonable care for the animal's safety.

Pye v. *McClure* (1915), 21 B.C. 114 followed.

COMSTOCK v. ASHCROFT ESTATES, LIMITED

APPEAL by plaintiff from the decision of CALDER, Co. J. of the 15th of June, 1916, in an action for the value of a horse which was lost while in the care of the defendant. In the spring of 1915, the plaintiff left with the defendant at his ranch near Ashcroft five horses, which the defendant agreed to pasture at $3.50 a head per month in the summer and $3 in winter. The horses were turned into a pasture with a fence on three sides, the fourth side being protected by a steep mountain, 6,000 feet high. Six months later the plaintiff demanded the return of his horses, but one of them could not be found. When search was made for the horse, the bones of a dead horse were found, but a large number of horses were pasturing in the same enclosure at the time and there was no means of identifying the bones as those of the lost horse. There was also evidence of the fence on one side having partially fallen down prior to search being made for the horses.

Statement

The appeal was argued at Vancouver on the 18th of December, 1916, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Armour, for appellant: The onus is on the defendant to shew he took proper care of the horse: see *Pye* v. *McClure* (1915), 21 B.C. 114. The defendant agreed to care for the horses at $3.50 per month in summer and $3 in winter, but the horse was lost. The enclosure in which they were put for pasturage was open on one side on which was a steep hill, and this accounts for the disappearance of the horse. There were

Argument

two pastures adjoining, one being fenced but the other not. The fence between the pastures was up when the horses were first enclosed, but had fallen down prior to the plaintiff's demand for delivery of the horse.

S. S. Taylor, K.C., for respondent: In the case of *Pratt* v. *Waddington* (1911), 23 O.L.R. 178, the onus is placed on the defendant, but I submit we have satisfied that onus. In the case of *Corbett* v. *Packington* (1827), 6 B. & C. 268, the agister was to redeliver the animals under the agreement: see also Halsbury's Laws of England, Vol. 1, p. 386. The law of bailment is not a safe guide in dealing with agistment.

Argument

Armour, in reply.

MACDONALD, C.J.A.: The appeal should be allowed. I think the learned County Court judge gave his judgment upon a wrong principle. He went wrong, if I may say so, in two particulars. He seemed to think there was a custom or usage by which the owner of the animal took the risk. I think he is quite wrong in that. There is no such custom proved. In the second place, no fault on plaintiff's part was proven, and of that the onus was upon the defendant. The agister is bound to take reasonable care of the animal. When the owner comes for it, if the agister cannot produce it or point it out, he must give some explanation, not necessarily what happened to the horse, but he must shew that he took all reasonable precaution against the horse's disappearance, if it disappeared, as it did in this case. I think the defendant has not made out a case of reasonable care. He advertised pasturage. There is no evidence that the plaintiff knew the condition of this pasturage or knew how it was fenced. The horses were delivered there and put in the field, which was protected by a fence on three sides, one side not being fenced. The defendant relies on the fact that on that side there is a mountain some 6,000 feet in height. The evidence of Veasey seems to me to be that of a disinterested and fair witness, and is to the effect that the mountain was some protection. That is as far as he could go. He said the horse could get out, but it was some protection. It is quite apparent to every one in this country that horses might well climb up one side of such a mountain and over the top and

MACDONALD, C.J.A.

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down the other side. When the defendant undertook to be an agister, he undertook to do something more than turn horses loose on an unfenced range; in effect, it was unfenced.

I would, ordinarily, hesitate to reverse the learned trial judge on the facts, considering that he is conversant with the locality, yet as I think he has given his judgment on principles wrongly applied to the facts, I am not embarrassed by his findings.

We think the damages should be $175.

MARTIN, J.A.

MARTIN, J.A.: As far as the law is concerned, we have a decision in this Court (*Pye* v. *McClure* (1915), 21 B.C. 114), which should be followed. Applying that to the facts, the question is whether or no the agister has satisfied the onus upon him of shewing reasonable care, and, without hesitation, I come to the conclusion he has not done so. If the learned judge below had expressed his opinion on the facts, I would hesitate, but he has done so in such a way (and, with respect, based upon a wrong view of the onus) that really we are unable, unfortunately, to apply that force to his findings of fact, which the Court is always anxious to do. The difficulty is in regard to these fences. According to the evidence, for example, of Veasey, "the horses could go in and out as much as they liked," and later on he says it again. We have it from the defendant himself that, up to the time Cornwall lost his horse, he had lost three. I am satisfied there must have been something wrong with his fences, so wrong that he has not satisfied the onus on him. Therefore, I have come to the same conclusion as my learned brothers.

GALLIHER, J.A.

GALLIHER, J.A.: I would dismiss the appeal. In *Pye* v. *McClure* (1915), 21 B.C. 114, where it is held the onus is on the agister, I found on the special contract and, considering the condition of pasturage in that locality, upon the evidence there the defendant had satisfied the onus; but gave judgment against him on another ground, as appears in my judgment. In the present case, I feel compelled to the view that on the facts the judgment below is right. We have a range of some eight or nine thousand acres in a district such as Ashcroft, which I know myself to a certain extent, and find that the defendant

was advertising having pasturage for horses and the rate is $2.50 or $3 per month. Now, it must be evident to any person that no one is supposed to herd horses on a range for that amount. There is also the fact that the man himself is resident for a long time in that country, and understood the nature of that country. He put his horse in there for pasturage, for a run on that 9,000 acres, knowing it was fenced on three sides, and, as Mr. *Taylor* points out, it was not until his horse was lost is any complaint made as to the back of the range not being fenced up on the mountain side. Under the circumstances, it appears to me, from the evidence, the man knew the nature of the country, and whether he knew there was no fence there or not does not make much difference. As I view it, there was a barrier there and, in my opinion, a very strong barrier at the end which, in all the circumstances, seems to me should be considered a sufficient one. A man wanting pasturage at two or three dollars must not expect that his horses will be taken the same care of as in a livery stable, where he pays $25 a month. I come to my view not on the strict interpretation to be applied to a case where a high rate was paid or where it might be taken to be in the mind of both parties when they entered into the contract, that good and sufficient care would be taken that horses would not stray away. I come to my conclusion under the particular circumstances and the locality and particular conditions attendant upon pasturage of horses in this manner in such a locality.

GALLIHER, J.A.

MCPHILLIPS, J.A.: In my opinion, the appeal should be allowed. I think the case of *Pye* v. *McClure* (1915), 21 B.C. 114, well indicates what the law is in the judgment of this Court. I do not repeat the language of my own judgment, I simply refer to the language of Bray, J., as found in *Phipps* v. *The New Claridge's Hotel (Limited)* (1905), 22 T.L.R. 49 at p. 50, where he says that he

MCPHILLIPS, J.A.

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

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Now, what story have these defendants told? As Mr. *Taylor* has said, there is no issue upon the question of the illness of the horse, that may be neither here nor there. I look for some tale: What is the tale the agister tells? It is this, that when last seen this horse was ill, but no steps taken to care for it, and the carcass is found. That in itself is evidence of negligence; but, apart from that, there is the question of fences, which may, perhaps, be taken to be the main issue. Why was this plaintiff putting the horse with the defendant? Was it not that some care was to be taken of the horse, otherwise why not let the horse run at large, and why pay $2.50 a month, which was to commence in March and afterwards went up to $3.50 a month? I consider this was very substantial remuneration for the pasturage of this horse, and it carried with it the reasonable requirement that the pasturage should be fenced. There have been no circumstances stated here that negative that, and there have been no circumstances stated that negative negligence, then there must be responsibility, and in law the plaintiff should have judgment.

Appeal allowed, Galliher, J.A. dissenting.

Solicitor for appellant: *R. Morgan.*
Solicitor for respondent: *F. T. Cornwall.*

THE A. R. WILLIAMS MACHINERY COMPANY OF VANCOUVER, LIMITED v. GRAHAM.

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1916

Dec. 7.

A. R. WILLIAMS MACHINERY CO. v. GRAHAM

Practice—Appeal—Injunction pending hearing of appeal—Preservation of assets ad interim—Fund in hands of assignee.

The Court of Appeal will, in a proper case, grant an injunction to prevent disposition of the assets in dispute, pending the hearing of the appeal.

MOTION to the Court of Appeal for an injunction to restrain the defendant, assignee for the general benefit of the creditors of the Westminster Woodworking Company, Limited, from dispensing or otherwise disposing or dealing with $9,000 (the amount involved in the action) which was received by the defendant from four insurance companies, (being the amount in question) until the final disposition of the action. The affidavit in support of the motion recited that, unless the injunction were granted, the defendant intended to forthwith disburse the funds on hand among the creditors, about 50 in number, some of whom were in poor circumstances financially, and that if the fund were so disbursed, it would be difficult (if not impossible) to recover the amount claimed, if successful on the appeal, and it further recited that on the return of the application to the Court below for an injunction restraining the defendant from disbursing the moneys in question, an undertaking was given by the defendant to hold $10,000 until the trial of the action. Upon judgment being given, the plaintiff asked the defendant to continue the undertaking until the disposition of the appeal, in answer to which he was told to apply to the Court.

Statement

The motion was heard at Vancouver on the 7th of December, 1916, by MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

J. A. Russell, in support of the motion: The Court of Appeal will grant an injunction pending the hearing of the appeal: *Johnstone* v. *Royal Courts of Justice Chambers Company*

Argument

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(1883), W.N. 5; *Wilson* v. *Church* (1879), 11 Ch. D. 576. Irreparable loss will be suffered if the injunction is not granted, as the assignee is about to distribute the moneys among a number of persons, from whom it will be impossible to collect in the event of our success on appeal.

Griffin, contra: There is no jurisdiction, but assuming there is, this is not a matter on which the Court should make the order applied for. The affidavit is insufficient in the face of section 45 of the Creditors' Trust Deeds Act, R.S.B.C. 1911, Cap. 13. There is nothing shewn which makes it imperative that an injunction should be granted; there must be very special circumstances.

MACDONALD, C.J.A.: I would accede to the application and grant the relief which has been asked for. I think that if this were the case of a stay, there could not be any doubt about the propriety of making the order. There is a fund in the hands of the assignee which is claimed by the plaintiff Company, which says that that fund belongs to it, being the proceeds of insurance paid over by the insurance company to the assignee, which had been allocated to the plaintiff Company. While the affidavit is not very full, yet I think it is sufficient in form, that it sufficiently alleges the danger of dissipation of this fund, and it would, I think, be manifestly just and convenient, and in the interests of all parties concerned, that the fund should be kept intact until this litigation is disposed of; until the appeal is heard and the rights of the parties determined.

MACDONALD, C.J.A.

MARTIN, J.A.: I regret I am unable to take the view which I understand is held by the majority of the Court. In *Polini* v. *Gray* (1879), 12 Ch. D. 438, Jessel, M.R. at p. 445 said:

> "The Court has to be satisfied that there would be danger, if it were not to interfere for the *interim* protection of the fund, of its not being forthcoming."

We have got here this statutory officer, who is presumed to be an honest and a capable man, and who must be presumed to be a solvent man, or the creditors would have taken advantage of the provisions of the statute against him—we have a man of that description with a fund under his direction

MARTIN, J.A.

entirely, and we have not the slightest suggestion that any disposition is going to be made of that fund, except this vague allegation in the affidavit:—

"I am advised by said solicitors for appellant Company and verily believe that unless an injunction is granted restraining him from doing so, the defendant (respondent) intends immediately to disburse the said funds among the creditors of whom there are fifty or thereabouts."

To hold that it is sufficient in such a case to say "I am advised by my solicitor," is something that I absolutely decline to do. It is an absolute departure from what the rules lay down and it does not "satisfy" me of the suggested danger. I think the motion should be dismissed.

GALLIHER, J.A.: I would grant the application. I can accept every word that was said in the judgment in *Polini* v. *Gray* (1879), 12 Ch. D. 438, and still come to the conclusion, in the circumstances of this case, that it would be just and right that the Court should preserve that money intact until the determination of this appeal. It is common ground, at all events, that some money there belongs and will belong to the Williams Company, and as to whether $9,000 or $2,000 belongs (the facts have not been stated to us), it is apparent that they are in a more or less involved condition, and I think the safe course to pursue, when we have matters in an involved condition, is to be cautious in allowing the subject-matter of this litigation to slip away, with probably no possibility of recovering it.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I am of opinion that the injunction should be granted. I wish to say this though, that, in my view, the material perhaps might be questioned somewhat, as not conforming with the usual material which is presented to the Court on an application for an injunction, but in view of the special circumstances, and from the fact that the Court allowed counsel to discuss the facts at large, I think that it may be now said that everything that could reasonably be called for in conformity with strict practice, is before the Court.

Now, this is apparent, it seems to me, upon the facts: the Williams Machinery Company supplied machinery which was destroyed by fire (which machinery was to be covered by

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schedule insurance), and the money should be kept and not distributed pending judgment in the action. In *Polini* v. *Gray* (1879), 12 Ch. D. 438 at p. 445, Jessel, M.R. said:

"Looking at the facts of this case, not forgetting the amount in dispute, and remembering the peculiar circumstances under which the fund was obtained, I think it would be right so to mould the order of the Court of Appeal as to keep the fund safe until the decision of the House of Lords is obtained. It must not be supposed from what I have said that I consider such an order to be by any means of course, or one that ought to be made except under very special or peculiar circumstances, but I think that when those special and peculiar circumstances exist the jurisdiction ought to be exercised."

Motion granted, Martin, J.A. dissenting.

Solicitors for appellant: *Russell, Mowat, Wismer & McGeer.*
Solicitors for respondent: *W. Martin Griffin & Co.*

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BAHME v. GREAT NORTHERN RY. CO.

BAHME v. GREAT NORTHERN RAILWAY COMPANY.

Master and servant—Wages—Monthly hiring—Summary dismissal—Right of wages—Damages—Default in cash—Set-off.

An employee who was dismissed at the end of a month, owing to shortage in his cash, sued for the completed month's wages, and for a sum equal to a further month's wages in lieu of a month's notice of dismissal. The defendant pleaded set-off in respect of the sum unaccounted for. The trial judge dismissed the action.

Held, on appeal (MCPHILLIPS, J.A. dissenting), that the plaintiff was entitled to his salary for the completed month, but his failure to account for the money which came to his hands was good ground for his dismissal without notice, and entitled the defendant to set off against the plaintiff's judgment the sum unaccounted for.

Statement

APPEAL by plaintiff from the decision of MCINNES, Co. J. of the 28th of September, 1916, in an action for arrears of salary and damages for wrongful dismissal. The plaintiff

had been cashier for the defendant Company for seven years at a salary of $100 a month, and on the 30th of April, 1916, was dismissed owing to a shortage in the cash which was kept in the safe at the station. On the 24th of April the plaintiff found out there was a shortage in the cash, and he immediately told the local agent, suggesting he should advise the auditor, in answer to which the agent told him not to make a fool of himself. In addition to the plaintiff, the local agent and two assistants had access to the safe. The auditor discovered the shortage on the 27th of April, and on a further revision of the accounts, found on the 30th of April there was a shortage of $749.24, when the plaintiff was dismissed without receiving his salary for the month of April. The plaintiff claimed $100 arrears of salary and $100 damages in lieu of one month's notice of termination of his employment.

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Alfred Bull, for plaintiff.
A. H. MacNeill, K.C., for defendant.

McINNES, Co. J.: In dealing with this matter as I will have to deal with it, and that is to dismiss the action, it is not necessary at all for the Court to arrive at the conclusion that the plaintiff has been dishonest or criminal in his actions. That is not necessary, but I think it is abundantly evident on the evidence that, however efficient he has been previously, for some short time before his dismissal he was careless, and that was sufficient to warrant the defendant in acting as it did. I will dismiss the action.

MCINNES, CO J.

From this decision the plaintiff appealed. The appeal was argued at Vancouver on the 8th of December, 1916, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Sir C. H. Tupper, K.C., for appellant: The plaintiff was employed at this work for seven years, and no fault was found. There were three others who had access to the cash, and it appears he was dismissed because the inspector was under the impression that he alone had such access. As to a servant's right to wages to the end of each period of hiring see Halsbury's

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Laws of England, Vol. 20, p. 85, par. 162; *Parkin* v. *South Hetton Coal Company (Limited)* (1907), 24 T.L.R. 193; *George* v. *Davies* (1911), 2 K.B. 445. As to a servant's right to wages when properly dismissed see *Smith* v. *Thompson* (1849), 8 C.B. 44. As to damages for wrongful dismissal see *Addis* v. *Gramophone Company, Limited* (1909), A.C. 488.

A. H. MacNeill, K.C., for respondent: Plaintiff was hired by the month and is not entitled to the wages for the current month when properly dismissed: see *Boston Deep Sea Fishing and Ice Company* v. *Ansell* (1888), 39 Ch. D. 339; *Goodman* v. *Pocock* (1850), 15 Q.B. 576. As to default of servant see Smith on Master and Servant, 6th Ed., 169, 170. In any case he was responsible for the money lost, and we are entitled to a set-off.

Tupper, in reply: A set-off is a debt pure and simple, and this is not a debt: see *Le Loir* v. *Bristow* (1815), 4 Camp. 134.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal should be dismissed. The plaintiff sues for two sums of money, wages which he claims were earned at the time of his dismissal, amounting to $100, and wages for the month of May following his dismissal, $100, in lieu of notice, claiming, as he does, that his dismissal was wrongful. The defence set up was that he had failed to account for the sum of $749.24, which had come to his hands as agent for the defendant, and which, admittedly, he was not able to account for. The defendant, therefore, says that it was justified in dismissing the plaintiff, without notice. With respect to the first sum, I think, on the whole evidence, he is entitled to succeed, but with respect to the second, I think his failure to account for the money which came to his hands, whether that failure is attributable to negligence or dishonesty, was good ground for his dismissal. The net result is, that the plaintiff has established his claim to $100. But the defendant pleads a set-off in respect of the said sum unaccounted for. It was contended that the dispute note did not sufficiently shew the nature of the set-off, and that in any case that sum could not be set off against the amount received by the plaintiff. While not very clearly pleaded, I think it was sufficiently set up to enable us to deal with it now. Under our rules, set-off

and counterclaim are placed almost on an equal basis, practically one is co-extensive with the other. This was pointed out in a recent judgment of this Court, in *Victoria & Saanich Motor Transportation Co.* v. *Wood Motor Co., Ltd.* (1914), 20 B.C. 537.

I think, had the defendant raised the point in its notice of appeal, it could not only have set this sum of $749.24 up as an answer to the plaintiff's judgment for $100, but could, under Order XXI., r. 17, have got judgment for the balance.

The appeal is dismissed.

MARTIN, J.A.: I agree with the learned trial judge that the defendant was justified in dismissing the plaintiff because he was short in his cash, and had not accounted for money of his employer which he had received. I also agree with the view expressed by the Chief Justice that, on the evidence, we must find that the plaintiff had actually served his month and therefore is entitled to be paid for that. The set-off, in my opinion, is properly set up. The plaintiff has not accounted for his employer's money, which admittedly came into his hands, therefore he must be held liable for it, and, on an adjustment of the accounts between them, this deficiency in his cash will more than make up for the amount due. That deficiency clearly is recoverable as a debt, and was recoverable for "money had and received" before the Judicature Act—Smith's Master and Servant, 6th Ed., 94; Odgers on Pleading, 7th Ed., 84; *Harsant* v. *Blaine* (1887), 56 L.J., Q.B. 511.

MARTIN, J.A.

MCPHERSON, J.A.: I am of opinion that the appeal should succeed. I think the plaintiff is entitled to the $100, and also that there should be an assessment of damages for wrongful dismissal on the facts as disclosed in this case. On turning to the dispute note, it will be seen that the defendant Company did not undertake the responsibility of saying they justified the dismissal of the plaintiff. There is no plea of that—no pleading such as we would expect to find; what is set up is, that his cash is less in amount by $749.24 than it should be. Cashiers, tellers, and officials, holding moneys for employers, are not, *ipso facto,* in case of shortages, debtors to their employers

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and the shortages payable out of their own estates. In order that that may be the position there must be a special contractual relationship that thereupon the relationship of debtor and creditor arises. If this were so, the employees without so obligating themselves would be taking the risk of the business, not the employers. It is always a matter of account as between the master and the servant. Lord Ellenborough in *Evans* v. *Birch* (1811), 3 Camp. 10 at p. 12 said:

"To support the present action, I think you must give some evidence that the defendant [the servant] has *not* paid over the money to the plaintiff [the master]. If in point of fact she has not, and no negative evidence can be adduced, I am afraid his only remedy will be by a bill in equity for a discovery and account; although this may rather be an expensive mode of settling a milk-score."

And for the reasons hereafter given, in my opinion, upon the taking of the accounts, it would be inequitable that the respondent should be held liable for shortages occurring under such a system as was in vogue—see Smith on Master and Servant, 6th Ed., 96.

In this particular case, the defendant Company, on the evidence, has been carrying on its business at this particular office in a very lax manner, without a proper business system, and the suggestion is that this subordinate employee, whose honour, credit and honesty are all important to him, is answerable as and for a defalcation in accounts, *i.e.*, that a crime has been committed. The Company does not take the step every good citizen should take—bring the crime home to the guilty party, if there was crime. It was stated by counsel at the bar that there was an indemnity bond. We are acquainted with that situation. Corporations take indemnity bonds, the employee defaults, the bonding company pays the money, and the corporations refuse to prosecute, leaving it to the bonding company to discharge that duty. I am impelled, under the circumstances, to say that in so far as my words have weight, this plaintiff ought to go out of this Court without any imputation upon his character. The evidence shews that the system was a negligent system, and that it was possible for three or four other persons, officials of the Company and one or more of higher position and authority than the plaintiff, to put their hands into the till containing this

MCPHILLIPS, J.A.

money. Yet this one employee is apparently to bear the burden. The Company's system was bad, and the plaintiff should not be answerable for this money, and lose his character and standing and opportunity for employment for the rest of his life. My judgment would be, that the plaintiff should recover the $100, the month's salary unpaid, and there should be an assessment of the damages for wrongful dismissal.

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Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Tupper & Bull.*
Solicitor for respondent: *A. H. MacNeill.*

BUTTERFIELD v. JACKSON.

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Set-off—Stay of execution—Actions in different Courts—R.S.B.C. 1911, Cap. 53, Secs. 111 and 113.

When a plaintiff has recovered judgment in the County Court a judge has power, under section 113 of the County Courts Act, to suspend execution when the defendant has a judgment against the plaintiff in the Supreme Court for a larger amount (MACDONALD, C.J.A. dissenting).

APPEAL by plaintiff from an order of MCINNES, Co. J., of the 13th of July, 1916, dismissing an application for the removal of the stay of execution granted in the action on the 29th of June, 1916. The plaintiff obtained judgment in this action for $75 and $90 costs. The defendant then applied for and obtained an order staying execution, on the ground that in an action in the Supreme Court brought by the defendant against the plaintiff, the defendant obtained judgment for $100 and $199.75 costs, upon which the plaintiff had paid nothing, the whole amount of $299.75 being still due. Statement

The appeal was argued at Vancouver on the 11th of Decem-

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ber, 1916, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

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O'Neill, for appellant: Removal of the stay was refused. Defendant held a judgment against the plaintiff for $100 and $199.75 costs in the Supreme Court. The two cases are distinct and in different Courts. Plaintiff's judgment is for $75, and $90 costs. The learned judge has no power to stay in these circumstances. Section 113 of the County Courts Act, R.S.B.C. 1911, Cap. 53, gives power of set-off, but a judgment held by the defendant in the Supreme Court in another matter is not ground for a stay.

Argument

Brydon-Jack, for respondent: Section 113 gives power to suspend payment or to pay by instalments. We agree to a set-off of the judgments: see *Royal Trust Co.* v. *Holden* (1915), 21 B.C. 185; *Puddephatt* v. *Leith* (1916), 2 Ch. 168. Section 111 of the Act gives right of set-off.

MACDONALD, C.J.A.: My opinion is that section 113 was never intended to refer to any such case as that to which it was applied by the learned County Court judge. The section, it seems to me, was passed for the purpose of enabling the judge to ease the severity of the judgment in favour of the debtor, that is to say, to give him time in case, from circumstances of poverty or other disability, it would be in the interest of justice that he should not be compelled to pay at once. I think that is the true interpretation of section 113, but when the learned trial judge applies it to something that was not, in my opinion, in contemplation at all, *viz.*: to stay execution on plaintiff's judgment in the County Court because it happens that defendant has judgment against him in the Supreme Court on another cause of action, then, I think, he is applying section 113 to a state of facts to which it was never intended to be applied. I base my construction not only on the wording of section 113, but on the context leading up to it.

MACDONALD, C.J.A.

MARTIN, J.A.: It all depends how you look at the statute. In my opinion, it, in plain language, gives two different powers: one of them, to suspend execution, is appropriate in this case;

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and I see no reason why any judge should be circumscribed in the due exercise of these powers. Of course, the circumstances are to be considered, and the circumstances of the other judgment clearly shew that the case was one in which he was perfectly competent to exercise his discretion.

GALLIHER, J.A.: I think the language of the statute is wide enough to include the construction put upon it by the judge below.

GALLIHER, J.A.

McPHILLIPS, J.A.: If this effect is not given to the section of the Act, manifest injustice would be caused in this case. It is in the interests of justice that a person should be protected from the payment of a County Court judgment when he has a judgment of the Supreme Court against the judgment creditor (in the County Court) for a greater amount. I see no difficulty whatever in working out the interests of justice in this case by sustaining the order.

MCPHILLIPS, J.A.

Appeal dismissed, Macdonald, C.J.A. dissenting.

Solicitor for appellant: *J. E. Jeremy.*
Solicitor for respondent: *A. C. Brydon-Jack.*

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NEWMAN v. BRADSHAW

NEWMAN v. BRADSHAW.

International law — Naturalization — Evidence of — Domicil in neutral country—Alien enemy—Right to sue—R.S.C. 1906, Cap. 77, Sec. 44.

The plaintiffs (brothers), who were Germans by birth, emigrated to the United States, where the older became naturalized. Some time later they came to British Columbia, where they lived a number of years, acquired property, and became naturalized citizens of Canada. In 1913, they sold their property under an agreement of sale, and returned and made their home in the United States, the younger brother later declaring his intention of becoming an American citizen. In an action for the moneys due under the aforesaid agreement of sale:—

Held, on appeal (reversing the decision of MACDONALD, J.), that the fact of their living permanently in the United States, and the younger brother declaring his intention of becoming an American citizen, does not affect their status as British subjects, and they are entitled to bring this action.

APPEAL by plaintiffs from the decision of MACDONALD, J. in an action, tried by him at New Westminster on the 12th of June, 1916, for principal and interest under a covenant contained in an agreement for sale of land. Both plaintiffs were Germans by birth, the older, Gustaf, having emigrated to the United States in 1872, where he became naturalized. Carl, the other brother, emigrated to the United States in 1881, but never became naturalized there. Gustaf came to British Columbia in 1883, and was followed by Carl in 1888. They owned and worked a ranch for some years in the Fraser valley. They sold this ranch under the agreement for sale in question to the defendants on the 2nd of April, 1913, and moved to the town of Blaine, in the State of Washington, U.S.A., where they have since resided. After moving to Blaine, Carl declared his intention to become a citizen of the United States. Both plaintiffs claimed that they had taken out naturalization papers in Canada, but had lost them. They, however, put in as evidence at the trial copies of certificates of naturalization, certified by the district registrar of titles as true copies of certificates of naturalization deposited in the land registry office in the

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City of New Westminster under section 44 of the Naturalization Act. The main defence to the action was that the plaintiffs, being German subjects, are alien enemies, and cannot sue in a British Court of justice.

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G. E. Martin, for plaintiffs.
Dorrell (*Donald Smith,* with him), for defendants.

28th June, 1916.

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MACDONALD, J.: This is an application on the part of the defendants upon the trial of this action, to set aside the writ and all further proceedings, upon the ground that the plaintiffs are alien enemies. The matter was to a certain extent dealt with in a judgment by CLEMENT, J. in (1916), 22 B.C. 420. He decided, upon the facts then before him, that the plaintiffs could not further pursue this action, but followed the course outlined in *In re Mary Duchess of Sutherland* (1915), 31 T.L.R. 394, and enlarged the motion to the trial judge. It appears that subsequently to such judgment being written, the plaintiffs' solicitors obtained evidence, which they considered sufficient, to shew that these plaintiffs had become naturalized British subjects, and this changed the facts upon which the judgment had been rendered. An adjournment of the trial before me took place, to enable the plaintiffs to satisfactorily prove that they were naturalized under the Canadian Naturalization Act, and if so naturalized, are entitled to bring this action. The proof adduced in support of such naturalization, consists of an affidavit made by one of the plaintiffs and also certain documents which purport to be certified by the district registrar of titles at New Westminster, and would appear to be copies of the certificates of naturalization issued in favour of these plaintiffs. It is contended, however, that neither section 44 of the Naturalization Act, R.S.C. 1906, Cap. 77, nor the corresponding section of the present Naturalization Act enables the plaintiffs to prove their naturalization in this manner. It is argued that the copy referred to in this section, that may be registered in the land registry office, must be the copy that has been referred to in the previous sections of the Act, and not a copy certified by the registrar of the

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County Court and then registered. Without deciding upon the sufficiency of this evidence as to naturalization, I thought it well to allow the argument to proceed upon the assumption that these plaintiffs were naturalized on the 27th of February, 1899.

It appears that in 1913 the plaintiffs left Canada and went to reside in the State of Washington, in the United States of America, and that subsequently, on the 1st of September, 1914, after the declaration of war between Great Britain and Germany, they made declarations of intention to become American citizens. There is no doubt that both these plaintiffs were natural-born subjects of the German Empire. If they obtained naturalization in Canada in 1899, they were not required to and did not disavow their allegiance to the Emperor of Germany. While obtaining the protection and benefit of naturalization in Canada, they did not cease to be German subjects. It is contended that the change of domicil, coupled with their declaration of intention to become American citizens, deprives the plaintiffs of any right they may have become possessed of under the Naturalization Act of Canada. In other words, that while they may not as yet have become American citizens, still that they have—treating them both alike for the time being—by their actions, placed themselves in such a position that they

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cannot now seek the protection and assistance of a Court in the British Empire. According to the declaration of intention made by these plaintiffs, they proposed, at a time when the country in which they now seek assistance to obtain their rights, was at war, to renounce for ever all allegiance and fidelity to that country, and particularly to the King who rules over the British Empire. This was clearly in violation of the oath of allegiance, which, after requisite residence, formed the essential basis of their naturalization, and, in the words of the statute, conferred on them benefits and imposed obligations as follows:

"An alien to whom a certificate of naturalization is granted shall, within Canada, be entitled to all political and other rights, powers and privileges, and be subject to all obligations, to which a natural-born British subject is entitled or subject in Canada. . . . ."

While there is no compulsory service in Canada, still, if any Canadian, while resident in this country, were to be so disloyal

as to express himself since the war as these plaintiffs have done, he would be subject to prosecution. This is one of the obligations he must bear. It would not seem just or reasonable that German-born subjects can, by absence from the country to which they have sworn allegiance, reap the benefit of their naturalization in Canada and yet escape the obligation.

The plaintiffs now seek, by process issued in the name of the King whom they are desirous of renouncing, to pursue a claim against British subjects. I do not think it would be out of place for me, under these circumstances, to refer to what, in my opinion, is the duty of everyone who claims to owe allegiance to the Empire. Instead, however, of attempting to put this in my own words, I intend to refer to a portion of the argument of Sir Robert Finlay in the well-known case of *Rex* v. *Lynch* (1903), 1 K.B. 444 at p. 456, where he points out what is expected of every subject or citizen in the time of war. He is quoting, in this portion of his argument, from an American work, as follows:

"'There rests upon every subject or citizen a moral obligation not to abandon his country in a time of war without the express sanction of the [King]. The personal services and the property of each separate individual are a component part of the natural resources on which the Government relies in declaring a war; and to withdraw this when his country may require their aid is a breach of the duty that springs from the necessary relation that each individual bears to the political society of which he is a member.'"

These plaintiffs having, as I say, not foresworn their allegiance to the country of their birth, but for purposes of their own become naturalized citizens of Canada, saw fit, in breach of their duty to the Empire to which they had sworn allegiance, and in which they are now seeking redress, to declare their intention of foreswearing that allegiance and to determine to live in a neutral country and become, if possible, citizens of that country. If that citizenship had been consummated, I might find some difficulty in arriving at a conclusion as to the disposition of this application. In the meantime, however, they have lost whatever rights, "within Canada," they may have acquired under their naturalization.

In my opinion, upon the facts disclosed, these plaintiffs are not entitled, at any rate at the present time, to ask this Court

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to deal with their claim against the defendants. Cases have been cited to me which have some bearing upon the matter, namely, *Simon* v. *Phillips* (1916), 114 L.T. 460; (1916), W.N. 38; also *Rex* v. *Vine Street Police Station Superintendent. Leibmann, Ex parte* (1915), 85 L.J., K.B. 210; (1916), 1 K.B. 268.

The proper order to make is to dismiss the action with costs, and give the plaintiffs leave to bring such further action as they may be advised after the war.

From this decision the plaintiffs appealed. The appeal was argued at Vancouver on the 14th and 15th of December, 1916, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Reid, K.C. (*G. E. Martin,* with him), for appellants: An instalment is overdue on an agreement for sale. The only defence is that the plaintiffs are alien enemies. They were naturalized when they came to Canada, but they have lost their certificates. I contend copies of the certificates of naturalization, certified by the district registrar of titles, is sufficient proof of naturalization under section 44 of the Naturalization Act; see also Taylor on Evidence, 10th Ed., Vol. 2, p. 1115; Howell on Naturalization 101. The fact that the plaintiffs are now living in the United States and that one of them has declared his intention of becoming an American citizen, does not affect their status as naturalized Canadians.

Dorrell (*Donald Smith,* with him), for respondents: Section 41 of the Act lays down the method whereby a certificate is proved. My contention is that section 44 only applies to cases with relation to land, and not to the present case. The Naturalization Act gave limited rights only. They are Germans to the whole world except Canada. They have gone to the United States, where they are now domiciled. When they make that change they again become Germans and the King's enemies. They are only entitled to the rights of British subjects within Canada, and they lose their domicil when they go out of the country and again become alien enemies: see Hall's Foreign Powers and Jurisdiction of the British Crown,

pp. 28 and 90; Clement's Canadian Constitution, 3rd Ed., 177-8; 181-4; *Rex* v. *Vine Street Police Station Superintendent. Leibmann, Ex parte* (1915), 85 L.J., K.B. 210; (1916), 1 K.B. 268.

Reid, in reply.

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MACDONALD, C.J.A.: I think the appeal should be allowed. It has been established, as we have already decided here early in the case, that the plaintiffs have succeeded in proving naturalization in Canada. It is true that they left Canada in 1913, and took up their abode in the United States. They may have ceased to be citizens of Canada as defined by the Immigration Act, but, in my opinion, that has nothing to do with the case; they still remain British subjects. One of them is said to have made a declaration in the United States of his intention to apply for citizenship there. It is admitted that he has not yet become, and cannot for some considerable time become, a citizen of the United States. I do not know that it would make any difference if he had obtained citizenship in the United States, because then he would be not an alien enemy but a citizen of a neutral country; but it is not necessary to consider this in connection with the matter which is now before us. The other plaintiff has not made a declaration of his intention to become a citizen of the United States.

That, then, being the situation of these two plaintiffs, they bring this action here for moneys due on the sale of land in British Columbia. The objection is raised that because they were of German birth, yet notwithstanding that they obtained the status of British subjects here, they must in this Province be treated now as alien enemies, and their action should either be dismissed or enlarged until after the war. I cannot take that view of their rights. I think that so long as they remain British subjects they are entitled to the privileges of British subjects in this Province, and what they are seeking now is a right which arose in and is being claimed in this Province. They are, therefore, strictly within their rights in bringing this action.

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MARTIN, J.A.: I am of the same opinion. These people

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are certainly entitled to be regarded as Canadian citizens, which is another way of saying British subjects, that is, British subjects as regards Canada. The suggestion that one of them might have in some way detracted from or in any way prejudiced his position by a declaration of an intention to become a citizen in the future of the United States, is not, I think, sustainable. The test of that is, that if he were to come here tomorrow he would not be able to set up that fact in excuse of any obligation that might be cast upon him as a citizen. That test shews that the declaration of intention really amounts to nothing. There is a case on a similar point, a decision of the Court of Appeal, in *Rex* v. *Speyer* (1916), 2 K.B. 858; 85 L.J., K.B. 1626, decided under the Naturalization Act, that an alien who is naturalized is still entitled to be a member of the King's Privy Council. The modern and juster rule in regard to the right of an alien enemy to "appear as a claimant and argue his claim" before the Prize Court in certain cases

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is the one referred to in the introduction to the British and Colonial Prize Cases, Vol. 1, at p. iv., and in the report of the case there referred to, *The Mowe,* at p. 60, wherein the President of the Prize Court, after referring at p. 72, to the "sea of passions [which] rises and rages as a natural result of such a calamitous series of wars as the present," goes on to say: "So in the unhappy and dire times of war the Court of Prize as a Court of Justice will, it is hoped, shew that it holds evenly the scales between friend, neutral, and foe."

GALLIHER, J.A.

GALLIHER, J.A.: I am inclined to the same view, although I do not pronounce any considered judgment on the matter. I would have preferred to have considered the question, but the rest of the members of the Court are unanimous, and under such circumstances and considering the very great list we have, I have decided not to request the case to be reserved.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of opinion that the appeal should be allowed. I cannot see, upon the evidence, that it has been at all proved that the plaintiffs are other than British subjects, that is, British subjects within Canada. Canadian citizenship is something that is unknown, I might say, speaking generally,

to the Imperial law. It is something that we have established ourselves. Canadian citizenship is dealt with in the Immigration Act, and domicil is also dealt with in the Immigration Act for special purposes. Those special purposes are that we may give close scrutiny to those who enter Canada; and we may exclude British subjects from other parts of the Empire, we can exclude all aliens under it; but we cannot exclude Canadian citizens under it. In this particular case, though, I do not think it necessary to analyze the position of these plaintiffs under the Immigration Act, as it has no relation to the subject-matter we have for decision. I think the status here has to be established, and can only be displaced under the Naturalization Act. Now, with regard to one of these plaintiffs, it would seem that he has withdrawn himself from Canada and has made a declaration of his intention to become an American citizen. I cannot see how it can be said that this particular plaintiff has lost his status under the Naturalization Act. He is still a British subject within Canada, and his present place of residence is immaterial. The mere fact that he resides without Canada, be he British subject or not, does not prevent him bringing an action relative to rights of property within Canada; and in this particular case, it is with relation to realty in one of the Provinces of Canada, the Province of British Columbia. The laws which govern property and civil rights are the laws of British Columbia. When we find that these plaintiffs are still, under the Naturalization Act, British subjects, British subjects within Canada, the mere fact that they are without Canada does not disentitle them to enforce rights within Canada, unless they have become alien enemies. That, I cannot see, has been in any way established here; and, failing the establishment of that, certainly the judgment of the Court below cannot stand.

Appeal allowed.

Solicitors for appellants: *McQuarrie, Martin, Cassady & Macgowan.*

Solicitor for respondent: *Donald Smith.*

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DORRELL v. CAMPBELL

DORRELL *ET AL.* v. CAMPBELL & WILKIE AND THE CORPORATION OF THE CITY OF VANCOUVER *ET AL.*

Mechanics' liens—Owner—Unregistered Crown grant—In possession. Evidence—Unregistered Crown grant—Admissibility of.

Actual possession under grant from the Crown, coupled with the statutory right to register the grant, creates an estate or interest within the meaning of the word "owner" in section 2 of the Mechanics' Lien Act upon which a mechanic's lien may attach.

An unregistered Crown grant is admissible in evidence when it is not sought to set it up against a registered instrument.

APPEAL from the decision of GRANT, Co. J. dismissing five consolidated lien actions tried by him at Vancouver on the 14th of June, 1915. The City of Vancouver entered into a contract with Messrs. Campbell & Wilkie of Vancouver for the construction of a public building on the northeast quarter and the east half of the northwest quarter of section 27, Hastings Townsite, Vancouver District. Messrs. Campbell & Wilkie subcontracted various portions of the work to the several plaintiffs, and they, upon completion of their work, filed liens for their respective claims, and commenced actions in due course. On the 28th of May, 1915, the five actions were consolidated. Before the trial the Bank of Toronto was made a party defendant, as they claimed the balance still owing by the City to the contractors under an assignment of said moneys from the contractors. The City filed a dispute note, admitting it held a conveyance from the Crown of the lands in question, and paid into Court the balance of the contract price, $6,252.69, to abide the result of the action, which was sufficient to pay the liens in question. On the case being called, counsel for the lienholders attempted to prove the City's title by calling the city clerk to produce the conveyance from the Crown, which had not been registered. Counsel for the Bank objected to its production, on the ground that it had not been registered. The objection was sustained, and it was held that under section 104 of the Land Registry Act, the City had no interest in the

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land in question, and the actions were dismissed. The plaintiffs in four of the actions appealed.

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The appeal was argued at Vancouver on the 11th of December, 1915, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

D. A. McDonald (*E. A. Lucas,* with him), for appellants: In following *Goddard* v. *Slingerland* (1911), 16 B.C. 329, the trial judge was in error as the Land Registry Act does not apply to this case. The City is in possession and can register its title at any time: see *Hazell* v. *Lund* (1915), 22 B.C. 264. The register is a blank, and will so continue until the City registers its title. If the judgment stands, it is impossible, in the circumstances, to enforce a lien.

Reid, K.C., for respondents: The judgment may be supported on two grounds: (1), the City cannot be recognized as owner until registration of title; and (2), there is no lien against the property of a municipality and especially against the City of Vancouver: see Wallace on Mechanics' Liens, 2nd Ed., 280; and *Guest* v. *Hahnan* (1895), 15 C.L.T. 61. The case of *Trustees of School District Number Eight, Havelock, Kings County* v. *Connely et al.* (1912), 41 N.B. 374; 9 D.L.R. 875, does not apply, as the New Brunswick Act is different.

Argument

R. M. Macdonald, for respondent Bank: The fact of the record of the property being a blank sheet in the registry office means the Crown is the owner. The City must come within the definition "owner." Section 104 of the Act must be construed strictly.

McDonald, in reply.

Cur. adv. vult.

7th November, 1916.

MACDONALD, C.J.A.: This is an appeal in four consolidated mechanics' lien actions, brought by sub-contractors of Campbell & Wilkie, who contracted with their co-defendants, the City of Vancouver, to erect a building for the City on property described as the northeast quarter of the east half of the northwest quarter of section 27, Hastings Townsite, Vancouver District. Before the trial, the Bank of Toronto was made a party

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defendant for the reason that it claims the balance of the contract price owing to the City by the contractors, Campbell & Wilkie, under an assignment from them, which assignment could not prevail if the plaintiffs should establish their liens against the said property: in other words, if the lienholders succeed the City could satisfy their claims out of the said balance, and thus defeat the assignment to the extent of the lienholders' claims. No formal order adding the Bank was taken out, nor were copies of the summons and plaints, or other process served, or ordered to be served, on the Bank, nor did the Bank file a dispute note.

Some of the plaintiffs alleged that His Majesty the King was owner of the said lands, but that the City of Vancouver had some interest therein, while others alleged that the City was the owner in fee.

The City filed a dispute note in the consolidated actions, admitting that it held a conveyance in fee simple of the said lands from the Crown, and was the owner thereof, and at the same time paid into Court the said balance of the contract price, $6,252.69, which is more than sufficient to satisfy the liens.

The situation at the opening of the trial then was, that the City's ownership of the property was by it admitted, and, but for the intervention of the Bank, no question would have been raised in respect thereof. While the Bank had no status so far as the pleadings go, yet counsel for all parties appear to have acquiesced in its assumption of the right to oppose the plaintiffs' claims.

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Counsel for the plaintiff O'Neill essayed to prove the City's title by calling the city clerk to produce the conveyance from the Crown. Counsel for the Bank thereupon objected to the grant being put in evidence, on the ground that it was unregistered, which objection was sustained. The fact that it was unregistered appears to have been admitted. Without more, counsel for the Bank insisted that the City had no interest in the lands because of section 104 of the Land Registry Act, and after considerable argument, and notwithstanding that counsel for the plaintiffs desired to proceed with the trial, the learned County Court judge decided that said section 104 precluded

him from holding that the City had any interest whatever in the said lands.

In my opinion, proof of the Crown grant was erroneously rejected. Its date was neither admitted nor proved. The applicability of said section 104 depends on the date of the instrument. If the instrument took effect prior to the 1st of July, 1906, the section does not affect it. But whatever its date, unless it fell under section 105 of the said Act, which it did not, because it was not sought to set it up against a registered interest, it was admissible in evidence, and the question of its legal effect was matter for argument, after proof of the instrument itself. Therefore, on the ground of the rejection of relevant evidence, the judgment below is open to attack. But while to order a new trial would, technically, dispose of this appeal, the question which must ultimately be answered would be left unanswered. This difficulty was subsequently overcome by counsel agreeing that the grant was later than the said 30th of June. They also agreed that the City was in actual possession of the land granted at the time or times the work was contracted for, and are still so possessed. These admissions enable us, in my opinion, to dispose of this appeal without ordering a new trial.

This question of law would then arise: Would actual possession under grant from the Crown, coupled with a statutory right to register the grant, and thereupon become the owner in fee, create an estate or interest upon which a mechanic's lien could attach? I think it would.

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This is not a contest between rival vendees claiming under unregistered agreements from the same vendor, such as was *Goddard* v. *Slingerland* (1911), 16 B.C. 329, so much relied on in the Court below. The City *dehors* the grant had, by reason of actual possession, a good title against all the world. When the Crown grant was delivered, it was optional with the grantee to register it or not. The grantee could enjoy the property for all time without fear of eviction by the Crown. The Crown could have no legal complaint by reason of non-registration of the grant, and in no event would it repudiate its own grant. Added to this, perpetual right of possession

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and enjoyment is the further right given by the statute itself, not by the instrument, to make the estate one of fee simple, whenever the grantee chose to do so. The City's interest, therefore, was, in my opinion, a very valuable one, and could be made the subject of assignment or sale. In a much weaker case, it was the opinion of Wetmore, C.J., that actual possession alone was an interest in land upon which a mechanic's lien would attach: *The Galvin-Walston Lumber Co.* v. *McKinnon et al.* (1911), 4 Sask. L.R. 68; 16 W.L.R. 310; and while it is, perhaps, not very useful to refer to United States decisions where statutes are involved, I find that the Supreme Court of Iowa held the same view in *Bray* v. *Smith* (1893), 54 N.W. 222.

MACDONALD, C.J.A.

I would allow the appeal, and declare that all the right, title and interest of the City of Vancouver is charged by the said liens, and subject to be sold to satisfy the same.

MARTIN, J.A.: This appeal has been much simplified by the admission, since the first argument, that the Crown grant to the City of Vancouver is dated the 20th of August, 1912; that actual possession was taken by the City in the autumn of 1913; and that work was begun under the contract in question in August, 1914, which leaves us free to deal, on the merits, with the substantial point involved and as though it had come before the learned judge below on those facts.

The question, therefore, is narrowed down to this: Is a Crown grantee in possession of land an "owner" within the definition of section 2 of the Mechanics' Lien Act? That section declares that:

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> "'Owner' means and shall extend to and include a person having any estate or interest, legal or equitable, in the lands upon or in respect of which the work or service is done, or material is placed or furnished, at whose request and upon whose credit," etc., etc.

Section 31 empowers the judge to "direct the sale of the estate or interest charged" by the lien, and "any conveyance under his seal shall be effectual to pass the estate or interest sold."

Now, apart from statute, no one could have a higher or better "estate or interest" in land than a Crown grantee in possession, so for the purposes of this case, unless some limita-

tion can be found in the Land Registry Act, the title of the City as owner is absolute. Section 104 of that Act is invoked, and it refers to certain "instruments" as follows:

"No instrument executed and taking effect after the thirtieth day of June, 1905, and no instrument executed before the first day of July, 1905, to take effect after the said thirtieth day of June, 1905, purporting to transfer, charge, deal with, or affect land or any estate or interest therein (except a leasehold interest in possession for a term not exceeding three years), 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. . . . . ."

But, in my opinion, the word "instrument," as here used, does not apply to Crown grants. In the first place, it is one section of a group, sections 102-7, entitled "Transfers," and that word is just as inappropriate to a grant from the Crown as is the word "conveyance," yet the first section of the group, 102, begins "When any conveyance or transfer is made of any land or interest therein," etc.; and section 103 relates to conveyances; section 106 also to transfer or conveyance; section 107 to "transfers" between joint owners, and sections 104 and 105 to "instruments" which "purport to transfer, charge, deal with, or affect land," etc. The word "transfer" is not defined in the interpretation section 2, of the Land Registry Act, but it declares that—

"'Instrument' means and shall include any document in writing or printed, or partly written and partly printed, relating to the transfer of land or otherwise dealing with or affecting land or evidencing title thereto, and maps, plans, or surveys."

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Compare this definition with, *e.g.*, that to be found in The Land Titles Act, Alberta Stats. 1906, Cap. 24, Sec. 2 (*k*), which begins by saying that "'Instrument' means any grant, certificate of title, conveyance, assurance," etc., etc., thus covering the very point left open here.

Then by section 77, "before any deed or instrument executed subsequently to the eighth day of October, 1865, other than a Crown grant, decree, judgment, or order of a Court of civil jurisdiction, is recorded or registered," it must be acknowledged as therein provided, and by section 15, save in the case of mineral claims (as to which, see section 17), "the land and every portion of the land comprised in an unregistered Crown grant shall be registered in the register of indefeasible fees,"

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and the certificate of indefeasible title is subject, by section 22, to several reservations, the first of which is "(*a*) The subsisting exceptions or reservations contained in the original grant from the Crown"; and subsections (2) and (3) provide:

"(2) Any certificate of indefeasible title issued under the provisions of this Act shall be void as against the title of any person adversely in actual possession of and rightly entitled to the hereditaments included in such certificate at the time of the application upon which such certificate was granted under this Act.

"(3) After the issuance of a certificate of indefeasible title no title adverse or in derogation to the title of the registered owner shall be acquired by any length of possession merely."

Now, estates and interests in land may be granted by or arise out of Acts of Parliament, illustrations of which are to be found in various land grants to railways, one of which was recognized by our recent judgment in this Court in *In re Assessment Act and Heinze* (1914), 20 B.C. 99; (1915), 52 S.C.R. 15 (leave to appeal to Privy Council refused on 3rd February, 1916), and yet are such Acts ordinarily appropriately styled instruments? And if so, how are they to be registered in the face of section 77, which does not exempt them from the necessity of acknowledgment? In my opinion, the whole Act, read together, goes to shew that the word "instrument" is not intended, in section 104, at least, to relate either to Crown grants or Acts of Parliament, the language therein, "transfer, charge, deal with or affect," primarily and properly used, contemplates land which has been dealt with by "instruments" which are subsequent to the original grant from the Crown, and the various specified modes of that subsequent dealing or alienation are *ejusdem generis;* no lawyer or parliamentary draughtsman, in this Province at least, would begin to treat such a subject by referring to the original alienation from the Crown, by its bounty or otherwise, as a "transfer," and the further one goes with the language employed, the further one gets away from such an intention. Of course, "instrument" may be made to include an Act of Parliament, *e.g.,* it does in the English Trustee Act of 1893, Cap. 53, Sec. 50, which says "The expression 'instrument' includes Act of Parliament," which goes to shew the necessity for something of the kind in our Act, if it were intended to include Acts and Crown grants. Even a

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decree of the Court of Chancery, dealing with a landed estate, was held in *Jodrell* v. *Jodrell* (1869), 38 L.J., Ch. 507, not to be included in the expression "any instrument that shall be executed after the passing of this Act." *i.e.,* the Apportionment Act of 1834, Cap. 22, 4 & 5 Wm. IV., Sec. 2. The truth is, that different meanings must be given to the same word in different contexts; and a meaning has to be given to a word "according as reason and good sense require the interpretation, with reference to the context, and the subject-matter of the enactment," as was said by Tindal, C.J., in delivering the judgment of the Queen's Bench in *The Queen* v. *Humphery* (1839), 10 A. & E. 335 at p. 370, wherein three different meanings were stated which might be given to the word "upon."

It flows from the foregoing, that, in my opinion, there is no section in the Land Registry Act which limits the title of the City to the land in question, and so long as it remains in possession under its Crown grant, its title is unassailable, and it is the "owner" of the land within the meaning of the Mechanics' Lien Act. I do not think it now advisable to discuss at any length, in the absence of argument, the further question of how far one other than a Crown grantee, in actual possession of land, may be deemed to be an "owner" under the Mechanics' Lien Act, apart from any transfer or conveyance, but I have not overlooked the opinion of Chief Justice Wetmore in *The Galvin-Walston Lumber Co.* v. *McKinnon et al.* (1911), 4 Sask. L.R. 68, and I observe that the definition of "owner" in our Mechanics' Lien Act is, if anything, wider than that in the Saskatchewan Act, as it says any interest or estate "legal or equitable" in the lands, etc. The subject of title by possession is discussed in Jones's Torrens System, 67, and Thom's Canadian Torrens System, 66-7. There is, in our Act, no provision for a qualified possessory title, such as there is in Ontario and elsewhere—Jones, *supra,* pp. 40-1. Under our system, actual adverse possession for the period contemplated by the Statute of Limitations, R.S.B.C. 1911, Cap. 145, Sec. 16, will confer an estate outside of the Land Registry Act, which need not be evidenced by any instrument at all, and yet will prevail against a certificate of indefeasible title, to the

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extent of making the latter "void" as above noted. One consequence at least of finding a person in actual possession is, that he in any event may have a valid though unregistered leasehold interest up to three years, recognized by said section 104, and be an "owner" to that extent under the Mechanics' Lien Act, from which it follows that one in actual possession has always the right to shew what his interest really is, for it might, *e.g.*, be anything between a short lease and a completed statutory title as aforesaid.

It must not be overlooked (and I make this observation because of the submission made during the argument, that in cases where there is no registered owner, the Crown would be assumed to be the owner) that, in regard to that large portion of this Province which comprises the old Colony of Vancouver Island, there can be no such assumption, because of the fact that said Island, with all the royalties of the seas upon its coasts and all mining royalties, was granted by the Crown to the Hudson's Bay Company on the 13th of January, 1849, as "the true and absolute lord and proprietor of the same," and was not reconveyed by the company to the Crown (saving a number of reservations) till the 3rd of April, 1867 (see Appendix to B.C. Stats. of 1871), after the union of the two colonies on the 17th of November, 1866, and during that time many alienations of lands and water frontages had been made by the company, as are formally referred to, *e.g.*, in said reconveyance, in the Vancouver Island "Act for Confirming Titles from the Hudson's Bay Company, 1860"; in the Vancouver Island Land Registry Act, 1860, Sec. 16, and today in section 31 of the Land Registry Act.

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With respect to the present mainland, the former Colony of British Columbia, the circumstances are different, the position of the company never being legally the same therein as it was in Vancouver Island or Rupert's Land, as distinguished from its rights by licence or otherwise over the Indian and North West Territories (*vide* my articles on the "Rise of Law in Rupert's Land" in Western Law Times, Vol. 1, pp. 49, 73, 193; and *Calder's Case* (1848), 2 West. L.T. 183; Martin's Hudson's Bay Company's Land Tenures, 1898, p. 183), and I am

unaware of any public document, of which judicial notice could be taken, defining the extent of the reserved areas round its "posts or stations" in British Columbia, such as there is in its deed of surrender of Rupert's Land to the Crown, dated the 19th of November, 1869, given under the Rupert's Land Act of 1868 (Martin's Hudson's Bay Company's Land Tenures, 1898, Appendix Q., pp. 216, 222).

Finally, I note that there is also another class of owner of "an estate or interest, legal or equitable" in land outside of the Land Registry Act, and in addition to those three already mentioned, *viz.*: (1) under Crown grant; (2) by Act of Parliament; (3) and actual possession under the Statute of Limitations, and section 104; I refer to the right of a free miner in his claim, which has been decided to be an interest in land—*McMeekin* v. *Furry* (1907), 13 B.C. 20; 2 M.M.C. 432, 536. Though section 6 (3) of the Mechanics' Lien Act provides for a lien on a "mine," yet by section 17 of the Land Registry Act—

> "No mine or mineral claim, as defined by any Mineral Act or Ordinance now or at any time in force in the Province shall be registered in the register of indefeasible fees, nor shall any certificate of indefeasible title to same be issued."

And refer to the final amendment of this section by section 4 of Cap. 33 of 1915 and to section 15, already cited. A certificate of absolute fee may be obtained after the issue of a Crown grant to a mineral claim under section 74 of the Mineral Act, R.S.B.C. 1911, Cap. 157, but up to that time all conveyances, bills of sale and documents of title relating to mineral claims or placer claims must be recorded with the mining recorder—sections 74-5 of the Mineral Act, and sections 56-60 of the Placer-mining Act. But, nevertheless, no one has yet ventured to contest the right to file a lien against a "mine," of any description, whether under the two Acts already cited or the coal or petroleum mining operations carried on under the Coal and Petroleum Act, R.S.B.C. 1911, Cap. 159, *e.g.*, see section 21 (1) (*d*) as amended by section 9 (*d*), Cap. 44 of 1913.

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I am of the opinion, therefore, that this appeal should be allowed, and the lien declared to exist to the full extent of the estate and interest of the City of Vancouver, as disclosed by the facts of the Crown grant and possession taken thereunder.

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

MCPHILLIPS, J.A.: I concur in allowing the appeal.

Appeal allowed.

Solicitors for the various appellants: *Abbott, Macrae & Co.; E. N. Brown; Bourne & McDonald; Lucas & Lucas.*

Solicitors for respondent City: *E. M. N. Woods,* and *J. B. Noble.*

Solicitors for respondent Bank of Toronto: *Bird, Macdonald & Ross.*

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SCOTTISH TEMPERANCE LIFE ASSURANCE COMPANY, LIMITED v. JOHNSON.

Judgment—Default in pleading—Judgment for excessive amount—Foreclosure—Setting aside—Rule 308.

SCOTTISH TEMPERANCE LIFE ASSURANCE CO. v. JOHNSON

A personal judgment for principal and interest due on a mortgage and for foreclosure was obtained by default. Interest, which was the subject of a previous action in the County Court, was included in the sum recovered. An application to set aside the judgment on the ground that it included an amount for which judgment had already been obtained was dismissed.

Held, on appeal, reversing the order of MORRISON, J. that the judgment should be set aside, and the defendant allowed in to defend generally.

Statement

APPEAL from an order of MORRISON, J. of the 1st of February, 1916, dismissing the defendant's application to set aside judgment obtained on motion after filing the statement of claim, the defendant having been in default both as to her appearance and defence. The action was for principal and interest due on a mortgage under a covenant therein contained, for an account, and for foreclosure. Prior to this action the

plaintiff sued in the County Court for three instalments of interest due on the mortgage and obtained judgment, upon which the defendant paid certain sums, $139 being still unpaid when the present action was commenced. The amount claimed and for which judgment was entered in this action included the unpaid amount of the County Court judgment.

The appeal was argued at Vancouver on the 31st of May and the 2nd of June, 1916, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

A. D. Taylor, K.C., for appellant: If a judgment is entered for too much it is the duty of the creditor, and not the debtor, to have it corrected: see *Muir* v. *Jenks* (1913), 2 K.B. 412; 82 L.J., K.B. 703. The instalments sued upon in the County Court became merged in the first judgment: see *Ex parte Fewings* (1883), 25 Ch. D. 338. The judgment was substantially for too much and was in no way in the nature of a slip: see *McKinnon* v. *Lewthwaite* (1914), 20 B.C. 55; *Armitage* v. *Parsons* (1908), 2 K.B. 410; *Re Mosenthal. Ex parte Marx* (1910), 54 Sol. Jo. 751. On the application of the slip rule see *Oxley* v. *Link* (1914), 2 K.B. 734.

Argument

Sir C. H. Tupper, K.C., for respondent: This is a chancery action, being for foreclosure of a mortgage. In effect it is a trial and not in the nature of a judgment by default: see *Sanguinetti* v. *Stuckey's Banking Company (No. 2)* (1896), 1 Ch. 502. The amount in excess is only $139, and the maxim *de minimis non curat lex* should be applied. The defendant is not entitled to consideration; she was in default both as to appearance and defence: see *Atwood* v. *Chichester* (1878), 3 Q.B.D. 722 at p. 724; *Hughes* v. *Justin* (1894), 1 Q.B. 667 at p. 670; *Anlaby* v. *Prætorius* (1888), 20 Q.B.D. 764 at pp. 769-71; and *Muir* v. *Jenks* (1913), 2 K.B. 412 at p. 414.

Taylor, in reply.

Cur. adv. vult.

7th November, 1916.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: This is a foreclosure action in which a personal judgment was also sought against the defendant.

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The defendant failed to appear to the writ and a statement of claim was filed, to which defendant failed to plead. The plaintiff then moved on notice, the defendant being unrepresented, before a judge in Chambers for judgment on the pleadings, and obtained an order for foreclosure, the appointment of a receiver, and judgment upon the covenants for principal, interest, taxes and insurance moneys in arrear, with a reference to take accounts. Shortly afterwards the defendant made an application to a judge in Chambers to set aside the judgment on two grounds, only one of which is, in my opinion, worthy of consideration; that one is that the personal judgment was entered for too large a sum. The learned judge dismissed the application and from that order the defendant appeals.

It appears from the material before us that about two weeks prior to the commencement of this action the plaintiff obtained a judgment in the County Court for some instalments of interest, which were afterwards included in the judgment in this action. The plaintiff's rights under the covenants in respect of these instalments were merged in the judgment of the County Court, and it is, therefore, quite clear to my mind that the personal judgment obtained in this action is an excessive one. The plaintiff has not moved to rectify the wrong, but, on the contrary, stands by it.

MACDONALD, C.J.A.

If this were the ordinary case of judgment entered in the registry for default in pleading, there would be no difficulty about its decision; the judgment would have to be set aside and the defendant allowed in to defend. Counsel on both sides have treated it as if it were such a case, and I propose to treat it in the same way. In the absence of objection and of argument upon the true construction of Order XXVII., r. 15 of our Rules, I do not feel called upon to construe that rule, but I wish to guard myself against appearing to have acquiesced in the practice adopted in this case.

It may be said that the whole judgment should not be set aside, but only the personal judgment. I think, however, in this case justice will be better served by setting aside the whole judgment. I notice, though the matter has not been discussed

before us, that the notice of motion for judgment does not specify that a decree for foreclosure would be asked for. The notice states that personal judgment will be asked for, and the appointment of a receiver, and such other order "as upon the statement of claim in this action this Honourable Court may consider the plaintiff entitled to."

I do not think that is specific enough, and while I should not, because of the failure to raise the point specifically, set aside the judgment on that ground alone, yet as it must be interfered with on another ground, I would let the defendant in to defend generally.

The appeal, in my opinion, should be allowed. The appellant should have the costs here and below.

MACDONALD, C.J.A.

MARTIN, J.A.: This is not a judgment which has been irregularly signed, in the true sense of that term, but, it is submitted, by "an error arising therein" under r. 319, as defined recently by *Oxley* v. *Link* (1914), 2 K.B. 734, it has been signed for $139 too much, and it could have been reduced by that amount upon the motion to set it aside under r. 308, which contemplates, as the Court of Appeal said in *Re Mosenthal. Ex parte Marx* (1910), 54 Sol. Jo. 751, "that the judgment may be set aside either wholly or in part." The plaintiff later made an offer to reduce its judgment by said $139, but it was refused, and the offer was renewed before us and again refused, the point being insisted upon that as the judgment was signed for too much it was for the plaintiff Company to make a special application to reduce it in order to prevent its being set aside, which it did not do when the motion came on before the learned judge, who *ex mero motu,* apparently, offered to reduce the judgment, but we are informed that no answer was made to this offer, which is tantamount to refusing it. This Court recently decided in *McKinnon* v. *Lewthwaite* (1914), 20 B.C. 55, after reviewing the authorities, that it was not necessary (as I ventured to think it was, pp. 61-3) for the plaintiff to make a substantive motion to amend his default judgment (in other words, to "elect to put it right") when it was sought to set it aside as having been signed for too much, it being held that his offer to reduce the judgment

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to the proper amount is equivalent to such a motion, and therefore the position of the present appellant is untenable in this respect, and it would have been open to the learned judge, if the case were on the facts brought within the "slip" rule, 319, quite apart from any specific application by the plaintiff, to offer as he did to amend the judgment by reducing it to the proper amount. But unfortunately for the plaintiff, no facts were brought forward on its behalf to shew that there had been any mistake, error, slip, or omission, which, as I pointed out in *McKinnon* v. *Lewthwaite, supra,* must be before the Court, either by proof or admission, and which facts are essential before relief can be given under said rule: the affidavits filed on its behalf really indicate the contrary. I therefore agree that the appeal should be allowed, and the motion below effectuated to the extent indicated by my learned brothers.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

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

Appeal allowed.

Solicitor for appellant: *J. E. Jeremy.*
Solicitors for respondent: *Tupper, Kitto & Wightman.*

ALLAN AND ALLAN v. McLENNAN AND BANK OF VANCOUVER.

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ALLAN
v.
McLENNAN

Practice—Parties—Joinder of plaintiffs—Series of transactions—Rule 123.
Damages—Sale of shares—Fraudulent misrepresentation—Measure of damages.
Appeal—Notice of by respondent—Appellant interested in respondent's appeal—Rule 870.
Evidence—Commission—Admission of at trial—Condition precedent—Proof of—Error in long order—Rectification of—Rule 319.

Two persons purchased shares separately, and on different occasions, in the capital stock of a bank through the solicitation of an agent who had received a block of shares from the president of the bank for sale in England. They joined in one action against the president and the bank to set aside the sale of the shares on the ground of fraud or, in the alternative, for damages.

Held (MARTIN, J.A. dissenting), that they were properly joined as plaintiffs within the meaning of marginal rule 123, as it was in the mind of the president that the shares in question were not to be sold *en bloc* to one person, but to several persons, in what may be called a series of transactions in respect of that block of shares.

Held, further, that the direction of the trial judge that the president should indemnify the plaintiff against all "calls, claims, costs, charges or other liabilities whatsoever which may at present or at any time attach to the plaintiff or to which the said plaintiff may become liable by reason of his ownership of the said shares in the defendant bank" should be struck out, as the measure of damages to be awarded each plaintiff is the difference in value of the shares with all their incidents at the time of the discovery of the deceit and what was paid for them.

A respondent who seeks to have the judgment varied on a point in which the appellant may be interested may proceed by notice under rule 870.

In re Cavander's Trusts (1881), 16 Ch. D. 270 distinguished.

The trial judge has jurisdiction to accept such evidence as he deems necessary as proof of a condition precedent to the admission of evidence taken on commission.

Where the short order for a commission provides that the long order shall be drawn in the form set out in the appendix, an error in the drawing of the long order which is apparent upon the face of the proceedings may be rectified under rule 319.

Statement

APPEAL from the decision of MURPHY, J., in an action tried by him at Vancouver on the 14th to the 17th of March, 1916, to set aside two sales of 50 shares each in the capital stock of the Bank of Vancouver to the

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Statement

plaintiffs on the ground of misrepresentation or, in the alternative, for damages. The defendant McLennan was the chief promoter of the Bank. Of the first subscriptions for stock a large portion was paid for by notes. Mr. McLennan purchased these notes from the Bank (about $230,000 worth) and borrowed $230,000 from the Royal Bank of Canada, depositing these notes as collateral in said Bank. This money was then with an additional amount paid by cash subscribers for shares, making $250,000 in all deposited with the minister of finance, and on the 16th of March, 1910, a certificate was issued by the treasury board under the Bank Act authorizing the Bank to do business. About a year later, as about $90,000 worth of notes deposited in the Royal Bank were not paid, McLennan and three of the other directors personally borrowed $90,000 from the Columbia Trust Company to pay off the Royal Bank and deposited the unpaid notes as collateral with the Trust Company. The certificates of stock that were not paid for and represented by these notes were put in the name of one Wilson in trust, and were held by him for disposal as McLennan would direct. In the spring of 1912, the directors, particularly McLennan, were approached by one S. St. J. Martin, who desired to sell stock in England. Eventually an arrangement was made whereby McLennan authorized him to sell 2,000 shares in the Old Country; first, he was to sell the 900 shares held by Wilson, and if further sales could be made McLennan and three of his co-directors were to make up the 2,000. On the 22nd of May, 1912, McLennan wrote four letters to Martin, from which it would appear that the stock he was to sell was new-issue stock. Martin proceeded to Glasgow where, after negotiations he sold 50 shares of stock to Claud Allan and three days later he sold 50 shares to Bryce Allan. Mr. McLennan's letters were used in order to induce the Allans to purchase, and they thought they were purchasing new-issue stock when, in fact, their money went to the Columbia Trust Company to pay off McLennan's indebtedness there.

Before the trial an order was made for examining the plaintiffs and Martin by commission in Scotland. Through inadvertence in drawing the long order according to the schedule in

the rules, section 8 thereof was partly left out and omitted to provide that the evidence taken on the commission would be accepted at the trial on the affidavit of the solicitor that to the best of his knowledge and belief the witnesses were not within the jurisdiction. The mistake was not noticed until the trial, when objection was taken to the production of the commission. The learned judge decided to accept the solicitor's affidavit on counsel's undertaking that he would have the long order rectified.

Mayers, for plaintiffs.
Woodworth, for defendant McLennan.
Martin, K.C. (*G. A. Grant,* with him), for defendant Bank.

27th March, 1916.

MURPHY, J.: In my opinion it is established that Martin was not the agent of the Bank of Vancouver to sell unissued shares, nor do I think any holding out by Mr. McLennan that he was such agent was within McLennan's scope of authority as president of the Bank to the extent of enabling plaintiffs to hold the Bank as principal. The president *qua* president would have no authority to direct an issue of shares and arrange for their sale. The action, so far as it rests on this ground, fails.

I have read the evidence and exhibits with anxious care, and have been thereby forced to conclusions to which I stated at the hearing I was reluctant to arrive. That the hands of any tribunal to which this case may be carried may be entirely free, I wish to state that these conclusions have been arrived at by a perusal of the written evidence and exhibits put in at the trial and not by impressions made on me by the oral evidence, though, of course, such oral evidence has been taken into account. I find that each of the plaintiffs when he purchased the shares believed that Martin was the agent of the Bank and that what he was purchasing was new-issue shares. By "new-issue shares," I mean shares other than those stated by McLennan in his letter of the 22nd of May, 1912, to have been already subscribed. In other words, each of the plaintiffs believed that his money was to become additional capital of the Bank and actually reach the Bank as such additional capital, either by being paid directly to

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it or by means of one or more directors as conduit-pipes. I find that such belief was one of the inducing causes of the purchase of shares by each plaintiff, and that it was induced by direct statements by Martin made to each of them for the purpose of inducing such belief and of effecting the sales. Whether Martin was honest or not in making these statements is, in my view, immaterial, but, on the whole, I think he was. I hold that Martin was in reality McLennan's agent. It is admitted that the shares delivered to each plaintiff were not new-issue shares, but original allotment shares standing in the name of Wilson in trust, who was McLennan's *alter ego,* the trust being in effect that he should obey McLennan's instructions as to disposal of the shares. These shares McLennan in fact had been forced to take control of and hold as collateral with power of sale to notes of the original subscribers given in payment thereof, which notes he had purchased and which had not been met. It is a fair inference from the evidence I think that in July, 1912, the chances that these notes would ever be paid were small. McLennan had borrowed a very large sum of money to make the notes purchase and, at the time the sales herein were made, *i.e.,* July, 1912, still owed $90,000 of this original loan and had put up the shares as collateral therefor. He had, therefore, been carrying this unexpected indebtedness at least for two years. Plaintiffs' money was used to pay off this loan *pro tanto,* and the shares thus released were delivered to the plaintiffs. The gist of the matter is that their money, instead of going, as they thought, to the Bank to increase its capital, went to reduce McLennan's indebtedness. McLennan insists, as I find to be the fact, that Martin was his agent, yet he also admits that he wrote the four letters of the 22nd of May, 1912, to Martin intending that they be used by Martin to shew his position and authority to intending purchasers. I have read and re-read these letters, and the only meaning I can extract from them, particularly the one beginning "Enclosed please find option," is that they state that Martin is the agent of the Bank and is to sell new-issue shares in the sense that any sales he may make mean additional capital to the Bank over and above what that letter states is already subscribed. Martin, as found, so stated to the plaintiffs. In the

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case of Claud Allan he backed up the statements by producing the letter which was apparently read with some care. Apparently he also shewed it to Bryce Allan, who, however, does not appear to have scrutinized it closely, but was content with Martin's statements. Reluctantly I find that these facts make out all the elements of an action of deceit against McLennan. The outstanding undisputed facts are the letters of the 22nd of May, 1912, the delivery of original allotment shares with which McLennan had been unwillingly saddled instead of new-issue shares, and the consequent diversion of plaintiffs' money to satisfy McLennan's indebtedness *pro tanto* instead of allowing it to form part of increased bank capital, either by direct payment to the Bank or to reimburse directors for money actually paid into the Bank for new-issue shares, "the result," to quote the letter of the 22nd of May, 1912, above referred to, "being the same," *i.e.*, that the Bank's capital was *pro tanto* increased over what that letter states was already subscribed. I have searched the evidence in vain for an explanation of these facts that would justify any other conclusion than the one above arrived at. I find that the plaintiffs, within a reasonable time after they became aware of the real facts, repudiated the transaction. The question remains to what remedy are plaintiffs entitled. Rescission is asked for, and I am urged to make an order that their names be removed from the Bank register. It is true that cases can be found where such order has been made if, as here, action was taken before liquidation. *Reese River Silver Mining Co.* v. *Smith* (1869), L.R. 4 H.L. 64 is an example. But in all such cases there was a direct contractual relationship between the plaintiff and the Company, or else the Company had no interest in retaining the shareholder's name on the register. The Bank here is a total stranger to the transactions in question. The shares stand in the Bank's books in Claud Allan's name, but admittedly as to 50 of them he is a trustee for Bryce Allan. This appearance on the share register is the result of the personal act of the plaintiff Claud Allan, and as to Bryce Allan's shares that act was authorized by Bryce Allan. The cases cited by McPHILLIPS, J.A. in *Fitzherbert* v. *Dominion Bed Manufacturing Co.* (1915), 21 B.C. 226, shew that in such cases as this countervailing equities easily arise in

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favour of the Bank, and on the facts here I think such have arisen. I do not mean to hold that double liability, should it become an actuality, will be enforceable against plaintiffs. I do not think it necessary to so decide, and I advisedly leave the question open to be decided in the liquidation should necessity arise. My opinion is that what plaintiffs are entitled to is damages for deceit. The action against the Bank is therefore dismissed with costs. There will be judgment against McLennan for the difference between the amount of money paid by each plaintiff plus interest at 5 per cent. from the date of such payment and the present value of the shares held by each plaintiff. If counsel cannot agree as to such present value, a reference to take place to establish same. In addition McLennan is to indemnify plaintiffs for all costs recovered by the Bank against them in this action, as I consider the litigation between plaintiffs and the Bank to be the direct result of McLennan's letters and conduct. Further, McLennan must indemnify plaintiffs against all liability that may attach to them or either of them in the liquidation because of their ownership of the said shares. Plaintiffs to have their costs against McLennan. All interlocutory costs referred to the trial judge are reserved to enable counsel, as requested, to be heard thereon.

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From this decision the defendant McLennan appealed, and the respondents (plaintiffs) gave notice of appeal under marginal rule 870 for an order that that portion of said judgment dismissing the action against the Bank of Vancouver be rescinded on the grounds (1), that McLennan was agent for the Bank and the Bank is therefore liable for his fraud; (2) that no contract was ever consummated between the respondents and the appellants, and that if such contract was ever concluded it was null and void, and the respondents are entitled to have their names removed from the register of members of said Bank; and (3) if a contract was ever concluded it was induced by misrepresentation, and was avoided prior to the winding up of the Bank, and their names should be removed from the register of members of the Bank. The respondent Bank then gave notice that they would apply to discharge said notice of appeal on the grounds (1), that the plaintiffs failed to

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deliver to the registrar copies of appeal books in the terms of marginal rule 872; and (2) that they failed to procure settlement of an appeal book and deliver the defendant Bank a copy so settled in the terms of section 24 of the Court of Appeal Act.

The appeal was argued at Victoria on the 27th, 28th and 29th of June, 1916, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Maclean, K.C., and *Woodworth*, for appellant.

Mayers, for respondents.

G. A. Grant, for respondent Bank, moved to have the notice of appeal to the defendant Bank discharged. The Bank was not made a party to the appeal, but notice of appeal was served by the respondents (plaintiffs) on the liquidator. I submit they must cross-appeal against the Bank and give fourteen days' notice and file and have settled their appeal books. This they have not done: see *In re Cavander's Trusts* (1881), 16 Ch. D. 270; 50 L.J., Ch. 292.

Argument

Mayers, contra: This is a proper proceeding under marginal rules 870 and 871. It is a case for cross-appeal. All the material is before the Court.

MACDONALD, C.J.A.: I think that this point is not well taken. The rule in its language is quite wide enough to permit of the notice in lieu of a substantive appeal, and it seems to me that is the spirit of the rule that ought to be observed by permitting what was done in this case. The idea was that it should not be necessary to have more than one main appeal in order that all the facts in the Court below might be tried in the appellate Court. With reference to *In re Cavander's Trusts* (1881), 16 Ch. D. 270, it is unnecessary to cast any doubt upon the soundness of that decision because there it appeared that the main appellant was not affected one way or the other, either prejudicially or beneficially by the so-called cross-appeal. Here it is admitted that he might be affected by this appeal. Then that objection is overruled and the motion is dismissed.

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MARTIN, J.A.: I agree, and there is a fuller and better report of the case mentioned in 50 L.J., Ch. 292.

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MCPHILLIPS, J.A.: I am of the opinion that the effect of the rule is that there must be something calling upon counsel to oppose. If there is nothing for counsel to oppose, then there is nothing to affect the client. It is true, though, that this Court can order both appeals to be argued together. In the case referred to, the Court made a direction that a notice of appeal should be served, and we have the same power; and possibly that would have been the order had the majority of the Court been of my opinion; it would only have resulted in this that the costs incurred up to this time would be to the Bank of Vancouver and notice of appeal would have been directed to be served. I think notice of appeal ought to have been given.

Motion dismissed.

Argument

Maclean, on the merits: We say there has been a misjoinder of parties. The Allans made distinct contracts, and they should have been tried separately: see *Smurthwaite* v. *Hannay* (1894), A.C. 494; and after the amendment to the rule see *Compania Sansinena de Carnes Congeladas* v. *Houlder Brothers & Co., Limited* (1910), 2 K.B. 354 at p. 363. The Allans were induced to take shares by distinct and separate representations: see *Sadler* v. *Great Western Railway Co.* (1896), A.C. 450 at p. 453. Separate causes of action cannot be embraced unless they arise out of the same transaction or series of transactions: see *Munday* v. *South Metropolitan Electric Light Co.* (1913), 29 T.L.R. 346. They appeal against the judgment dismissing the action as against the Bank, and, although judgment is against us, we are concerned in the question of including the Bank in the appeal: see *Sadler* v. *Great Western Railway Co., supra.*

On the question of admission of commission evidence, I submit it should not have been allowed. The trouble arose out of the way the long order for the commission was drawn, there being an error in paragraph 8 thereof. The commission was for examination of the plaintiffs in Scotland. An application was made under the slip rule to amend the long order which was allowed. This order was made without material: see

Civil Service Co-operative Society v. *General Steam Navigation Company* (1903), 2 K.B. 756.

Per curiam: The Court is against you, Mr. *Maclean*. There are two reasons why we should support what was done below. In the first place we think the admission of that evidence is in the nature of an interlocutory proceeding. When the commission came back and was produced at the trial, counsel moved for the admission of that evidence upon proving the conditions precedent to having it admitted, that is to say on affidavit, and, having satisfied the conditions precedent, the evidence was admitted. It seems to me that is an interlocutory proceeding in itself. It has not to do with the main question in the action at all, but simply has to do with the admission of a piece of evidence. Apart altogether from that, there is a second consideration, *viz.*, that the short order provided that the long order should be drawn in the form set out in the Appendix. Now there has been a clerical error in the drawing up of the long order, and it seems to us that, under the slip rule, that is something that can be corrected by the judge, having all the facts before him. On the face of the proceedings, all there was to be done was to produce the long order, the short order and the form in the schedule. The mistake was apparent.

Judgment

Maclean: On a case of fraudulent representation they must prove (1), the representations were made; (2), that they were false; and (3), that said representations induced the plaintiffs to enter into the contract. The evidence shews the false representation alleged was not the inducing cause; it was not the question of whether these were a new issue or not that induced them to buy, they must have known the shares were not new, as the power of attorney shewed they were transfers from McLennan.

Woodworth, on the same side: The trial judge's assessment of damages is wrong in principle. It should be the difference between the amount paid and the value of the shares when allotted: see *Davidson* v. *Tulloch* (1860), 3 Macq. H.L. 783 at p. 790; *Goold* v. *Gillies* (1908), 40 S.C.R. 437 at pp. 451-2. McLennan says the shares were his, therefore we should not be compelled to pay the liquidator's costs.

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Mayers, for respondents: On the question of joinder the only difference is that Martin made a certain statement of facts as to the shares to Claud Allan alone and three days later he made the same statement of facts to Bryce Allan. Both cases referred to by my learned friend are no longer law: see *Bedford (Duke of)* v. *Ellis* (1901), A.C. 1 at p. 12; *Drincqbier* v. *Wood* (1898), 68 L.J., Ch. 181. The representations to the plaintiffs were precisely the same. The cause of action must be complete at the date of the issue of the writ: see *Davis* v. *Reilly* (1898), 1 Q.B. 1; *Weldon* v. *Neal* (1887), 19 Q.B.D. 394; *Russell* v. *Diplock-Wright Lumber Co.* (1910), 15 B.C. 66. On the objection to evidence from the examination for discovery of the liquidator see *Gooch's Case* (1872), 7 Chy. App. 207 at p. 212. We contend that there was no contract at all; if there was it is void through the fraud of the sellers, and should be rescinded; and that the Bank was not properly constituted, as there never was any bank nor were there any shares. Martin, who did the negotiating with the plaintiffs, was admittedly an agent. The plaintiffs accepted his offer for shares, and he represented himself as agent for the Bank. There was no contract, as he did not represent the Bank: see *Boulton* v. *Jones* (1857), 2 H. & N. 564; *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459 at p. 456; *Smith* v. *Hughes* (1871), L.R. 6 Q.B. 597 at p. 607; *Fitzherbert* v. *Dominion Bed Manufacturing Co.* (1915), 21 B.C. 226 at p. 230; *International Casualty Co.* v. *Thomson* (1913), 48 S.C.R. 167 at p. 195. If it is found there was no contract, we are entitled to a refund of the money paid: see *Swan* v. *North British Australasian Co.* (1862), 7 H. & N. 603; *Barton* v. *London and North Western Railway Co.* (1888), 38 Ch. D. 144 at p. 149. McLennan deliberately deluded the plaintiffs in letters that a new issue of shares was being sold, and we are entitled to rescission: see *Reese River Silver Mining Co.* v. *Smith* (1869), L.R. 4 H.L. 64 at p. 73; *Henderson* v. *Lacon* (1867), L.R. 5 Eq. 249. In October, 1913, we first knew we did not have new-issue shares. When we repudiated them we were then entitled to restitution: see *Clough* v. *London and North Western Railway Co.* (1871),

L.R. 7 Ex. 26 at p. 35; *In re Hampshire Land Company* (1896), 2 Ch. 743. In point of time as to restitution the time is when the contract is repudiated: see *Clarke* v. *Dickson* (1858), El. Bl. & El. 148 at p. 154; 27 L.J., Q.B. 223; *Adam* v. *Newbigging* (1888), 13 App. Cas. 308 at p. 330; *Head* v. *Tattersall* (1871), L.R. 7 Ex. 7; *Peek* v. *Derry* (1887), 37 Ch. D. 541. As the certificate obtained from the treasury board under section 14 of the Bank Act was obtained by fraud, the Bank was not entitled to do business as a bank. Section 13 of the Act requires them to have $500,000 subscribed, and half of that is to go to Ottawa. It was not the subscribers' money but borrowed money that went to Ottawa. The means whereby the certificate was obtained is wholly contrary to the Act: see *Niagara Falls Road Co.* v. *Benson* (1852), 8 U.C.Q.B. 307. The Bank is liable as McLennan held Martin out as the Bank's agent: see *Lloyd* v. *Grace, Smith & Co.* (1912), A.C. 716 at p. 733; *Citizens Life Assurance Co.* v. *Brown* (1904), A.C. 423 at p. 427; *Patterson* v. *Patterson* (1899), Times Ap. 29, cited in Phipson on Evidence, 5th Ed., 447. McLennan's fraud was in telling people Martin was an agent of the Bank: see *Cave* v. *Cave* (1880), 15 Ch. D. 639; *Dobell* v. *Stevens* (1825), 3 B. & C. 623; *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1. On the question of McLennan paying the Bank's costs see *Sanderson* v. *Blyth Theatre Company* (1903), 2 K.B. 533; *Bullock* v. *London General Omnibus Company* (1907), 1 K.B. 264.

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Maclean, in reply: The correspondence shews the transaction was between McLennan and Martin and not between the Bank and Martin: see *Bradley* v. *Riches* (1878), 9 Ch. D. 189; *Stewart* v. *Cunningham* (1915), 21 B.C. 255. As to compliance with the Bank Act in obtaining the certificate from the treasury board, it was held in *McLennan* v. *Kinman* (1916), 22 B.C. 414, that it was properly obtained. The plaintiffs have already issued execution against McLennan, and now have no remedy against the Bank: see *French* v. *Howie* (1906), 2 K.B. 674; *Morel Brothers & Co., Limited* v. *Earl of Westmorland* (1904), A.C. 11.

Grant, in reply: If any irregularity as to the Bank's certifi-

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cate be attacked, the Attorney-General must be a party: see Cook on Corporations, 7th Ed., Vol. 1, p. 29; Vol. 2, p. 1948.

Cur. adv. vult.

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MACDONALD, C.J.A.: The first question, and one which, if decided in appellant's favour, may save consideration of the appeal on the merits, is one of parties.

The plaintiffs are several purchasers of shares in the capital of the Bank of Vancouver. They purchased separately and on different occasions 50 shares each. They sued in this action, in which the Bank was joined as party defendant with the appellant, for rescission of their contracts, or, in the alternative, for damages for deceit against the appellant. The learned judge dismissed the action as against the Bank and gave judgment against the appellant for damages. Objection was taken by appellant's counsel at the opening of the trial to what he contended was misjoinder of plaintiffs. The learned judge did not give full effect to this objection, but, as I understand it, proceeded to try the action as if there were two separate actions brought by the plaintiffs respectively. This course I do not think was warranted. If the learned judge thought there was misjoinder the better course, in my opinion, was to have called upon the plaintiffs to elect which should remain in. I think what the learned judge really did in the result was to try the action as if both plaintiffs were proper parties.

On the question of whether the plaintiffs were rightly joined I have to consider the meaning of Order XVI., r. 1, of the Rules of the Supreme Court as applicable to the facts of this case. The respective sales were negotiated by one Martin, whom the judge found to have been the appellant's agent. Martin received his instructions partly by word of mouth and partly in writing from the appellant. On these instructions and with the writing in his hands, which were shewn to at least one of the plaintiffs, he made the representations which the learned judge found to have been fraudulent, not on the part of Martin, but on the part of the appellant. On the strength of these representations Martin succeeded in effecting sales to the respondents severally on separate occasions. The representa-

tions in substance were that the shares offered were the property of the Bank, and that the moneys to be received therefor would belong to the Bank, whereas, unknown to Martin, they were the individual shares of appellant, who would receive the proceeds of the sales. The learned judge has found that these representations were relied upon by the respective plaintiffs and induced them to purchase shares. The plaintiff Bryce Allan was told by Martin that his brother, Claud Allan, had agreed to subscribe for shares, and this statement induced Bryce Allan to inquire less carefully into the matter than he otherwise would have done, but there is no doubt the evidence on the whole bears out the learned judge's finding that Martin did make to Bryce Allan the same false representations that he had previously made to Claud Allan. In my opinion there was no misjoinder of plaintiffs. Appellant's counsel placed his main reliance on *Stroud* v. *Lawson* (1898), 2 Q.B. 44. There the plaintiff sued the directors of a company for damages for fraud in inducing him to take shares. He joined with this claim a claim on behalf of himself and all other shareholders to have it declared that a certain dividend paid out of the capital was *ultra vires* of the company. The Court of Appeal held that in effect there were two plaintiffs, Stroud in his individual capacity, and Stroud in his representative capacity, and that their respective claims did not arise out of the same transaction or series of transactions. If I may say so, that seems reasonably manifest. The declaration of dividends and the sale of shares have no fundamental connection with each other. But in the case at bar Martin was deputed by appellant to sell a specified number of shares, *viz.*, 2,000, and it was clearly in the minds of both that these shares would not be sold *en bloc* to one person but to several persons in what I think may be fairly called a series of transactions in respect of that block of shares. I see no distinction in principle between sending forth a living solicitor and an inanimate one. In *Drincqbier* v. *Wood* (1899), 1 Ch. 393, plaintiffs were held properly joined in one action for deceit, who had severally purchased shares in a company on the faith of a false prospectus. While I am not free from doubt, yet, having regard to the object of the rule as extended in scope by the amendment to the English rule in 1896, from which our

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rule is copied, and the facts as above recited, I do not think I ought to disturb the judgment on this ground of appeal.

On the merits, I think the judgment appealed from is wrong in one particular, as was admitted by respondents' counsel during the argument before us. It is the difference between the value of the shares at the time respondents discovered the fraud and what they paid for them with interest, which is the true measure of damages, not "the difference between the amount of money paid by each plaintiff plus interest at 5 per cent. from the date of such payment and the present value of the shares." The learned judge left it to the parties to agree upon the amount of damages calculated on this basis, and, in the event of failure to agree, ordered a reference. With the variation above indicated, and the one about to be referred to, the judgment should be affirmed.

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The judgment appealed from ordered the appellant to indemnify each of the plaintiffs against all "calls, claims, costs, charges or other liabilities whatsoever which may at present or at any time attach to the said plaintiffs or to which the said plaintiffs may become liable by reason of his ownership of the said shares of the defendant Bank or any of them." This term in the judgment is, in my opinion, wrong. The measure of damages to be awarded each plaintiff will be the difference in value of the shares, with all their incidents, and what was paid for them. Hence, assuming that the Court could make an order respecting contingent future loss in an action of this kind, which I do not grant, that matter is already provided for in the measure of damages.

The appellant should have the costs of the appeal on the issues upon which he has succeeded, and the costs of the cross-appeal, which I would dismiss. The respondents should have the costs of the issues in the main appeal on which they have succeeded.

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MARTIN, J.A.: At the outset the objection to the jurisdiction taken during the trial, raised by section 12 of the defence, and renewed and urged here, that there has been a misjoinder of parties, must be met. What happened at the opening of the trial was, that when the objection was raised by both defend-

ants to the joinder of the plaintiffs, as not being within rule 123, and that therefore there was no jurisdiction to combine two distinct causes of action in one suit, the learned trial judge refused the motion to strike out one of the plaintiffs, but he expressed the opinion that—

"I do not think these cases should ever have been joined, but I am not strong enough to say it was not possible to join them to the extent of saying I must strike one out. I think the language of the rules is wide enough to allow this sort of thing to be done, but I think if it had been objected to in the early stages the cases would have been brought separate. I propose to separate them now if either counsel desires me to do so.

"Mr. *Martin*: I do. As far as the Bank of Vancouver is concerned it is very necessary.

"Court: I am going to separate them. I will proceed with either case, and try them separately."

And later he went on to say:

"I will proceed to try the cases now consecutively and you can take whichever one you want."

Plaintiffs' counsel then took up Claud Allan's case, and judgment upon it, and upon that of Bryce Allan, was reserved, and in the formal judgment of the Court both the plaintiffs are still kept as such upon the record. I pause here to say that it is clear to my mind there was no waiver by Mr. *Woodworth* of his objection to the misjoinder, which had been raised in the morning and continued after the mid-day adjournment: on the contrary, indeed, it was decided in his favour, but the learned judge adopted an intermediate course, for which, in my opinion, there is no warrant. The position was either that there was no misjoinder, in which case the trial would proceed with both the proper plaintiffs upon the record; or that there was a misjoinder, in which case the name of one of the plaintiffs must be removed or struck out of the record in default of their counsel making the necessary election, as directed in, *e.g.*, *Stroud* v. *Lawson* (1898), 2 Q.B. 44; 67 L.J., Q.B. 718; 78 L.T. 729. In other words, unless the situation was cured by rule 123, the Court had no jurisdiction to try what were really two distinct causes of action at the same time: the place for separation of them was primarily upon the record, and there could not be a proper trial of one cause upon a defective record of two causes. Before the trial could proceed of either, the formal separation of both must be made, and there could

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in law be no separation in fact while both were allowed to remain upon the same record.

Turning, then, to rule 123, what is necessary here to determine is, can the two sales of shares in question be viewed as "arising out of the same transaction or series of transactions," and does "any common question of law or fact" arise? Beyond all question, the sales of these two parcels of shares to the two Allans were two entirely distinct matters, or as Claud Allan puts it, his "transaction" was "an independent one," made "with Martin alone," and his brother Bryce "bought his shares quite irrespective of (me)." Claud Allan purchased his shares on or before the 22nd of June, 1912; Bryce Allan did not buy his till the 4th of July, and there was no connection whatever between the two transactions. At the meeting with the former, Martin went into the matter at length and made statements and shewed and discussed letters from the president of the Bank that were not made to or discussed with the latter, who frankly says that he knew of the prior sales to Claud Allan and various other people, and "I assumed like a fool that they had made inquiries regarding the Bank and all that sort of thing"; and that he was "lax in not inquiring regarding Martin's representations. . . . . I was relying on someone else doing it." He, Martin, did, however, make the same substantial representation to both of them that these were new-issue shares. These being the facts, what is the state of the law upon them? I have examined many authorities, and I think the leading case upon the point is now *Stroud* v. *Lawson, supra,* a unanimous decision of the Court of Appeal, reversing Darling, J., and wherein is to be found, in my opinion, the clearest exposition of the rule. In that case it was decided that even where there was only one plaintiff in name upon the record yet he could not be allowed to sue in two capacities on separate causes of action which did not arise out of the same transaction or series of transactions, and he would in law be regarded as two separate plaintiffs. It was pointed out that there were two conditions precedent to the application of the rule, *viz.,* existence of the "same transaction or series of transactions," and "the common question of law or fact," and it was laid down that the presence of a "common feature" does not make two transactions the

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same. Lord Justice Vaughan Williams, at p. 722 of the Law Journal report, gives the following lucid illustration of his views on the meaning of "same transaction or series of transactions":

"I do not read these words as meaning that the whole transaction or the whole series of transactions must be involved in both actions. It seems to me that if there is a series of transactions or one transaction, in respect of which one plaintiff is interested up to a certain point and the other plaintiffs are interested not only up to that point but in the entire transaction or series of transactions from beginning to end, the plaintiffs may bring their actions in respect of different causes of action in one action, because there would be a transaction or series of transactions in respect of which all the plaintiffs had a common interest. The remedies might be different, the damages might be different, but up to a certain point both would be complaining of the same transaction or series of transactions."

This language contemplates a continuous thread of interest carried through the "entire" series from beginning to end. In the case at bar it is clear the "transaction" is not the same, and the only hope for success lay in presenting it as one of "a series of transactions" which it certainly is not within said definition, but two disconnected sales of different shares. Can it be said that the rule contemplates the joinder of two such distinct causes of action as *e.g.,* where the travelling salesman of a Victoria publisher sold on a false representation a set of Shakespeare's works to John Doe in Victoria, and next week, on another and different representation, sold a set of Ibsen's works to Richard Doe in Prince Rupert? *Stroud* v. *Lawson,* not so strong a case, clearly shews it does not, and the principle would not be altered even if another copy of the same edition of Shakespeare had been sold to the second purchaser on the same representation. A succession of disconnected transactions of the same kind, each complete in itself, is not, legally speaking, turned into a "series" simply because the representation in each case was the same, because the necessary thread of continuity "from beginning to end" is lacking. If it is, what is to be said of a situation of, say, three similar transactions, the first made on one representation, the second on a different one, the third on the same as the first? Clearly, there is no series in such case, which demonstrates the soundness of the "continuous thread" test. Yet if we hold the case at bar is within the rule then the

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said disconnected sales of books would be a "series of transactions," as also on the same principle would be the sale of bad cheeses of the same kind over the same counter by a grocer to different customers, on a different, or the same, misrepresentation. The "transaction" is the sale itself, brought about by the salesman, and is not the direction to and sending forth of the servant by the master. As Vaughan Williams, L.J., at p. 72 of the Law Times report, said:

> "The transaction . . . . . consists in deceiving the plaintiff by false representation into becoming a shareholder."

I am not at all prepared to go to such unsuspected, not to say preposterous lengths, and give a meaning to "series" which is foreign to the subject-matter of the rule and the amendment sought to be affected thereby.

In *Universities of Oxford and Cambridge* v. *George Gill & Sons* (1899), 1 Ch. 55, and *Walters* v. *Green* (1899), 68 L.J., Ch. 730, Stirling, J. applied *Stroud* v. *Lawson* and held that the rule covered the joinder of plaintiffs as being an action arising out of the "same transaction or series of transactions"; and Byrne, J. applied the same case in *Drincqbier* v. *Wood* (1898), 68 L.J., Ch. 181. I see no reason to differ with these applications on the facts of those cases when carefully examined, but in none of them do I find anything that interferes with my view of the case at bar, but if there should be anything then it is not in accord with the governing decision of *Stroud* v. *Lawson,* and should not be followed. I only add as regards *Drincqbier* v. *Wood* that it is clearly, in any event, distinguishable from this case, because the decision there turned upon the express point that it was the "same transaction," Byrne, J. saying:

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> "All the plaintiffs allege their right to relief to arise out of the issue of the prospectus containing false statements, and therefore out of the same transaction."

But it is admitted here that the transaction is not the same, and the question depends on the meaning of "series of transactions," upon which the *Drincqbier* case sheds no light, though a safe guide is to be found in *Stroud* v. *Lawson* already cited. It should also not be overlooked that Byrne, J. admitted there was "some difficulty" in finding that the action was properly

brought, and it must be confined to the facts then before him as the Lord Chancellor laid it down in *Quinn* v. *Leathem* (1901), A.C. 495 at p. 506, as follows:

". . . . There are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all. My Lords, I think the application of these two propositions renders the decision of this case perfectly plain, notwithstanding the decision of the case of *Allen* v. *Flood* (1898), A.C. 1."

I note, by way of precaution, that the difference between the cases of rule 123 and rule 131, relating to representative actions, is pointed out by Fletcher Moulton, L.J. in *Market & Co.* v. *Knight Steamships Co.* (1910), 79 L.J., K.B. 939.

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The result is that the appeal should be allowed, the judgment set aside, and the case referred back to the learned trial judge to follow the course indicated in *Stroud* v. *Lawson,* instead of proceeding with the trial without jurisdiction. The question of the costs below should, I think, be determined by him. It is worthy of notice that in the *Drincqbier* case the objection to the misjoinder was raised as a preliminary one at the opening of the trial, as it was here.

McPHILLIPS, J.A.: This is an appeal from the judgment of MURPHY, J. in an action for rescission of contracts for the sale of shares of the Bank of Vancouver or, in the alternative, damages. The learned trial judge held against rescission and dismissed the action as against the Bank, but gave judgment for the plaintiffs severally against the appellant McLennan, as and for damages in deceit. Against this judgment the appellant McLennan appeals, and the respondents cross-appeal from the judgment dismissing the action as against the Bank.

MCPHILLIPS, J.A.

The learned counsel for the respondents, in his very careful and clear argument, stated that he was content with the judg-

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ment of the learned trial judge, but that the cross-appeal was brought to cover any possible eventualities in the appeal.

The first point that needs consideration is the question as to whether the plaintiffs were rightly joined in the one action, and this involves the consideration of marginal rule 123 (English Order XVI., r. 1), and the case that requires consideration is *Stroud* v. *Lawson* (1898), 67 L.J., Q.B. 718. See *per* Chitty, L.J. at p. 720, and Vaughan-Williams, L.J. at pp. 721 and 722. And in *Market & Co.* v. *Knight Steamships Co.* (1910), 79 L.J., K.B. 939, see *per* Fletcher Moulton, L.J. at p. 947.

Now, in the present case, the action is in respect of the sale of shares, no doubt separate contracts, but contracts made by the plaintiffs with the agent of the appellant McLennan, and upon representations made by the agent, who received his instructions and the *data* upon which to make the representations directly from the appellant McLennan. The only apparent difference, upon the evidence, in respect to the two plaintiffs is that more was said perhaps to one plaintiff than to the other, but in the main the same representations were made—the salient facts may be said to be the same. The representation common to both causes of action in the plaintiffs was the representation that the shares were "new-issue shares," and the money paid therefor would be additional capital of the Bank.

MCPHILLIPS, J.A.

This likens the present case to *Drincqbier* v. *Wood* (1899), 68 L.J., Ch. 181, where Byrne, J. at p. 182 said:

> "The entering into the contracts was a separate transaction. All the plaintiffs allege their right to relief to arise out of the issue of the prospectus containing false statements, and therefore out of the same transaction. I do not consider that the word 'transaction' in the rule necessarily implies something taking place between two parties, as, for example, where a collision between two ships causes damage or houses are shaken down by a traction-engine passing along a highway, which are cases where the transaction is the same. It is perfectly true that to establish their respective rights to relief the plaintiffs must prove their title to relief on distinct evidence."

(Also see *Walters* v. *Green* (1899), 2 Ch. 696; *Universities of Oxford and Cambridge* v. *George Gill & Sons* (1899), 1 Ch. 55; *Ayscough* v. *Bullar* (1889), 41 Ch. D. 341; *Bedford (Duke of)* v. *Ellis* (1901), A.C. 1).

The present case may be said to fit in exactly with the

language of Vaughan Williams, L.J. in *Stroud* v. *Lawson, supra,* at p. 722:

"I do not read these words as meaning that the whole transaction or the whole series of transactions must be involved in both actions."

In my opinion, there has been no misjoinder of plaintiffs in the present case, but were I wrong in this, the appellant McLennan is late in taking the objection. His course was to promptly apply by summons for an order that the proceedings be set aside on the ground that the plaintiffs were improperly joined, or that they be stayed unless the plaintiffs elected which of them would proceed and that the other be struck out (see *Smurthwaite* v. *Hannay* (1894), A.C. 494; and *Sandes* v. *Wildsmith* (1893), 1 Q.B. 771). Further, the course adopted by Mr. *Woodworth,* counsel for the appellant McLennan, at the trial, precludes this point being now pressed:

"Mr. *Woodworth*: I wish to take a point, my Lord. My point is, if the joindure of the two parties was improper. If your Lordship should find against me on that, and say that the action as it has come up is a live action at the present time, and that all this evidence has been taken and must be put in—I may say I have not read all this evidence—but there being no jury I believe then that the matter had better proceed together, because I do not believe your Lordship would find any difficulty in deciding it. My point is that the action has been wrongfully conceived, and I warned them of that in my pleadings when I put in my defence.

"Court: That is the point we are now considering.

"Mr. *Woodworth*: If I am right, the action is a misconception and they ought to pay the costs and commence over again.

"Court: That is on the question of whether the two plaintiffs should be joined?

"Mr. *Woodworth*: Yes."

Now, having arrived at the point that the action rightly proceeded to trial, the question is, whether the learned trial judge arrived at the right conclusion in allowing damages as and for an action in deceit, being the alternative claim to that of rescission?

It may be said that upon the facts a case was made out for rescission. As I think it was possible to place the parties *in statu quo,* I am not, though, to be understood as in any way disagreeing with the course the learned trial judge pursued, or his holding that it was not a case for the removal of the respondents' names from the share register of the Bank. The rescission, of course, in any case would only have been as

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between the respondents and the appellant McLennan—there was no contract between the respondents and the defendant Bank to rescind.

However, the respondents brought the action in the alternative form, and cannot be now heard to complain that one rather than the other relief has been granted.

In *Clarke* v. *Dickson* (1858), El. Bl. & El. 148, 155 (113 R.R. 583); and *Clarke* v. *Dickson* (1859), 6 C.B.N.S. 453 (120 R.R. 217), we have two actions, which in the end resulted in the relief being granted which has been granted in the present case.

I am in complete agreement in the present case with the learned trial judge upon the facts, and do not think it necessary to review those facts. There was, in the language of Cockburn, C.J. in *Clarke* v. *Dickson* (1859), 6 C.B.N.S. 453 at p. 470, an "important misrepresentation" made by the agent of the appellant McLennan that the shares sold were "new-issue shares" and the moneys would be new capital going to the Bank, and that misrepresentation was made upon instructions and letters going directly from the appellant McLennan to his agent, with the intention to be communicated, as they were, to possible purchasers, and these misrepresentations were made to the plaintiffs, and that they were, in the language of Cockburn, C.J., appearing at the same page (470) in the last case above cited, "calculated to exercise a material influence upon the minds of persons who became shareholders is too plain to admit of doubt."

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The evidence is clear that the plaintiffs, relying upon the representations which were false and fraudulent, were induced to purchase the shares, and the contention upon the part of the respondents is that the shares are in fact of no worth or value whatsoever.

The law which requires consideration in the present case is well stated in Halsbury's Laws of England, Vol. 20, p. 740, par. 1750.

With great respect, I am of opinion that the learned trial judge went wrong in his judgment when he said:

"There will be judgment against McLennan for the difference between the amount of money paid by each plaintiff plus interest at 5 per cent.

from the date of such payment and the present value of the shares held by each plaintiff."

And as I understand it, the learned counsel for the respondents admitted in argument in the appeal that the learned judge was in error in so deciding.

As we have seen in *Clarke* v. *Dickson* (1858), El. Bl. & El. 148, Lord Campbell, C.J., at p. 155 said, "he will recover, not the original price, but whatever is the real damage sustained."

Also with great respect, I cannot agree with the learned trial judge when he says:

"McLennan must indemnify plaintiffs against all liability that may attach to them or either of them in the liquidation because of their ownership of the said shares."

In granting the relief alternatively claimed, it must be based upon the premise that the respondents elected "to adhere to the contract" (Halsbury's Laws of England, Vol. 20, p. 740, par. 1750), but that notwithstanding this, the respondents were entitled to damages for the fraudulent representations, and these damages have to be assessed upon the basis of the respondents having elected to retain the shares, and in the assessment of damages what is to be found is "the real damage sustained": Lord Campbell, C.J. in *Clarke* v. *Dickson* (1858), El. Bl. & El. 148 at p. 155.

The damages will have to be assessed upon the correct principle, the cross-appeal to be dismissed.

Appeal allowed in part, Martin, J.A. dissenting.

Solicitor for appellant: *C. M. Woodworth.*
Solicitor for respondents Allan: *H. Despard Twigg.*
Solicitors for respondent Bank: *Cowan, Ritchie & Grant.*

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IN RE DICKIE, DE BECK & MCTAGGART AND SHERMAN

IN RE DICKIE, DE BECK & McTAGGART AND SHERMAN.

Solicitor and client—Costs—Reference to taxing officer—Question of fact—Onus of proof.

The decision of the registrar on a question of fact on a reference with regard to a solicitor and client bill of costs, will not be interfered with by the Court of Appeal, unless convinced he is clearly wrong (GALLIHER, J.A. dissenting).

Statement

APPEAL by the solicitors from an order of GREGORY, J., on appeal from the registrar's taxation of a solicitor and client bill of costs under order of MACDONALD, J. of the 18th of October, 1915. The dispute centred on a charge that was made for printing the appeal book in the case of *Scottish Canadian Canning Co.* v. *Sherman* (1915), 21 B.C. 338. Sherman stated there was an agreement between himself and the solicitors that in any event there was to be a charge of $150 only for printing the appeal book. Mr. Dickie, a member of the firm of solicitors, swore the arrangement was that if they lost the appeal the charge would be $150, but if they won the regular tariff charges would be made. They were successful on the appeal. The registrar did not allow any charge for printing the appeal book. The learned judge below allowed $150, from which this appeal was taken.

The appeal was argued at Vancouver on the 6th of December, 1916, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

C. W. Craig, for appellants: The charge for the appeal book according to the tariff is $804. The registrar did not allow even the $150, according to the arrangement as alleged by Sherman. This amount the Court below allowed. The burden is on Sherman to shew we are not entitled to the tariff allowance. The finding of fact by a registrar should be more readily overruled: *Pratt* v. *Idsardi* (1915), 21 B.C. 497 at p. 500; *Gillies* v. *Brown* (1916), 53 S.C.R. 557 at p. 558.

A. D. Taylor, K.C., for respondent: The registrar chose to accept Sherman's statement, and that settles the case. The Court will not interfere with the registrar's finding of fact, except upon strong grounds.

MACDONALD, C.J.A.: I think the appeal should be dismissed. I say this with a good deal of regret, because if the case were before me as of first instance, and I had to decide, apart from the impression I might get from the demeanour of the witnesses, I should give the decision for the solicitor.

The onus of proving a retainer is upon the solicitor. The retainer had been accepted before this alleged agreement was made, and therefore the relationship of solicitor and client subsisted some weeks before this, and the solicitor would be entitled to such costs as the tariff of costs would give him, as against his client. The client, however, sets up a special agreement with respect to the appeal book, and, in my opinion, the onus of proof is upon him to shew there was such an agreement. The evidence consists of an assertion of that agreement, by the client, and a denial of it, in a modified way, by the solicitor. That is to say, the client says $150 in any event, and the solicitor says he only agreed to accept $150 in a certain event. The onus was clearly upon the client to prove this special agreement which was to displace, to a certain extent, the general agreement subsisting between them arising out of the retainer. If the learned registrar was in doubt which story he ought to believe, he should have held that the onus on the client had not been satisfied, but where he accepts one story as against the other, we should be violating one of the salutary rules which govern Courts of Appeal if we were to interfere with his decision, on a question of fact, unless convinced he was clearly wrong. The fact that he is an officer, and not a judge, is not very material. If the question had been tried by a jury, I do not think counsel would have brought it to this Court, or if the case were decided by a judge of the Supreme Court or the County Court, I venture to think the solicitors would not have appealed to this Court. The fact that the finding is that of the registrar of the Court is not very important, as while we are perhaps not bound to give

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quite as much weight to his decision as we should to that of a judge, still we must give weight to it, and giving the weight which I think is due to the finding of the registrar, I would not set it aside.

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MARTIN, J.A.: I have reached the same conclusion. The rule in regard to the registrar is the same in principle, though, as was observed by the Supreme Court of Canada in *Gillies* v. *Brown* (1916), 53 S.C.R. 558, it has been less strictly observed. As I pointed out during the argument, this case is one which is peculiarly open to the formation of opinion upon demeanour, because of the conflict between the parties, conflict in a very unusual degree; almost a dramatic degree. On the cross-examination of the client by the solicitor, the registrar had an unusual opportunity of discovering the truth. I have not arrived at my opinion based upon any question of onus, because I think the circumstances are so peculiar that the decision of the registrar on this pure question of fact should carry such unusual weight that I should not feel justified in disturbing it. But if it came to a question of onus I should have some difficulty in deciding the way to answer that question. In the case of *In re Baylis* (1896), 2 Ch. 107 at p. 119, Kay, L.J. said:

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> "In any case of an agreement between solicitor and client the Court must consider the great influence which a solicitor has over his client, and if the agreement is impeached it must throw on the solicitor the burden of sustaining it."

Undoubtedly in the case of a retainer the onus is upon the solicitor to sustain it. Are we able to say that the same burden does not exist where a special agreement is sought to be proved? I refrain from expressing any positive opinion on the question of onus, and simply say, whatever it may be, the case is one which does not justify our disturbing the finding of the registrar.

GALLIHER, J.A.: I would allow the appeal. Without discussing the question of onus, I proceed simply on the evidence as it is. I am clearly of opinion that the registrar came to an erroneous conclusion on the evidence.

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When it came to taking this appeal, the success or non-success

of the appeal, admittedly, according to Sherman's own evidence, meant a great deal to him, not only from a financial standpoint, but from a character-clearing standpoint. And not being, I think he says, desirous of incurring heavy expense in the matter, made a special agreement with the solicitor in this case. His statement is that the solicitor agreed that the preparation of the appeal book would cost him $150, and that was an end of his liability. On the other hand the solicitor says, no, the arrangement was that that would be the extent of his liability in case he lost the appeal, because it was a matter where, in case he lost the appeal, he would be bankrupt or ruined. It is not reasonable to presume that a solicitor would make a bargain in the event of winning the appeal, that he should charge him nothing for his services, except a stated sum which did not include anything like the fees for services in connection with the preparation of the appeal book. I say that is not reasonable to begin with, but I do not come to my conclusion on that alone. I only mention it as viewing it from the standpoint of whether it would be reasonable or unreasonable to presume.

GALLIHER, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal should be dismissed. I consider that it is a fundamental principle, that in matters of contract and agreement between solicitor and client, the responsibility is upon the solicitor to establish that agreement against the statement of his client. If a solicitor buys or intermeddles with property of his client, such dealings are set aside; the law will not support them. Now, in this particular case, in the first place, there was some agreement; that is common ground. In the second place, the circumstances are such that it seems not unreasonable that the agreement, as deposed to be by the client, was the one that was come to. On the question of retainer, the onus is on the solicitor that there was a retainer, and not being in writing, it is not accepted against the client's statement. I am putting both parties upon an equal ground of credibility. There runs through all the cases, that which seems right and proper in the administration of justice, that if a solicitor will make an agreement with a client, then he must be able to shew what that agreement is,

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and if it is not in writing, then it seems to be that the client's statement must be accepted. If he makes an agreement, then let him make it in writing as a prudent solicitor with a client, disclosing all the facts and circumstances.

Appeal dismissed, Galliher, J.A. dissenting.

Solicitors for appellants: *Dickie & De Beck.*
Solicitor for respondent: *T. J. Baillie.*

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ROBERTS v. MACDONALD

ROBERTS v. MACDONALD *ET AL.*

Company law—Liquidation—Directors—Personal interest in company's dealings—Liability—Winding-up Act, R.S.C. 1906, Cap. 144, Secs. 94-100.

M., a solicitor, whose firm financed a company by which a large indebtedness accumulated, acted as the company's solicitor, for which he was paid a stipulated sum monthly. He obtained one share and became a director in the company largely for the purpose of protecting his firm's interest. The debt to the firm was secured by some of the individual directors and by an assignment of an agreement for sale made by the Canadian Pacific Railway to the company of 1,100 acres of timber lands on which $2,000 was owing. Later a sale was made of the Canadian Pacific Railway's timber lands to E. & W. at $7 an acre, the terms being $2,000 down and balance in payments extending over some years; this sale was brought about by M.'s efforts, for which he received a commission of $268.87. E. & W. purchased in order to sell at an advance to a certain group of persons (including themselves), and later carried out this sale. M. was not interested at the time of the sale, but later became interested in the purchasing group. The directors held all the shares in the company. On the company going into liquidation the liquidator brought action against the directors for misappropriation and dissipation of the company's assets. The case narrowed down to a claim against M. in respect to three items: (1) his remuneration as solicitor for the company; (2) the item of $268.87 for commission; (3) the profit obtained from his interest in the purchasing group of the Canadian Pacific Railway lands.

Held, on the facts, that the claims do not come within the provisions of the Winding-up Act, nor do they give rise to any statutory presumption which is not refuted by the evidence.

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ROBERTS v. MACDONALD

ACTION by the liquidator against the directors of the Cranbrook Saw Mills Company for misappropriating and dissipating the assets of the Company, tried by CLEMENT, J. at Cranbrook on the 10th of June, 1916. The facts are sufficiently set out in the head-note and reasons for judgment.

Statement

Hamilton, K.C. (*Mecredy*, with him), for plaintiff.
McCarter (*Nisbet*, with him), for defendants.

8th December, 1916.

CLEMENT, J.: With two trifling exceptions, to be noticed later, the contest in this case narrowed down at the trial to a claim against the defendant Macdonald in respect of three items. Before dealing with them, a short statement is desirable of the material facts as I find them on the evidence. The plaintiff is the liquidator of the Cranbrook Saw Mills, Limited, a company incorporated under the Companies Act of this Province, which is being wound up under an order of this Court, dated the 11th of June, 1915, made pursuant to the Dominion Winding-up Act. The company was incorporated in December, 1910, to carry on a lumber business, and its assets consisted of certain plant and an assignment from its president, the defendant Futa, of three agreements; the first, a lease or licence to cut timber upon what is called, in the evidence, the Burton tract of some 1,000 acres; the second, a lease of a mill site; and the third, an agreement of sale of certain timber lands from the Canadian Pacific Railway, containing some 1,100 acres. I rather gather that the company's enterprise was in part commercial and in part (as to the Canadian Pacific Railway lands) a real-estate speculation. The sole shareholders during all material times, and in fact at all times to the present, were the five defendants, all of whom were also directors. The defendant Macdonald was also the duly-appointed solicitor of the company at $50 per month, the company's articles providing that such an appointment should not vacate his position as director. The company was very largely

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financed by the firm of which the defendant Macdonald was a member, and I infer that he took one share and was a director largely with a view to protecting his firm in respect of its advances to the company. As security for such advances, various securities were given by the company as well as by certain of the individual shareholders. Amongst others, an assignment of the Canadian Pacific Railway agreement of sale was given to the defendant Macdonald, acting as trustee for his firm.

The commercial end of the company's enterprise proved a failure, with the result that in the fall of 1911 the company was left with the Canadian Pacific Railway's land, the mill site and plant, and an indebtedness of several thousand dollars to the firm of which the defendant Macdonald was a member. The other debts were comparatively trifling—a few hundred dollars. And so matters stood until the summer of 1912. Then one Ralph offered the company $7 an acre for the Canadian Pacific Railway land, $2,000 or thereabouts in cash and the balance in payments extending over some years. The company inclined to accept the offer. As there was still over $2,000 owing to the Canadian Pacific Railway, and the claim of the defendant Macdonald's firm was then between $4,000 and $5,000, the resultant situation would be awkward and complicated, and much would hinge on the financial standing of Ralph, a Winnipeg speculator. Ralph's offer was declined, or at least not accepted; and instead, largely through the efforts of the defendant Macdonald, a sale was made to Elwell & Ward, two local men of Cranbrook, at the same figure as Ralph had offered, *viz.*, $7 per acre. It is quite true that Elwell & Ward intended from the first to "syndicate" the property—in other words, to sell it at an advance to a larger group, including themselves—but it was no part of the scheme that the defendant Macdonald was to be one of such larger syndicate. Afterwards he did take an interest, and that circumstance is now strongly put forward against him. It is well to consider just how the arrangement actually carried out affected the company and the firm of which the defendant Macdonald was a member. The company was given credit for the full purchase price of $7 an acre, less what the company's secretary called a "dis-

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count" of $268.87 in entering the item in the company's books, but what was really in the nature of a commission or remuneration to the defendant Macdonald for his efforts in arranging what, so far as the company was concerned, was a cash transaction. Besides this, the firm surrendered all the other securities it held from individual shareholders. The company, therefore, was relieved of all liability to the defendant Macdonald's firm and to the Canadian Pacific Railway. On the other hand the firm had to complete the payments to the Canadian Pacific Railway, and then look to the members of the buying syndicate for the ultimate repayment of such payments to the Canadian Pacific Railway and of the balance due on the firm's advances to the company. Later on, as I have intimated, the defendant Macdonald agreed to become a member of the larger syndicate formed or procured by Elwell & Ward, and, in that connection, stipulated that he should share in the profit to be made by Elwell & Ward on the resale at an advance to the larger syndicate. Owing to the state of the title, the arrangement took legal form as an agreement by the defendant Macdonald as vendor and the members of the larger syndicate, including the defendant Macdonald, as purchaser; but I am quite persuaded that the real transaction was as I have above stated. Apart from the evidence afforded by the document itself, there is no evidence to controvert the statement made by Ward, a witness for the plaintiff, and by the defendant Macdonald. The contest, then, as I have said, narrows down to the three items: first, the remuneration paid or allowed to the defendant Macdonald as the company's solicitor; second, the item of $268.87 allowed as a "discount" as above particularized; and third, the profit which the defendant Macdonald stipulated for with Elwell & Ward.

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The transaction of 1912, above detailed, was treated by the company as ending their relations with the defendant Macdonald and his firm, and is so entered up in the company's books. Now, in 1916, the plaintiff, as liquidator of the company, seeks to reopen this stated account and charge the defendant Macdonald in respect of the three items above mentioned. As representing the company it seems to me clear that he cannot do so. As between the defendant Macdonald and the company,

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its directors and each of its shareholders, the whole transaction was open and above board. Item No. 3 is a matter between the defendant Macdonald and the other members of the syndicate. In a winding-up, however, the liquidator is entitled by statute to attack certain kinds of transactions, which the company itself would be debarred from questioning. Only in the interests of or as representing creditors has the plaintiff any *status* here to attack; and on a perusal of the sections of the Winding-up Act (94-100), it is, in my opinion, impossible to bring the facts of this case within them. The facts do not even give rise to any statutory presumption, but if they did, any such presumption is more than rebutted by the evidence.

As regards the defendant Macdonald, therefore, the action must be dismissed with costs; and I feel it only right that I should express my regret at seeing upon the record sweeping charges of fraud and misappropriation in respect of transactions which the least inquiry on the spot would have shewn to be honest and business-like.

I referred, in opening, to two trifling exceptions to the statement that the contest at the trial narrowed down to an attack on the defendant Macdonald. Those exceptions are these: It appears from the books that the president of the company (the defendant Futa) was a creditor of the company for the sum of $494, and that the defendant Nichigama was also a creditor for $222.80. Futa's account is closed in the books with the entry:

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"Aug. 1/12. This account is settled by giving safe and office fixtures for $494.00,"

while Nichigama's account is closed with this entry:

"June 31. Gave truck and other consideration use of team $122.80,"

leaving a balance due Nichigama of $100. No argument was addressed to me as to these two defendants. I incline to the view that sufficient is not shewn to bring section 98 into play, but if the plaintiff desires it, I will hear argument upon the point. Otherwise the action will be dismissed without costs as against the defendants other than defendant Macdonald.

Action dismissed.

IN RE LAND REGISTRY ACT AND SMITH.

MACDONALD, J. (At Chambers)

1916

Oct. 25.

IN RE LAND REGISTRY ACT AND SMITH

Moratorium—Commissioned officers—Registration—"Proceeding outside the Court," meaning of—War Relief Act, B.C. Stats. 1916, Cap. 74.

A commissioned officer is a "volunteer" within the protective provisions of the War Relief Act, and an application for registration of a final order for foreclosure is a "proceeding outside the Court" which should not be taken to the prejudice of any person entitled to protection under the Act.

APPLICATION to compel the registrar of titles to register a final order for foreclosure, heard by MACDONALD, J. at Chambers in New Westminster on the 23rd of September, 1916. The facts are stated in the reasons for judgment. Statement

Lidster, for the application.
Gwynn, for the District Registrar of Titles, *contra.*

25th October, 1916.

MACDONALD, J.: John M. Smith, in an action against Percy H. Smith, obtained, on the 29th of January, 1916, a final order of foreclosure against the defendant, with respect to a lot in the Municipality of South Vancouver. On the 10th of July, 1916, he made application to the district registrar of titles at Vancouver, B.C., to register the final order and obtain title to such lot thereunder. The district registrar declined to register for the following reasons: (1) "No notice has been served on parties cut out by foreclosure," and required (2) "Declaration that the defendants in the foreclosure action are not protected by section 2, War Relief Act." Judgment

It is evident that if the defendant does not come within the protection afforded by the War Relief Act, then that notice under section 134 of the Land Registry Act would be issued and served, so that in due course registration would be completed and the applicant become the registered owner of the property. It is contended by the applicant, that the War Relief Act does not, under the circumstances, apply, and that the registrar

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should be directed to proceed with the registration without reference thereto. It is admitted that the defendant is a captain in the 29th Battalion of Canadian Expeditionary Forces and that he left British Columbia with his Battalion for England in May, 1915, and has been in France since November of that year fighting for his country.

The first point taken is, that the defendant was an officer and that "officers" do not "enlist," but receive commissions, and consequently the War Relief Act does not apply to them. I do not think this contention reasonable or tenable. The preamble to the Act states that,

"Whereas . . . . a great number of residents of British Columbia have volunteered to serve in the forces raised by the Government of Canada in aid of His Majesty during the said War, and it is desirable to pass this Act for the protection and relief of all such persons and their families from proceedings for the enforcement of payment by all such persons of debts, liabilities, and obligations."

I see no reason to limit the application of the Act, so as to deprive officers of its benefit. They "volunteered" the same as privates and were prepared to make a similar sacrifice for the cause. It is true that the term "enlistment" is not usually applied to officers, but in this Act I think that its meaning should not be restricted, and that the Act is intended to apply to all "volunteers." In the Imperial Foreign Enlistment Act, 1870, "enlistment" would seem to include both officers and men, as by section 4 of the Act, illegal enlistment exists:

Judgment

"If any person, without the license of Her Majesty, being a British subject, within or without Her Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign state at war with any foreign state at peace with Her Majesty . . . ."

The Militia Act, R.S.C. 1906, Cap. 41, Sec. 10, provides that,—

"All the male inhabitants of Canada, of the age of eighteen years and upwards, and under sixty, not exempt or disqualified by law, and being British subjects, shall be liable to service in the Militia: Provided that the Governor-General may require all the male inhabitants of Canada, capable of bearing arms, to serve in the case of a *levee en masse*."

Such Act declares that the active Militia of Canada shall consist of corps raised by volunteer enlistment and corps raised by ballot. While the latter mode of raising forces might be adopted, under the "emergency" existing, and is a form of

compulsory service, still I do not suppose this was considered in the passage of the War Relief Act. I think it was the purpose of the Legislature to give special protection to those who were not compelled to go, but had voluntarily enlisted for service overseas. This legislation, thus granting protection, does not differ from similar enactments that have been passed for the same purpose in other Provinces. While it is, to a limited extent, an interference with civil rights, the purport and object of the Act is quite apparent. It is not, strictly speaking, a remedial measure, while it savours of such legislation. It is intended that residents of our Province who have gone abroad in defence of the Empire, shall not have their property in jeopardy of being lost through foreclosure or otherwise during their absence. I feel satisfied it was intended to include "volunteer" soldiers of all ranks and is applicable to the defendant herein. In coming to a conclusion on this point, and the one presently to be considered, I think the War Relief Act should, at this period in the history of our country, receive such "fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act."

The next point to be decided is, whether the application to register the title is a "proceeding" outside of a civil Court of the Province and, consequently, requiring evidence to prove that the War Relief Act is not applicable. It is contended that the applicant, having obtained a final order of foreclosure, is the owner of the property, and that the effect of such order is that the title has thus become vested in him. If the applicant were not required to resort to the Land Registry office in order to perfect his title there would be a great deal of strength in the contention as to the Act not being applicable. In *Heath* v. *Pugh* (1881), 6 Q.B.D. 345 the effect of a final order foreclosure is fully discussed. It was there decided that the land had, by virtue thereof, become for the first time the property of the mortgagee. That he had a title newly acquired and from that time indefeasibly given, so that the Statute of Limitations began to run. The applicant herein, as mortgagee, however, is not satisfied with the order of the Court and deems it necessary to apply to the district registrar of titles to strengthen his position. The end he desires to accomplish is to render it well

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nigh impossible for the mortgagor to redeem his property, should any grounds exist for enabling him to do so in the face of the final order. The question then is, what interpretation is to be placed upon the word "proceeding" in the Act? If a matter be in Court a "proceeding" might be "any step taken in a cause by either party"—see Murray's New English Dictionary, *nom.*—proceeding. The effect and meaning of the word was discussed in *Neil* v. *Almond* (1897), 29 Ont. 63 at p. 69 as follows:

> "The taking steps to sell the land under the provisions of Rule 881, Con. Rule 906, provisions that were substantially contained in successive statutes since 2 Geo. IV., ch. 1, sec. 20, is, or would be a proceeding falling within the meaning of the words 'other proceeding' in sec. 23 of Ch. 111 above. In the English and American Encyclopædia of Law, vol. 19, p. 220, note 2, it is said: 'Proceeding,' means in all cases the performance of an act, and is wholly distinct from any consideration of an abstract right. It is an act necessary to be done in order to attain a given end; it is a prescribed mode of action for carrying into effect a legal right, and so far from involving any consideration or determination of the right pre-supposes its existence.'
>
> "In the Century Dictionary 'proceeding' is defined by the words 'especially a measure or step taken.'"

Judgment

Bearing in mind that the basis of the registration system in our Province is a registration of title, as distinguished from registration of instruments, these definitions are particularly applicable. The applicant deems it necessary to obtain registration of his title "in order to obtain a given end." I have considered the following authorities cited in argument: *In re Lancashire Cotton Spinning Company* (1887), 35 Ch. D. 656 at p. 661; *In re Perkins Beach Lead Mining Company* (1877), 7 Ch. D. 371; *Brigham* v. *McKenzie* (1884), 10 Pr. 406; *Cole* v. *Porteous* (1892), 19 A.R. 111, but they do not afford much assistance in deciding the question. In my opinion, the application for registration is a "proceeding outside the Court" which the War Relief Act intended should not be taken to the prejudice of any of those persons entitled to its protection. The registrar was thus entitled to issue the notice referred to and require compliance therewith before registration. As this was apparently impossible, it follows that registration should in the meantime be refused.

Application refused.

DONKIN, CREEDEN & AVERY, LIMITED v. S.S. "CHICAGO MARU."

MARTIN, LO. J.A.

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Nov. 24.

DONKIN, CREEDEN & AVERY, LTD. v. STEAMSHIP "CHICAGO MARU"

Admiralty law—Cargo—Damage by heat—Ventilation—Closing of owing to inclement weather—"Accident of the seas."

A cargo of maize was shipped on the defendant's steamship under a bill of lading excepting "accidents of the seas." Owing to inclement weather and for the safety of the ship the ventilators were closed on a number of occasions during the voyage, with the result that the air in the holds became heated and a portion of the cargo was damaged.

Held, that the case comes within the exception "accidents of the seas" and the ship owners are not liable, as the heating of the maize was caused by the stoppage of ventilation which, as a matter of good seamanship, was necessitated by the state of the weather.

ACTION tried by MARTIN, LO. J.A. at Vancouver on the 29th and 30th of March, and the 6th of July, 1916, for damage caused to a consignment of Manchurian maize shipped in March, 1915, on the S.S. "Chicago Maru" from Kobe to Vancouver. The facts are set out fully in the judgment. Statement

S. S. Taylor, K.C., for plaintiffs.
Bodwell, K.C., and *Mayers*, for defendant.

24th November, 1916.

MARTIN, LO. J.A.: This is an action to recover the sum of $1,793.10 for damages to a consignment of 1,112 bags of Manchurian maize shipped on or about the 30th of March, 1915, by the Japanese S.S. "Chicago Maru," owned by the Osaka Shosen Kaisha (*i.e.*, the Osaka Mercantile Steamship Co.), from Kobe to Vancouver. Upon arrival, on or about the 21st of April, 1915, in Vancouver, *via* Victoria, B.C. and Seattle, U.S.A., it was discovered that 957 of the bags were in a damaged condition, being badly heated and mouldy, and they had to be sold at a low price in consequence. In the plaintiffs' particulars it is alleged that "the cause of the deterioration of the cargo was the improper stowage of the same, causing insuffi- Judgment

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cient ventilation." Other questions were discussed, but as this is the principal one, I shall first address myself to it.

The total number of 1,112 bags were "shipped in apparent good order and condition" at Kobe, as the defendant's bill of lading recites, and were stowed, as shewn by the ship's stowage plan, in two separate lots; a small one of 155 bags at the bottom of No. 2 hold, fairly well forward, which suffered no damage, and a large one of 957 at the stern, in No. 5 hold. This is deposed to be the best place on the ship, because it is far from the engines and has the side of the ship on each side, and is on top of the tunnel recess and opens forward towards No. 5 'tween deck hatch. This hatch is ventilated with four ventilators, two on each side, *i.e.*, two in the fore and two in the after part, which go through the 'tween decks. The cargo was loaded under the superintendence of the chief officer, who is now employed on another ship and is not available as a witness. The master, Keichi Hori, has no personal knowledge of the actual stowage of this cargo, and deposed only as to the general custom of the ship. He said there were additional wood ventilators on board at the time, but could not speak as to their use on this occasion, though they were used when the ship had a full cargo of maize, or in hot climates, but there was no necessity for them in the North Pacific ordinarily. According to the evidence of John H. Ryan, the supercargo, who superintended the unloading of the cargo at Vancouver, he is positive he saw at least one set of these wooden ventilators on either side of the ship, stowed fore and aft, at the place in question, which would beyond all doubt afford sufficient ventilation. In some respects his evidence lacked particularity, but not in this, and I do not feel justified in disregarding it. In bad weather the outer ventilators would be closed, the master testifies, and as a matter of precaution they were supposed to be always closed in the evening. The master could not say exactly how often they were closed on this voyage, but he could remember doing so "about two or three times."

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In his examination *de bene esse* the master describes the voyage as "not so rough . . . . . Just the kind of trip I would expect," which means what would be expected at that season in those latitudes by a skilled mariner. Undoubtedly some

exceptionally heavy weather was encountered at one part of the voyage, as appears by the log, and the protest made at Seattle on the 21st of April, 1915, put in by the plaintiff, *viz.*: on the 5th, 6th, 8th and 9th of April, on which last day, after the wind force reached the maximum, 10, at midnight on the 8th, and so continued for four hours, "the sea became much higher than the ship ever experienced," though this was her 24th voyage East. The log at midnight of the 8th records, "whole gale and ugly weather, high sea causing ship to labour and strain. Shipping much water constantly and flooded at times"; and at 4 a.m. on the 9th: "Heavy seas washing over all constantly." The "rough sea" continued, the log states, up to 8 p.m. of the 9th, after which it abated for a short time, but recurred at midnight of the 9th, and prevailed on the following day gained (on Eastward voyages) of the same date, and after being fine most of the 10th, began to be rough in the evening of that day, continuing till the evening on the 11th and afternoon of the 12th (when "shipping much water at times" is noted), and midnight, and 4 a.m. and noon and afternoon on the 13th; and again most of the 14th, after which moderate seas prevailed till the arrival at Victoria on the 17th of April.

The ship sailed from Kobe on the 1st of April, and it is noted, in the log of the 3rd of April, 8 a.m., "Opened all hatches and ventilator cover(s) for ventilation," and 8 p.m., "Left the hatches open through the night." On the 5th of April at 6 a.m., "Put all hatches (on) as taking spray on deck." On the 7th at 8 a.m., "Opened all hatches"; on the 8th at noon, "Shut all hatches." On the 10th at 6 a.m., "Opened all hatches for ventilation"; on the 12th at 9 a.m., "Shut all hatches." These are the only entries relating to ventilation which I can find after a careful perusal of the log throughout the whole voyage, from which it clearly appears that there must have been many occasions which required the shutting of the hatches and covering the ventilators, with canvas covers, and appropriate action must have been taken thereon from time to time by the watch officer, all of which would not necessarily be entered in the log.

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After a careful consideration of the whole evidence, I can

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only come to the conclusion that the cargo was properly stowed, and that the system of ventilation was sufficient for ordinary purposes, and that the heating of the maize, assuming it to have been in real and not merely "apparent good order and condition" when shipped, was caused by the stoppage of ventilation, which, as a matter of good seamanship, was a matter of necessity imposed by the state of the weather. This brings the case within the exception "accidents of the seas" contained in the bill of lading, according to the decision in *The Thrunscoe* (1897), P. 301, wherein a certain portion of the cargo, oats and maize in bulk, stowed low down in the centre of the ship and nearest to the engine, had been damaged owing to the interruption, during a storm, of the ventilation, which was otherwise sufficient, and it was held that the ship was not liable in such circumstances. And it was later and further held, in *Rowson* v. *Atlantic Transport Company* (1903), 2 K.B. 666, that the Harter Act (1893, 52nd Congress, Sess. 2, c. 105, invoked herein, under the 21st clause of the bill of lading) did not apply where the ship was "in all respects seaworthy and properly manned, equipped and supplied," as I find this ship to be.

Judgment

It therefore becomes unnecessary to consider the other questions raised; such as that relating to the real condition of the maize when shipped at Kobe, and I shall only observe in regard to this that the master, whose evidence was relied upon by the plaintiffs, had, it was clear, practically no personal knowledge thereof, the shipment having been left to the superintendence of the chief officer, who is not available, as already noted; and even when the bags arrived at Vancouver the damage was not apparent outwardly. The meaning of such statements in bills of lading as "shipped in good order and well conditioned," and "weight and contents unknown" (which are also to be found in this bill of lading) and "apparent good order," has been considered in *e.g., The Peter der Grosse* (1875), 1 P.D. 414; and *Crawford & Law* v. *Allan Line Steamship Company, Limited* (1912), A.C. 130, to which I refer.

It follows that the action must be dismissed with costs.

Action dismissed.

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada:

BANK OF TORONTO, THE v. HARRELL AND HARRELL (p. 202).—Reversed by Supreme Court of Canada, 2nd May, 1917. See (1917), 2 W.W.R. 1149.

COLUMBIA BITULITHIC, LIMITED v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED (p. 160).—Reversed by Supreme Court of Canada, 26th March, 1917. See (1917), 2 W.W.R. 664.

FERRERA v. NATIONAL SURETY COMPANY (p. 15).—Reversed by Supreme Court of Canada, 11th December, 1916. See (1917), 1 W.W.R. 719.

NATIONAL MORTGAGE COMPANY, LIMITED v. RALSTON (p. 384).—Affirmed by Supreme Court of Canada, 1st May, 1917. See (1917), 2 W.W.R. 1144.

SUCCESSION DUTY ACT AND ESTATE OF MOSSOM MARTIN BOYD, DECEASED, *Re* (p. 77).—Affirmed by Supreme Court of Canada, 6th February, 1917. See 54 S.C.R. 532; (1917), 2 W.W.R. 242.

T. R. NICKSON COMPANY LIMITED v. THE DOMINIÓN CREOSOTING COMPANY, LIMITED *et al.* (p. 72).—Affirmed by Supreme Court of Canada, 6th February, 1917. See (1917), 2 W.W.R. 330.

Cases reported in 22 B.C., and since the issue of that volume appealed to the Supreme Court of Canada:

BERGKLINT v. WESTERN CANADA POWER COMPANY, LIMITED (p. 241).—Reversed by Supreme Court of Canada, 30th December, 1916. See 54 S.C.R. 285; (1917), 1 W.W.R. 1262.

TAIT v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED (p. 571).—Motion to quash an appeal from the judgment of the Court of Appeal allowed by Supreme Court of Canada, 18th October, 1916. See 54 S.C.R. 76; (1917), 1 W.W.R. 544, 1093; 32 D.L.R. 378.

TECLA *et al.* v. BURNS, JORDAN & WELCH (p. 460).—Reversed by Supreme Court of Canada, 30th October, 1916. See (1917), 1 W.W.R. 639.

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respect to three items: (1) his remuneration as solicitor for the company; (2) the item of $268.87 for commission; (3) the profit obtained from his interest in the purchasing group of the Canadian Pacific Railway lands. *Held*, on the facts, that the claims do not come within the provisions of the Winding-up Act, nor do they give rise to any statutory presumption which is not refuted by the evidence. ROBERTS v. MACDONALD *et al.* - - - - - **542**

4.——*Loss of assets through dishonest dealing of manager—Liability of directors—Company and trust funds kept in one bank account — Ultra vires — Negligence—Misfeasance—Winding-up Act, R.S.C. 1906, Cap. 144, Sec. 123—Can. Stats. 1912, Cap. 89, Sec. 9.*] Directors of a company who have not attended any of the meetings of the board and are not shewn to have been cognizant of any of the acts of commission or omission complained of, will not be held answerable for what has been done or omitted by the board. *Marquis of Bute's Case* (1892), 2 Ch. 100 followed. The loss must result from the negligence or *ultra vires* acts of the directors before they can be charged with misfeasance in the legal sense of the word. *Per* MCPHILLIPS, J.A. (dissenting in part): Section 9 of the Act incorporating the Dominion Trust Company does not require company funds to be kept in a separate bank account from trust funds, and there is error in law in finding the resident directors guilty of misfeasance by reason of company and trust funds being kept in the same bank account. *In re* DOMINION TRUST COMPANY AND MACHRAY *et al.* - - - - - - - - **401**

5.——*Shareholders' meeting—Agreement of reconstruction between shareholders—Act sanctioning agreement subject to ratification at shareholders' meeting—Notice of meeting — Sufficiency of — Ratification by acquiescence—Knowledge of transaction by shareholders — B.C. Stats. 1911, Cap. 72. Pleadings—Amendment of at trial—Should be settled forthwith.*] Notice calling a meeting of shareholders of a company for the purpose of confirming an agreement between certain shareholders for reconstruction of the Company and held in compliance with the terms of an Act of Parliament ratifying said agreement subject to its being adopted at the meeting, contained the following information: (1) description of the parties to the agreement; (2) its date; (3) that it was deposited with the Registrar of Joint-stock Companies at Victoria

and could be seen at the meeting; (4) that resolutions would be passed reducing the capital stock of the Company by $1,000,000, authorizing the issue of debentures, and ratifying said agreement. At the meeting, which was attended by shareholders either in person or by proxy representing 97 per cent. of the capital, the resolutions were passed unanimously. At the next general meeting of the Company a statement disclosing the terms of the agreement was read, copies of which were sent to all the shareholders. At the three annual general meetings of the Company following, no objections to the agreement were raised. *Held* (*per* MACDONALD, C.J.A. and GALLIHER, J.A. reversing the judgment of CLEMENT, J.), that the question of sufficiency of notice is one of fact which must be governed by the circumstances of the particular case, but assuming the resolutions were of no effect by reason of the insufficiency of the notice (a) the shareholders' actions at the subsequent general meetings shew they had full knowledge of the agreement and recognized it as binding, thereby ratifying the agreement by acquiescence; and (b), a defective notice contravened a directory clause in the articles patent on the face of the notice, of which the shareholders must be presumed to have knowledge. When in the face of such knowledge they made no complaint in respect of the resolutions as passed, a Court of Equity would not rescind the agreement. *Per* MARTIN, J.A.: The notice of the meeting is sufficient, viewing it in the light of all the surrounding circumstances, and substantially put the shareholders in a position to know what they were voting about. *Per* MACDONALD, C.J.A.: Parties wishing to amend their pleadings at the trial should submit their amendment and settle the matter forthwith. It should not be left to be dealt with at some future time during the trial. PACIFIC COAST COAL MINES, LIMITED *et al.* v. ARBUTHNOT *et al.* - **267**

6.——*Shareholders' meeting—Resolution granting bonus to shareholder—Intra vires of company — All shareholders present — Secret profits—Conflict of evidence.*] It is unnecessary to consider the regularity of the proceedings of a company leading up to the granting of a bonus and fixing of a salary provided it is *intra vires* of the company and consented to by every shareholder. A shareholder is not debarred from voting or using his voting power to carry a resolution by the circumstances of his having a personal interest in the subject-matter of

2.——*Bridge — Defective condition of draw — Collision with ship — Contributory negligence—Perilous alternative—Liability —Railway and municipality.*] In order to reach the upper portion of False Creek the plaintiff's freight steamer had to pass, first through the draw of the Kitsilano bridge, and then that of the Granville Street bridge, the distance between the two bridges being about 920 feet. For some days previously to the accident, repairs to the railway passing over the Granville Street bridge by the B.C. Electric Railway Co. necessitated the severance of the electricity by which the draw was operated. The bridge tender informed the proper officers of the Company that at times he was unable to move the draw, but nothing was done. At noon on the day of the accident the captain of the steamer telephoned the bridge tender he would pass through about 2.50 p.m. The steamer on approaching the Kitsilano bridge signalled in the usual way and passed through, but on approaching the Granville Street bridge the captain saw the draw was not working and promptly put his engines full steam astern, but owing to the tide was carried against the bridge, resulting in the damage complained of. The bridge tender had attempted to open the draw but the power being cut off he was unable to do so. *Held*, that the accident was due to the negligence of the bridge tender in not notifying the captain of the steamer of the danger of the power being cut off and preventing the operation of the draw. STAR STEAMSHIP COMPANY v. CITY OF VANCOUVER AND THE BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED. - - - - - - - - - - **317**

3.——*Contributory negligence—Collision —Electric-car and wagon—Railway crossing —Defective brakes — Speed approaching a crossing.*] In an action for damages arising out of a collision at a street crossing between an electric-car and a wagon drawn by a team of horses, the trial judge found that the Railway Company was guilty of negligence in running their car at a speed of 40 miles an hour approaching a street crossing on a down grade and that the driver of the wagon was guilty of contributory negligence in not taking precautions when approaching the track, but that he could do nothing to avoid the collision after he became aware of the danger. He also found that the brakes of the car were defective, but that efficient brakes would not have avoided the accident. He gave judgment for the plaintiff. *Held*, reversing the judgment of MURPHY, J. (MARTIN, J.A. dissenting), that as the evidence shewed that the accident could not have been avoided with efficient brakes and as the accident did not take place in "any thickly peopled portion of any city, town or village" and there was no excessive speed, the action should be dismissed. *British Columbia Electric Railway Company, Limited* v. *Loach* (1916), 1 A.C. 719 distinguished. COLUMBIA BITULITHIC, LIMITED v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED. - - - - - - - - **160**

4.——*Contributory negligence—Ultimate negligence — Collision between interurban electric-car and motor-car.*] In an action for damages owing to a collision between an interurban electric-car and the plaintiff's motor-car the jury found that the defendant was guilty of negligence in that the motorman did not give warning as soon as the plaintiff's car was visible (he having already given the statutory warning required when approaching a crossing by whistling). They also found the plaintiff guilty of contributory negligence in not looking out for the electric-car directly the track became visible. The question, "did the defendant do anything or omit to do anything constituting a proximate cause of the accident despite such contributory negligence?" was answered "Yes, they should have given warning on seeing the plaintiff's car." Judgment was entered for the plaintiff. *Held*, on appeal, that on the findings of the jury judgment should have been entered for the defendant; that the motorman, after giving the statutoy warning, was not bound to give further warning to persons approaching the crossing, unless he had reason to apprehend that such persons were oblivious of his presence and of the danger of crossing the track, but there was no evidence or finding by the jury that such a contingency arose. HONESS v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED. - - - - - - **90**

4.——*County Court—Judgment of nonsuit — Right to bring another action — County Courts Act, R.S.B.C. 1911, Cap. 53, Sec. 110.*] A judgment of nonsuit under section 110 of the County Courts Act is not a bar to another action by the plaintiff on the same subject-matter. *Poyser* v. *Minors* (1881), 7 Q.B.D. 329 followed. SKELDING *et al.* v. LEVIN. - - - - - - **47**

5.——*Court of Appeal—Reserved judgments—Delivery of in absence of a member of Court—Court of Appeal Act, R.S.B.C. 1911, Cap. 51, Sec. 26.*] Where judgment is reserved after argument and the decision of one of the judges, in his own handwriting, but not signed, is later handed to the presiding judge of the Court, who subsequently, in delivering judgment, announces the decision of the absent judge:—*Held,* that if the Court is satisfied that the opinion which reaches them is the opinion of the judge, though not signed, it must be accepted as an effective judgment from the day it is pronounced, and the subsequent filing thereof with the registrar of the Court is a sufficient compliance with the requirements of the Court of Appeal Act. FERRERA v. NATIONAL SURETY COMPANY (No. 2). - - - - - - - **122**

6.——*Default in answering interrogatories—Defence struck out—Liberty to sign interlocutory judgment — Local judge of Supreme Court — Jurisdiction — Marginal rules 297, 299 and 363.*] Where, in an action for pecuniary damages, the statement of defence is struck out by order of a local judge of the Supreme Court owing to the defendant's default in answering interrogatories, the plaintiff can, under marginal rule 297, enter interlocutory judgment without the order of a judge. Where an order striking out the defence included the words "the plaintiff is at liberty to sign interlocutory judgment forthwith" (irrespective of whether the local judge exceeded his powers in inserting them), such words must be regarded as merely surplusage, and do not invalidate the order. LOGAN v. THE GRANBY CONSOLIDATED MINING, SMELTING AND POWER COMPANY, LIMITED. - - - - - - - - **188**

7.——*Discontinuance—Service of notice—Marginal rule 290—Attaching order—Money paid into Court — Assignment of after discontinuance of action.*] When an action is discontinued after money has been paid into Court under an attaching order, the money ceases to be subject to any Court process, and the defendant may assign the fund to a third party who may successfully resist an application that the fund be kept in Court to abide the result of further action between the same parties. SCHMID AND KRUCK v. GIFFIN: ROBIN HOOD MILLS, LIMITED, CLAIMANT. - - - - - **459**

8.——*Examination for discovery—"Officer"—In employ of a company that is the sole shareholder and has control of plaintiff Company — Marginal rules 370c (1) and 370d.*] A person, not an officer or servant of a company party to an action, but who is an officer in a company to which the first company is subsidiary, holding all its shares and having full control of its affairs, is not subject to examination for discovery under marginal rules 370c and 370d, notwithstanding his having negotiated and his being the only person in authority to negotiate, the proceedings over which the action arose (GALLIHER, J.A. dissenting). WELLINGTON COLLIERY COMPANY, LIMITED v. PACIFIC COAST COAL MINES, LIMITED. - - - - - - - - - **138**

9.——*Interlocutory appeal—Further evidence—Application to introduce—Notice of—Filing—Leave of Court—Marginal rule 868. Judgment — Order XIV. — Surety — Right to question amount obtained on disposition of securities—Appeal.*] A party intending to offer new evidence on an interlocutory appeal must give notice thereof in his notice of appeal and file the material intended to be used. On an application for leave to sign final judgment, a defendant, who was surety for the debt sued upon, sought leave to defend on the ground that the plaintiff should have obtained a greater sum for certain securities he sold, the proceeds of which were applied in reduction of the debt, an order was made for leave to sign final judgment. *Held,* on appeal, reversing the decision of GREGORY, J. (MCPHILLIPS, J.A. dissenting), that the order should be set aside and the defendant be allowed in to defend. THE ROYAL BANK OF CANADA v. PACIFIC BOTTLING WORKS, LIMITED *et al.* - - - - - - **463**

10.——*Judgment—Costs paid—Decision reversed in Supreme Court—Costs ordered to be refunded—Interest. Interim injunction—Dissolved—Order for inquiry as to damages — Appeal — Judicial discretion.*] The plaintiff recovered judgment which was affirmed by the Court of Appeal, but reversed by the Supreme Court of Canada. The plaintiff's costs of the trial and before

STATUTES—*Continued.*

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